Answering the Call of the Question: Reforming Mental Health Disclosure During Character and Fitness to Combat Mental Illness in the Legal Profession

INTRODUCTION

Every applicant to every state bar in the United States is required to undergo a character and fitness evaluation. Though the depth of the inquiry will vary by state, “an investigation . . . may delve into normally private areas such as finances, divorces, citations, and frequently, mental health or substance abuse treatment histories.” Revelation of certain information may give rise to a more probing inquiry, such as a hearing. The character and fitness process, specifically related to mental health, engages two important but competing interests: protection of the public through attorney regulation and protection of individual privacy rights.

Proponents of expansive mental health disclosure on state bar applications, and in the investigative process, have traditionally pointed to two objectives: “shielding clients from potential abuses” and “safeguarding the administration of justice from those who might subvert it through subornation of perjury, misrepresentation, bribery, or the like.” Furthermore, “[g]iven the difficulties with controlling and disciplining attorneys once they are admitted to the bar,” the best way to prevent disciplinary problems is by “trying to prevent the admission of these attorneys in the first place.” The United States Supreme Court has recognized that protecting the public through attorney regulation is permitted. Given that lawyers are required to act as fiduciaries and must maintain a certain level of public trust, it is important that bar associations have some mechanism for regulating admission and discipline in a way that will help protect the public. Because it is undisputed that “attorneys whose ability to practice law is impaired by a mental illness or substance abuse

5. Denzel, supra note 2, at 928.
can present a risk to clients and that the bar has a duty to prevent attorneys who will harm clients from practicing law,” bar associations have a vested interest in inquiring into mental illness and addiction. In fact, obtaining information from applicants related to mental illness and addiction allows bar associations to play an important role in protecting the public and protecting its attorneys by offering them support services and treatment early on.

Critics of this expansive disclosure argue that not only does it allow bar associations to “impermissibly discriminate on the basis of disability” but also that it further stigmatizes mental illness within the profession. Critics often suggest that law students are reluctant to seek mental health treatment while in law school for fear that they will be later subject to more hurdles to entering practice. Both under the Americans with Disabilities Act and the Fourteenth Amendment of the Constitution, protecting applicants from invasive disclosure is important because it can protect them from discrimination on the basis of mental disability. With this in mind, bar applicants have an interest in not disclosing sensitive personal information that may be entirely irrelevant and may be misused by examining authorities.

This Note contends that the competing interest of bar associations in soliciting disclosure and the bar applicant’s interest in protecting privacy can best be balanced through asking a combination of narrowly tailored questions and subjective, open-ended questions that comport with the Americans with Disabilities Act. Disclosure can be used to facilitate prevention and treatment for lawyers who need it. Disclosure related to mental illness and substance abuse can be used as a screening tool to guide lawyers who have a mental illness or addiction into supportive environments. This Note contends that this can be achieved through the expansion of conditional admission programs and an increased role for Lawyer Assistance Programs in education, prevention, monitoring, and assistance.

Part I provides a historical overview of the character and fitness requirement for bar admission, paying particular attention to the competing interests in this debate. Part II explores the types of mental health and substance abuse disclosures required at the questionnaire phase and addresses the implications of the Americans with Disabilities Act. Part III critically examines three cases at the investigatory stage, to illuminate best practices. Finally, Part IV provides suggestions for how Lawyer

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7. Denzel, supra note 2, at 891.
8. Id. at 892.
Assistance Programs and Conditional Admission can be used to help law students who disclose a mental illness or addiction become effective members of the legal profession. Only when students feel comfortable to disclose and seek treatment will the stigma associated with mental illness and addiction in the legal profession be effectively addressed.

I. HISTORY OF THE CHARACTER & FITNESS REQUIREMENT

At present, “every state bar currently makes certification of character a prerequisite for practice.”\(^\text{10}\) In a seminal character and fitness case, Justice Frankfurter remarked that the most desirable characteristics of a lawyer are the “qualities of truth-seeking, of a high sense of honor, of granite discretion, [and] of the strictest observance of fiduciary responsibility.”\(^\text{11}\) The character and fitness requirement seeks to ensure that these traits are present in an applicant. The American Bar Association and the National Conference of Bar Examiners identify the purpose of the character and fitness process as follows:

The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.\(^\text{12}\)

The character and fitness requirement operates as a quid pro quo between the legislature and the judiciary. The courts “have generally accepted legislative specifications of minimum requirements,” and the legislatures have “tolerated a large degree of professional autonomy over membership determinations in both admissions and disciplinary contexts.”\(^\text{13}\) The identified purpose of the requirement and the operation of the quid pro quo both serve to illustrate the tensions between protecting the public through attorney regulation and protecting the individual from overly intrusive disclosure. Further, this tension is evidenced throughout the development of the character and fitness requirement.

In the early nineteenth century, the character and fitness requirement was primarily used as a tool to exclude certain classes of people and retain exclusivity at the bar.\(^\text{14}\) For example, the English Inns of Court required a

\(^{10}\) Rhode, supra note 4, at 493.
\(^{11}\) Schware, 353 U.S. at 247 (Frankfurter, J., concurring).
\(^{12}\) Comprehensive Guide to Bar Admission, supra note 1, at viii.
\(^{13}\) Rhode, supra note 4, at 496.
\(^{14}\) Id. at 494.
Barrister applicant “to obtain references from two Barristers prior to admission . . . .”\textsuperscript{15} This requirement for references functioned only to ensure that members of certain classes were being admitted to the bar.\textsuperscript{16} The United States followed the trend set in Britain by implementing “a facially neutral character requirement to deny admission to undesirables.”\textsuperscript{17}

The implementation of character requirements in the United States grew out of a public distrust for attorneys, frequent dueling by attorneys (including President Andrew Jackson), violent judges, and general attorney misfeasance.\textsuperscript{18} Even in this early stage of development of the process, it was readily apparent that the interest in protecting the public from unfit attorneys was a motivating factor in increased lawyer screening. The interest in the protection of personal privacy would not arise until later.

The interest in protecting the public through character screening in the United States grew significantly in the late nineteenth and early twentieth centuries: “Expanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy.”\textsuperscript{19} Founded in 1878, the American Bar Association “began spearheading a campaign for higher professional standards.”\textsuperscript{20} This purpose was identified in “[a] nineteenth-century essay on professional ethics [which] stated the matter pointedly: because lawyers control our ‘fortunes, reputations, domestic peace . . . nay, our liberty and life itself . . . their character must be not only without a stain, but without suspicion.”\textsuperscript{21}

This effort resulted in a more systematic form of regulation of character and fitness. This spread through the states, and “by 1927, nearly two-thirds of all jurisdictions made ‘further efforts to strengthen character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.’”\textsuperscript{22} As a result of the crystallization of this process, lawyers have become “members of a very exclusive [judicially sanctioned] club,” only entered through the passage of

\begin{itemize}
  \item \textsuperscript{15} Id. at 495.
  \item \textsuperscript{16} Aaron M. Clemens, \textit{Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants}, 40 \textit{Akron L. Rev.} 255, 260 (2007).
  \item \textsuperscript{17} Id. (“The requirement was used to exclude recent immigrants, Jews, women, and ethnic minorities from bar admission.”).
  \item \textsuperscript{18} Id. at 262-63.
  \item \textsuperscript{19} Carol M. Langford, \textit{Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process}, 36 \textit{Hofstra L. Rev.} 1193, 1204 (2008).
  \item \textsuperscript{20} Rhode, \textit{supra} note 4, at 500.
  \item \textsuperscript{22} Langford, \textit{supra} note 19, at 1205.
\end{itemize}
strict requirements that often require the disclosure of deeply private information all in the name of public protection.23

A. Schware v. Board of Bar Examiners of New Mexico

In an early opinion related to the character and fitness process, the Supreme Court of the United States affirmed the long-standing idea that protecting the public through regulation of attorneys is necessary.24 The Court concluded that a state may establish character qualifications for bar applicants and that bar associations will be afforded significant deference by the Court.25 Mr. Schware’s application to sit for the New Mexico bar examination was denied because he lacked the necessary moral character.26 On review, the New Mexico Supreme Court agreed with the Board’s decision that Mr. Schware was unfit for legal practice because he used multiple aliases, had been arrested several times, and he was a member of the Communist Party.27 The Supreme Court disagreed.

In an 8-0 opinion, authored by Justice Black, the Court held that “[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.”28 The Court further held that “[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”29 Justice Black indicated that deference would be paid to the examining authority, but that there were limits to that deference. He explained, “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.”30 It was in this case that the Court began to recognize that the attorney regulation process has a role not only in relation to protecting the public but also in the protection of individual privacy rights, particularly under the Due Process Clause of the Fourteenth Amendment.

25. Id.
26. Id. at 234–35.
27. Id. at 240–44.
28. Id. at 238–39.
29. Id. at 239 (emphasis added).
B. Kongisberg v. State Bar of California

In the same year the Court decided Schware, Justice Black authored the opinion in Konigsberg v. State Bar of California.31 In this case, the Court held that Mr. Kongisberg could not be denied admission to the bar based on his past affiliation with the Communist Party and his refusal to answer questions about that involvement because these qualities did not establish bad character.32 The Court opined on the meaning of good character:

The term “good moral character” has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It 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.33

The Court concluded that good moral character was best framed in the negative as “an absence of proven conduct or acts which have been historically considered as manifestations of ‘moral turpitude.’”34 Although the Court recognized that the character and fitness requirement has the potential to be misused, “courts have categorically refused to find good moral character requirements unconstitutionally vague.”35

However, on a subsequent re-hearing of Konigsberg, the Court held that failure to respond to the questions of the State bar was sufficient grounds for denial of his application.36 This time, the Court took the opportunity to explain the character and fitness process:

[A]n applicant must initially furnish enough evidence of good character to make a prima facie case. The examining Committee then has the opportunity to rebut that showing with evidence of bad character. Such evidence may result from the Committee’s own independent investigation, from an applicant’s responses to questions on his application form, or from Committee interrogation of the applicant himself. This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the

32. Id. at 273.
33. Id. at 262–63.
34. Id. at 263.
Committee’s questioning, revealing as it may infirmities in an otherwise satisfactory showing on his part.  

Here, the Court recognized the importance of an in-depth questioning process for public protection, and it recognized that, in this case, Konisberg’s involvement in the Communist Party and his evasive answers were sufficient grounds to deny his application.  This case represented the beginning of the Court’s recognition of personal privacy as an issue in this debate, and it began the Court’s struggle to reconcile these competing interests.

Taken together, these cases demonstrated the long-assumed tradition that state bar associations had a legitimate interest in regulating access to the legal profession to protect the public, but they also revealed a competing right of the individual to be free from discrimination in the process of pursuing his or her vocation. This idea was taken to its extreme by Justice Black in Wadmond:

[T]he right of a lawyer or Bar applicant to practice his profession is often more valuable to him than his home, however expensive that home may be. Therefore I think that when a State seeks to deny an applicant admission . . . it must proceed according to the most exacting demands of due process of law.

However, this is not the prevailing view; the mainstream opinion is that the practice of law is a privilege and to exercise that privilege individuals have to sacrifice some personal privacy.

In the mental health context, these competing interests conflict once again. On the one hand, the state has a legitimate interest in regulating entry to the bar, and it asserts that mental health and addiction bear a rational connection to one’s fitness to practice law. On the other hand, applicants have an interest in privacy, protection from unnecessary disclosure of personal information, and the space to seek treatment without fear of punishment.

II. MENTAL HEALTH & SUBSTANCE ABUSE DISCLOSURE AT THE QUESTIONNAIRE PHASE

The character and fitness review process begins “with candidates’ submission of applications, requiring various character-related information. The scope of the inquiry . . . differs among jurisdictions, but typically

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37.  *Id.* at 41–42.
38.  *Id.* at 56.
encompasses a wide range of criminal and civil misconduct, mental health matters, physical addictions, and educational, employment, and financial background.41 Affirmative responses to any of the questions posed often will lead to further investigation often requiring submission of supplemental documentation or, in some cases, a formal hearing.42 At present, twenty-three states ask some form of question related to “mental disability” or “substance abuse.”43 The American Bar Association recognizes that “[t]he interests of the public and bar applicants are best served by bar admission rules that promote early detection of substance abuse and dependency, and mental or other illness that may render an applicant unfit to practice law absent effective treatment or rehabilitation.”44

It was not until the latter part of the twentieth century that bar associations became concerned with mental illness and addiction as an impediment to the effective practice of law.45 Beginning in the 1970s, bar application forms began to contain questions pertaining to an applicant’s mental health.46 There is little evidence identifying a concrete reason for this increase in interest in mental health and substance abuse disclosure. However, “[t]he rise of mental health questions on bar application forms generally corresponds with a period when the public, and the professions, were paying increased attention to mental illness and addiction.”47

Some scholars have suggested that the increased interest in mental health and addiction in the legal profession was a result of a statement made by the New York City Bar Association on how lawyers with mental illnesses should be disciplined.48 The American Bar Association embraced

41. Rhode, supra note 4, at 506.
45. Bauer, supra note 42, at 103.
46. Id.
47. Id. at 104 n.32.
the issue in Ethical Consideration 1-6 of the 1970 ABA Model Code of Professional Responsibility:

An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and education reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like matter, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

Questions related to mental illness and addictions reflect the values espoused in Ethical Consideration 1-6: a desire to protect the public from lawyers who are unfit to practice. To further this goal, the questions attempt to elicit the fullest disclosure possible of all information with a rational connection to the practice of law. Interestingly, it also expresses a role for bar associations and members of the bar to assist a lawyer in entering the profession.

After the enactment of the Model Code of Professional Responsibility, many jurisdictions started asking questions related to mental illness and addiction. For the most part,

applicants were required to reveal whether they had ever received treatment for any mental, emotional, or nervous disorder; whether they had ever been hospitalized or committed to an institution (voluntarily or involuntarily) for mental illness; whether they had ever been addicted to alcohol or other drugs; and whether they had ever been treated for substance abuse.

These types of questions or similar iterations were prominent on bar applications by the mid-1990s. Soon after, disability rights advocates and bar applicants began to attack the validity of such inquiries under the Fourteenth Amendment and, later, the Americans with Disabilities Act. Opponents assert that these questions “impermissibly discriminate on the basis of disability” and do not adequately protect the privacy interests of individual bar applicants.

Some jurisdictions provide a preamble to the character and fitness application, which defines and explains the purpose and may limit the

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49. Id. at 3 (citing Place & Bloom, supra note 48, at 580).
51. Id. at 1-1; Esquerra, supra note 48, at 3.
52. Bauer, supra note 42, at 104.
53. Esquerra, supra note 48, at 3.
54. Bauer, supra note 42, at 106, 126.
55. Denzel, supra note 2, at 892.
The ‘Preamble’ often explains that the bar examiners are not interested in ‘situational counseling,’ such as ‘stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders.’ This limiting language serves to ensure that only the most severe instances of mental health and substance abuse treatment are disclosed.

Presently, there are two general formulations of questions: status-based inquiries and more open-ended, conduct-specific questions. It is important to note that these types of questions are not mutually exclusive and jurisdictions may use some combination of both.

A. Status-Based Questions

As of 2009, Michigan retains one of the most expansive disclosure requirements related to mental illness and substance abuse. Michigan’s character and fitness application asks applicants “whether the applicant has ‘ever’ been ‘treated or counseled . . . for, a mental, emotional, or nervous condition which permanently, presently or chronically impairs or distorts your judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life.’” The idea behind this “is that absence of treatment for or history of mental illness or substance abuse somehow correlates with character and fitness to perform as a competent professional.”

Proponents of the exclusive use of these types of questions assert that because “the state has a legitimate interest in evaluating bar members’ character” these questions, based on status or diagnosis alone, have a rational connection to the practice of law and that the bar is entitled to all of the information available in deciding whether to admit an applicant. State bar associations “defend mental health questions as necessary to protect the public ‘from mentally troubled lawyers’ who could commit legal malpractice.” Furthermore, “[l]awyers are particularly susceptible to stress because of working long hours and a perfectionist work ethic” and, as such, underlying mental health pathology could affect a lawyer’s ability

56. Esquerra, supra note 48, at 5.
57. Id.; see also Clark v. Virginia Bd. of Bar Exam’rs, 880 F. Supp. 430, 433 (E.D. Va. 1995) (demonstrating an example of the kind of language used in the preamble of the Virginia Questionnaire).
59. Coleman & Shellow, supra note 9, at 147.
60. Clemens, supra note 16, at 267.
61. Id. at 292 (quoting Adam J. Shapiro, Defining the Rights of Law Students with Mental Disabilities, 58 U. MIAMI L. REV. 923, 940 (2004)).
to handle stress while practicing. These questions rely on the assumption that a diagnosis of a mental illness frequently bears some rational connection to future conduct. Proponents of narrow, status-based questions argue that mental health disclosure at the time of admission act as a gate preventing malpractice and ameliorating the problem of inadequate disciplinary systems and the difficulty associated with disbarment after admission.

Generally, there are two main arguments that arise from opponents to these questions. The first is that questions about mental health status have a limited correlation to fitness to practice law. Opponents of these questions argue that the underlying hypothesis, that lack of treatment is related to overall fitness to practice law, has been outdated by new medical research. Indeed, the “American Psychiatric Association’s (APA) guidelines for inquiry by licensing boards” suggests

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\text{[p]rior 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. . . . The salient concern is always the individual’s current capacity to function and/or current impairment.}
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Opponents argue that “[t]he mere presence of a mental illness or substance abuse no more impacts on an individual’s character than the existence of coronary artery disease or cancer.” They advocate a focus on behavior and concede that sometimes mental illnesses may produce behavior that makes a person unfit to practice law. However, they maintain that observable behavior is a better basis for denying a license than a diagnosis of mental illness or addiction alone.

The second argument advanced by opponents to these questions is that expansive disclosure requirements further stigmatizes mental illness and addiction in the legal profession. They contend that status-specific questions “invidiously discriminate against a particular group” and that this is exactly the type of discrimination Justice Black cautioned against in

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62. Id.
63. Id. at 269–70.
64. Coleman & Shellow, supra note 9, at 157.
66. Id. at 363–64 (quoting Clark, 880 F. Supp. at 435).
67. Coleman & Shellow, supra note 9, at 152.
68. Id.
69. Id. at 155.
70. Clark, 800 F. Supp at 438.
Schware. Opponents assert that applicants who disclose a history of mental illness or addiction at the questionnaire phase are harmed by either not being admitted to the bar or by “being compelled to reveal private details of mental health or substance abuse and . . . facing the stigma associated with a mental disorder.” They support this point by stating that because few boards “inquire about physical illness [it] demonstrates prejudice against mental disorders and a basic misunderstanding about mental illness.”

Although opponents concede “very few applicants are denied admission on mental health grounds,” the questions pose “real and serious harms” to applicants. Critics point out that “forcing those individuals who are aware to choose between developing adequate therapeutic relationships and minimizing certification difficulties is not readily justified given the limited value of information likely to be provided.” The story of former White House Counsel Vincent Foster is often cited to support this proposition. He committed suicide, and after his death “it was learned that Foster ‘had hesitated to see a psychiatrist because it “could jeopardize his White House security clearance.”’ Critics have extrapolated this story to suggest “[s]imilar tragedies might occur [or perhaps have occurred] if applicants avoid treatment for fear of the bar.”

An older study confirmed that forty-one percent of students would seek mental health or substance abuse assistance during law school “if they were assured that bar officials would not have access to the information.” While it is true that law students may try to hide their issues as a result of stigma, this does not necessarily indicate a problem solely in the legal profession. Indeed, “[t]he Surgeon General indicates that nearly half of the most severely mentally ill Americans do not seek help from mental health professionals most often because of the stigma.” This problem can be

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71. Coleman & Shellow, supra note 9, at 157; see also Schware v. Bd. of Bar Exam’rs of New Mexico, 353 U.S. 232, 239 (1957).
72. Coleman & Shellow, supra note 9, at 148.
73. Id. at 157.
74. Bauer, supra note 42, at 95–96.
75. Rhode, supra note 4, at 583.
77. Id.
ameliorated by changing the discourse around mental health in the profession to provide a focus on recovery and well-being rather than punishment when seeking bar admission.

Disregarding the value of these questions is a mistake. Bar associations play an important gatekeeping role in protecting the quality and integrity of the bar. To properly carry out this function, it will require some invasion into private matters. Changing the way that the disclosure is used at the investigatory stage could reduce stigma and ensure that lawyers susceptible to mental illness and substance abuse are monitored and offered help in a timely fashion. Help cannot be made available if there is no demand. Narrowly tailored, status-based disclosure gives bar associations the most information possible and help them provide resources to those who need them.

B. Open-Ended, Subjective Questions

Open-ended, subjective questioning is the most popular method among bar examiners and is endorsed by the National Conference of Bar Examiners in its sample application. Generally, these questions consist of the following:

Do you currently have any condition or impairment (including but not limited to, substance abuse, alcohol abuse, or mental, emotional, or nervous disorder or condition) that in any way currently affects your ability to practice law in a competent and professional manner?

Sometimes, these open-ended questions contain modifying language, such as limiting disclosure to a specified period (i.e. two years or five years) or defines the meaning of “currently”:

These open-ended question[s] leave it up to the applicants to determine if a mental illness will affect their ability to practice law and requires disclosure to the bar examiners. If an applicant’s condition is successfully being treated with medication and he or she can perform the essential tasks of being a lawyer, then the applicant can confidently answer ‘no’ to such a question in good faith.

Disability advocates support this type of tailored disclosure because it minimally impairs the privacy interest of applicants and allows applicants to make a subjective determination as to whether their condition will or will not affect their performances as lawyers. These questions have undeniable utility as subjective prompts for applicants considering whether they suffer from impairment that could be a basis for intervention and treatment. Taken to its most extreme, advocates support an approach that


81. Id. at 13.

82. Esquerra, supra note 48, at 12.
merely asks, “Are you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?” Notice the total absence of mentioning mental illness or substance abuse. This minimally affects an applicant’s privacy interest but may miss important information regarding mental health status.

Relying on a subjective assessment by an applicant can yield problems. Unfortunately, among law students, lawyers, and judges, “disability is synonymous with ‘failure and incompetence’” and is often viewed as a personal failing. This can cause bar applicants to deny their mental illness or substance abuse problems. Denial by an applicant limits the utility of these types of questions because the only time the bar associations can intervene is at the disciplinary stage when the consequences are much higher. Indeed, “denial—one of the hallmark symptoms of dependency—prevents the impaired lawyer or judge from obtaining assistance until the progression of the disease leads to a professional mistake or misconduct.” Therefore, these questions are of limited utility to bar examiners in trying to protect the public and “prevent the extreme harm that may result from some mental health problems;” and, for these reasons, the status-based disclosures are important parts of the questionnaire.

These conduct-based questions largely act as “a less direct route to the same mental health information that is sought by direct mental health queries.” Indeed, “[i]n the end state bar examiners would have to resort to direct mental health questions anyway” if an applicant were to answer “yes” to one of these questions. This approach also may not further the privacy interest of individuals as much as hoped; “the only individuals who will be relieved from disclosure under the behavioral approach are those who are not substantially limited by their illness.” This, therefore, almost completely negates the anti-discrimination goal.

83. Id. at 12 (quoting Application for Admission to the Alaska Bar Association, ALASKA B. ASS’N, Question 18 (Sept. 2007), https://www.alaskabar.org/BarExamResources/ExamApplication.pdf) (This is the form of question used in Alaska as of 2007.).
85. Report to AALS, supra note 78, at 50.
86. Becton, supra note 65, at 356.
88. Id.
89. Id. at 290.
III. THE IMPLICATIONS OF THE AMERICANS WITH DISABILITIES ACT

In 1992, the Americans with Disabilities Act ("ADA") became effective; it was an act premised upon the idea that "disability is not really the cause of an undignified, harsh life. The real cause is the lack of access to buildings, jobs, [and] transportation; segregation and denial of services." The goal of the ADA is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."90

Title II of the ADA prohibits state bar associations from discriminating against an applicant on the basis of disability. Shortly after the enactment of the ADA, applicants and disability advocates began litigating questions related to mental health on bar applications. This was precipitated by a holding in a medical board licensing case whereby "extra investigations imposed on medical licensing applicants who disclosed prior mental health problems were impermissible under Title II of the ADA."91

Challenges to mental health inquiries on bar applications have been somewhat successful. In Ellen S. v. Florida Board of Bar Examiners, the District Court held that overly broad inquiries eliciting information about whether an applicant had ever suffered from a mental illness, regardless of current impairment, were invalid.92 Specifically, the court held that "question 29 and the subsequent inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."93 Later, in Applicants v. Texas State Board of Law Examiners, the court held that more narrowly tailored, diagnosis-specific questions were not a violation of the ADA.94 Finally, in Clark v. Virginia Board of Bar Examiners, "the

93. Id. (Question 29 of the Florida Board of Bar Examiners’ Character and Fitness application reads, “whether an applicant has ever sought treatment for a nervous mental, or emotional condition, has ever been diagnosed as having such a condition, or has ever taken any psychotropic drugs” and includes a consent for all medical records of the applicant to be released as well as a mandatory follow-up investigation and hearing by the Board).
94. No. A93CA740SS, 1994 WL 923404, at *9 (W.D. Tex. Oct. 11, 1994). See id. at *2 n.5 (In this case, the questions read, “(a) 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? (b) Have you, since attaining the age of eighteen or within the last ten years, whichever period is shorter, been admitted to a hospital or other facility for the treatment of bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder? If you answered ‘YES’ to any part of this question, please provide details on a Supplemental Form, including date(s) of diagnosis or treatment, a description of the course of treatment,
court held that, absent evidence that all or most of the applicants who answered the questions affirmatively threatened public health or safety, the questions were invalid.\textsuperscript{95} In addition, the court criticized mental health inquiries for their “deterrent and stigmatic effects.”\textsuperscript{96} The result of these cases is that the required disclosures must further the Board’s purpose of protecting the public rather than simply eliciting useless information.

The American Bar Association responded to these cases by adopting a resolution limiting the types of questions that could be asked concerning mental health:

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BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of public trust, should . . . tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.

BE IT FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about an applicant’s behavior, conduct or any current impairment of the applicant’s ability to practice law.\textsuperscript{97}
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Most jurisdictions have followed this recommendation, recognizing that the applicant’s interest in maintaining privacy in matters not presently relevant to the practice of law is nearly as important as the bar association’s interest in asking the question in the first place. Today, most courts have, “with virtual unanimity, ruled that the ADA applies to questions posed to applicants by legal licensing boards. In other words, the Board does not

\footnotesize{\textsuperscript{95} Spranger, \textit{supra} note 87, at 280 (citing Clark v Bd. of Bar Exam’rs, 880 F. Supp. 430, 431 (E.D. Va. 1995) (In this case, Question 20(b) asked, “Have you within the past five (5) years been treated or counselled for any mental, emotional or nervous disorders?” Question 21 required that an applicant furnish the bar examiners with copies of medical records and additional information explaining the diagnosis and treatment)).}

\footnotesize{\textsuperscript{96} Id. at 281 (quoting \textit{Clark}, 880 F. Supp. at 446).

\footnotesize{\textsuperscript{97} Becton, \textit{supra} note 65, at 370–71 (quoting H. Rutherford Turnbull et al., \textit{American Bar Association Admissions Resolution: Narrow Limits Recommended for Questions Related to the Mental Health and Treatment of Bar Applicants}, 18 \textit{Mental & Physical Disability L. Rep.} 597, 598 (1994)).}
have carte blanche to pry into every crevice of the bar applicant’s life, as the ADA prohibits at least some disability-related inquiries.98

In the most recent case related to the validity of mental health inquiries under the ADA, the court held that the Board is justified in asking (1) unlimited temporal questions related to serious mental illnesses (i.e. bipolar disorder or schizophrenia) and (2) questions narrowly focused to the current time period based on impairment.99 However, the court did not permit the asking of temporally unlimited questions related to minor or brief mental health issues (i.e. exam stress).100 As a result of these cases, there is now some restraint on the types of questions asked. In general,

[t]he inquiries have been much more narrowly tailored to focus on behavior, conduct, and discipline, rather than asking about treatment status or diagnosis. They also have tended to narrow the timeframe. Some states ask only about conduct and current impairment. Other states, however, have recognized the deterrent effect of these questions and have eliminated these inquiries. Most states have not eliminated these questions but have only narrowed them to some degree, with many still asking about diagnosis and treatment.101

The rulings associated with question limitations under the ADA have, to this point, stated the types of questions that are prohibited and the types of questions that are allowed, thereby striking the appropriate balance in the questionnaire phase between protecting the public and protecting the privacy interests of applicants. Questions pertaining to an applicant’s mental health are “[t]he best means of protecting the public from potential harm related to mental illness,” and the ADA has determined the level of legal protection required for individual applicants.102

The form of the question, or the fact that the question is asked, is not really the culprit in perpetuating the stigma; rather, the problem is in the way bar examiners use the answers to these questions. Alternatively, the disclosure could be used to recognize “potential incapacity before unsuspecting clients are represented by unqualified attorneys” and provide meaningful assistance to applicants as they enter the bar.103

IV. MENTAL HEALTH & SUBSTANCE ABUSE DISCLOSURE AT THE INVESTIGATORY PHASE

If an applicant answers in the affirmative to any of the inquiries on the character and fitness questionnaire, mental health related or otherwise, the

99. Id. at *9–10.
100. Id. at *9.
102. Becton, supra note 65, at 384.
103. Id.
“machinery of character and fitness screening [is set] in motion.” At this point, the Board may require supplemental documentation, such as treatment records. In addition, some applicants are required to undergo an interview in which they answer questions “about the circumstances that led to treatment or counseling, the nature of the condition, whether and how it had affected the applicant's functioning, and so on.” In most jurisdictions, there are up to two additional hearing stages. It is at these stages that the objections to the form of the questionnaire arise; more specifically, the concern with the disclosure arises when it is used improperly to disqualify an otherwise qualified applicant.

The following section compares and contrasts several cases in which an applicant was denied admission after disclosing a mental illness or addiction. The section explains that rather than denying an applicant outright on the basis of mental illness or searching for behavior that comport with mental illness and demonstrates lack of fitness, bar examiners should use the investigatory phase to elicit relevant information related to fitness with the goal of assisting the applicant into the practice of law.

Recall Ethical Consideration 1-6 of the ABA Model Code, “when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.” That said, the bar examiners have an important role in ensuring that lawyers entering the practice of law become competent members of the bar.

A. Henry: The Wrong Approach

In re Henry is an example of how character and fitness disclosures related to mental health and substance abuse can be misused by a panel to improperly deny an applicant. Henry sought mental health treatment in law school and was diagnosed with Bipolar II Disorder. He periodically attended treatment throughout law school. In addition to his diagnosis,

104. Bauer, supra note 42, at 104.
105. Id.; see also Request/Authorization, supra note 39.
106. Id.
107. Id.
108. It is important to note that it is extremely rare for an applicant to be denied admission based solely on mental illness. Denials are usually based on a combination of mental illness and some type of bad conduct. However, the problem arises when that bad conduct is used to disqualify applicants when they have shown they are taking their illnesses seriously (i.e. seeking treatment or having been sufficiently rehabilitated). See Baum, supra note 58, at 3.
110. 841 N.W.2d 471 (S.D. 2013).
111. Id. at 473.
112. Id. at 473–74.
Henry had several encounters with the law (primarily related to alcohol) and faced a suspension of his driver’s license and an impaired driving charge.\textsuperscript{113} Henry applied to the Iowa bar and was required to undergo a psychological assessment which revealed that he “[d]id not presently meet criteria for any psychological disorders” and that there was “no evidence to suggest any impairment” that would affect his ability to practice law.\textsuperscript{114} He adhered to the one-year waiting period as a result of his criminal convictions and was admitted to the Iowa bar in 2011.\textsuperscript{115} Henry subsequently applied to the South Dakota bar and was denied. In its opinion, the South Dakota Supreme Court reasoned that Henry’s application to the South Dakota bar was denied because

Henry did not appear to be forthright in his presentation to the Board. The Board believed that Henry withheld some of his mental health records. It also expressed concern at Henry’s decisions to discontinue recommended treatments without consulting the prescribing physician. The Board also noted periods of Henry’s life that were affected by his mental health condition. Additionally, the Board believed that Henry showed disrespect to its members. Finally, the Board stated that Henry’s DUIs evidenced poor judgment and lack of maturity. The Board concluded that when viewed in totality, the unanswered questions about the status of Henry’s mental health combined with his lack of good judgment, lack of candor, and unreliability demonstrated that he failed to meet his burden to establish his good moral character . . . .\textsuperscript{116}

Upon review, the court determined that “[a]n individualized assessment of an applicant with a history of bipolar disorder is necessary to protect the public.”\textsuperscript{117} The court heavily emphasized the role of the bar association in protecting the public through attorney regulation; however, there was nothing in the facts of the case to indicate that Mr. Henry posed a threat to the profession because of his mental health status or his conduct.

In this case, Henry revealed his mental illness on his questionnaire and was subject to a more probing inquiry during the investigative phase.\textsuperscript{118}

\textsuperscript{113} Id. at 474.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Henry, 841 N.W.2d at 475.
\textsuperscript{117} Id. at 479.
\textsuperscript{118} See Edwards v. Ill. Bd. of Admissions to Bar, 261 F.3d 723, 726 (7th Cir. 2001) (Applicant was denied on the basis that she refused to provide complete medical records related to her mental illness. She had disclosed on her application that she had left a previous job because she was unable to pass an employment physical because she was diagnosed with major depression. Applicant demonstrated no signs of her diagnosis presently affecting her functioning in any way.); In re Bar Admission of Manion, 540 N.W.2d 186, 188–89 (Wis. 1995) (Applicant was denied because he lacked the requisite moral character and fitness due to a cocaine dependency even though applicant had been
His disclosure was used improperly. Henry should have been required to undergo an interview; however, it should have been directed towards treatment and support services because he demonstrated commitment to his mental health.\footnote{Henry, 841 N.W.2d at 475.} Nothing in the facts indicated he was a threat to public safety or was likely to bring the administration of justice into disrepute. Henry was honest about his mental health status and his conduct. As Justice Frankfurter noted in \textit{Schware}, the essential characteristics of a lawyer are “qualities of truth-speaking, of a high sense of honor, of granite discretion. . . .”\footnote{Schware v Bd. of Bar Exam’rs of N.M., 353 U.S. 232, 247 (Frankfurter, J., concurring).} Henry demonstrated these qualities by disclosing his history to the Board. He would have been better served by a Lawyer Assistance Program or even conditional admission if the examiners were concerned about his conduct.

\textbf{B. Kastner: Properly Used Disclosure with Justified Denial}

Kristofer Kastner was denied admission to the Texas bar on the grounds that “there was a clear and rational connection between Kastner’s history of mental instability and personality disorder and the likelihood that, if licensed, Kastner would fail to carry out his duties.”\footnote{Kastner v. Tex. Bd. of Law Exam’rs, No. 03-10-00167-CV, 2011 WL 3890398, at *1 (Tex. App. Aug. 31, 2011).} At the time of his original application, Kastner was denied admission because he had a severe chemical dependency, but he was permitted to reapply if he satisfied the conditions of the Board’s order, including refraining from criminal activity, maintaining employment, abstaining from alcohol, attending Alcoholics Anonymous, and conducting himself in an ethical manner.\footnote{Id. at *1, 3.} Kastner chose not to abide by these conditions, was arrested several times, used alcohol and drugs, and was unable to maintain employment.\footnote{Id. at *3–4.} At his second hearing, the Texas Court of Appeals affirmed the denial of his admission to the bar.\footnote{Id. at *6.}

This case was decided correctly. Kastner was not denied admission on the basis of his mental status alone, and he was permitted to demonstrate his fitness through concrete actions in the year prior to seeking admission. Unlike Henry, Kastner did not demonstrate the honesty and commitment to his mental health that was necessary for admission. Kastner’s denial was based on his inability to show the bar examiners that he was of good moral character when given a chance to do so. \textit{Kastner} illuminates why \textit{Henry} was improperly handled. The distinguishing factor from \textit{Henry} is that
Kastner was given an opportunity to demonstrate better conduct rather than being denied outright.

This case also illustrates an earlier point, that the questionnaire is important, especially if an applicant is in denial about his or her condition and is not seeking help.\textsuperscript{125} Based on the facts provided, Kastner was in denial about his condition and did not take it seriously.\textsuperscript{126} This is the problem with using subjective disclosure alone. Kastner was the type of individual who did not believe his fitness was limited by his addiction and mental health issues. This case illustrates the importance of asking some narrow, status-based mental health questions on the questionnaire not only for prevention’s sake but also as an assessment of an applicant’s self-honesty.

C. Burch: Perfect Candidate for Support Services

\textit{In re Burch} demonstrates the role of support services in giving applicants a chance to prove their fitness and be placed in a supportive environment once they have disclosed a mental illness or addiction. Applicant Robin Burch applied to the Ohio bar.\textsuperscript{127} On her questionnaire, Burch admitted to a diagnosis of depression and ADHD.\textsuperscript{128} She was subjected to an interview with the review panel and then was referred to another panel even though “the admissions committee certified that Burch possessed the requisite character, fitness, and moral qualifications required for the admission to the practice of law in Ohio.”\textsuperscript{129} The Board expressed “serious concerns about Burch’s conduct during law school, including her lack of diligence and failure to abide by law-school rules, her unprofessional conduct, and her failure to accept responsibility for those actions.”\textsuperscript{130} Both her treating psychiatrist and her counselor at the Ohio Lawyer’s Assistance (OLAP) program testified she had made “fair” progress in her mental health and opined that she was more “unwilling than unable.”\textsuperscript{131} She had “entered into a two-year mental-health-recovery contract” with the Ohio Lawyer’s Assistance Program and had “substantially complied with its requirements.”\textsuperscript{132} The Board’s primary concerns were related to the applicant’s unprofessional conduct during law school, including turning in assignments late, not attending class, and...
general disrespect towards the court during an externship.\textsuperscript{133} In her hearing, she accepted responsibility for her actions in law school.\textsuperscript{134} Ultimately, she was denied admission because she did “not yet possess the maturity to accept responsibility for her past conduct, to learn from her mistakes, or to make better choices in the future.”\textsuperscript{135}

While it is impossible to see into the minds of the panel members and the judges, it is unlikely that the stated reason for denying Ms. Burch is entirely accurate. If acting irresponsibly in law school were grounds for denial of admission to the bar, many students would have a difficult time with character and fitness. It is more likely Ms. Burch was denied because she (1) had a diagnosis of depression and ADHD and (2) that diagnosis prompted her unprofessional behavior. While this may be the case, it does not suggest that denial is the only solution. Ms. Burch had substantially completed her Lawyers Assistance Program contract and was taking responsibility for her past wrongs.

This case demonstrates how mental health disclosure can be used to unfairly disadvantage an applicant. It is unlikely that an applicant who displayed similar behavior but did not have a mental illness would have been subjected to the same exacting scrutiny. A better approach is to offer support services where they can be used. Here, Ms. Burch may have benefitted from more time with her Lawyer’s Assistance Program counselor or could have assured the Board of her fitness under Conditional Admission.

The problem with mental health disclosure at the investigatory stage is that it may be used to deny an otherwise qualified applicant. The solution here is not to eliminate the disclosure entirely. It plays an important role in assuring an applicant’s fitness and in protecting the public. Simply denying applicants or telling them they may reapply in several years sends a message that the bar association is not interested in actually assisting lawyers with mental health and substance abuse problems. Furthermore, it presumes that if applicants with mental illness or an addiction merely behave better, their illnesses will no longer affect their lives. This assumption is wholly inaccurate. Recognizing that bar associations have a role in protecting the public through attorney regulation requires respect for individual privacy via narrowly tailored disclosure and a meaningful attempt to assist lawyers who are transparent about mental illness and addiction.

\textsuperscript{133} Burch, 975 N.E.2d at 1005.
\textsuperscript{134} Id. at 1006.
\textsuperscript{135} Id. at 1008.
V. CONDITIONAL ADMISSION AND OTHER MECHANISMS FOR ASSISTING LAWYERS WHO DISCLOSE MENTAL ILLNESS OR SUBSTANCE ABUSE

Outright denial of admission to an applicant who discloses a history of mental illness is unlikely to combat the stigma associated with mental illness in the profession. However, the questionnaires and investigations are important to gain “[i]nsight concerning how depression permeates a lawyer’s ability to practice,” and they “will better equip lawyer assistance programs (LAP), disciplinary committees, and state bars in combating lawyer depression.” Unfortunately, those with the most to gain in this debate, law students, are not in the best position to change the current framework. Law students are at the mercy of the Board of Examiners to have their licenses issued. The power imbalance in this relationship makes it difficult for law students alone to affect reasonable change in this area. With that in mind, there are structural changes that can be made to help law students succeed as lawyers. “The interests of the public and bar applicants are best served by encouraging early treatment and rehabilitation from conduct or behavior or a condition that would otherwise render an applicant unfit to practice law.”

A. Increased Role for Lawyers’ Assistance Programs

The first Lawyer Assistance Program (LAP) “was founded in 1960 in South Dakota and the most recent LAPs were started in Colorado and West Virginia in 2012.” A LAP is “a coordinated program, usually supported by a state bar association or related agency, consisting of trained professionals or volunteers charged with the duty of assisting members of the legal community . . . who are suffering from mental or physical conditions that may impair their ability to practice law.” “Lawyer assistance programs, though they differ from state to state, now generally offer a range of services and support to struggling attorneys and judges” and law students. “The backbone of most LAPs is the maintenance and

138. Id.
139. Model Rule on Conditional Admission, supra note 44, at 12.
141. John W. Clark, Jr., “We’re From the Bar, and We’re Here to Help You”—Lawyer Assistance Programs, 34 COLO. LAW. 117, 117 (2005).
142. Wilson, supra note 140, at 954.
operation of a confidential hotline that can be accessed directly by attorneys, family members, and friends to get help for an impaired attorney and facilitate his or her access to treatment." 143 Other services offered by a LAP may be monitoring contracts with lawyers, counseling services, and education. “LAP uses peer support, referrals, and intervention to help a lawyer maintain or regain her professional functioning, preferably before she disserves her clients, neglects her professional responsibilities, or damages her professional standing or personal life.” 144

As evidenced by the presence of a LAP in all fifty states, and the ABA Commission on Lawyer Assistance Programs, state bar associations have recognized the realities about mental illness and addictions and have sought to develop programming to address and treat this problem. 145 However, there is a discord in the current approach. On the one hand, bar associations are openly discussing the number of depressed lawyers, providing self-assessments on their websites, and maintaining LAPs; but on the other hand, they are not providing enough meaningful mental health and addictions resources to law students, bar applicants, and lawyers who need it.146 LAPs further the state’s interest in protecting the public because they allowing law students and lawyers to obtain professional assistance before any misconduct occurs. It also furthers the individual’s privacy interests by providing a confidential source of treatment. Finally, it destigmatizes mental illness by providing an open, transparent forum for seeking help. To successfully assist bar applicants bar associations need to emphasize preventative education during law school, an increased availability of resources to law students, and consideration of a role for mental health and addiction specialists when determining the admissibility of an applicant with a mental illness or addiction.

There needs to be an increased presence of LAPs on law school campuses. Increased presence serves two objectives: (1) providing education and awareness of available resources, and (2) creating an accessible way for law students to get help before engaging in behavior that could cause problems with character and fitness. “The hope of all LAPs is, of course, that the old patterns affecting the onset of law student problems can be turned around with education, changes in law school culture, and in attitudes about mental illness and substance abuse.” 147

143. Clark, supra note 141, at 119.
146. Pulliam, supra note 136, at 298.
In several jurisdictions, [LAPs] provide law schools with speakers who are attorneys experienced in dealing with substance abuse; they can talk to law school classes about issues concerning substance abuse by attorneys and [about] issues involved in dealing with clients who have a substance abuse problem. In some states LAPs have initiated joint educational efforts involving judges, attorneys, and legal educators.\textsuperscript{148}

This type of programming needs to be increased through peer-support initiatives initiated by LAPs or formal monitoring programs.\textsuperscript{149} By normalizing mental illness and addiction as part of the discourse in law schools, students will be more likely to seek treatment when they feel they need it. The Arkansas LAP noted “[m]ost of the students we see refer themselves for help with stress and anxiety. When they find they can return to their classes and studies, families and friends with a new outlook, many of these students are not shy about suggesting to their peers that they give it a try."\textsuperscript{150}

Furthermore, the Board of Bar Examiners generally looks favorably upon a student who has sought help:

[W]hen a student with a serious problem gets help, it is actually more likely that he will have an easier time during the character and fitness process. This is so because when a student seeks help and gets better, it signals to the state bar character and fitness examiners that he is able to recognize when he needs assistance, get appropriate professional support, and consequently manage his problems responsibly.\textsuperscript{151}

This is the narrative students need to be hear about mental health disclosure on the bar application. Eliciting the disclosure is important to protect the public, but if an applicant makes a good faith effort to seek treatment that should not hinder them during the character and fitness process. In this way, students should be encouraged to seek treatment.

Bar Examiners should rely on LAPs to conduct monitoring programs for applicants who disclose mental illness on their applications and to determine whether an applicant’s conduct is going to have an effect on his or her ability to practice. “Monitoring assists them in establishing a plan of action to remedy these problems” that may be a hurdle for the character and fitness committee.\textsuperscript{152} By allowing LAPs to intervene early in the process (i.e. at the time of application, often in the fall) rather than after the hearing, applicants can undertake a course of action to prove to the Board that they possess the moral character required for admission. Bar

\begin{footnotes}
\item[148.] Report to AALS, supra note 78, at 48.
\item[149.] Karabin, supra note 9, at 31, 33, 35.
\item[150.] Cearley, supra note 147, at 455.
\item[151.] Baum, supra note 58, at 3–4.
\item[152.] Karabin, supra note 9, at 31.
\end{footnotes}
Examiners should first refer an applicant to a LAP for an assessment prior to denying an application outright.

Finally, Lawyers Assistance Programs and law students should lobby state bar associations to have mental health and addictions specialists sit on the panels during character and fitness when it is relevant to the inquiry. While outside assessments are often used, it is important to have an individual not only to advocate for the applicant but also to provide insight and expertise into the mental illness and addiction process in the profession.153 It will only serve to further stigmatize mental illness in the profession if misunderstanding about the illness is perpetrated at the character and fitness screening.

B. Conditional Admission Programs

When education and support by a Lawyers Assistance Program is insufficient, conditional admission of an applicant should be considered. In 2008, the American Bar Association passed a Model Rule on Conditional Admission to practice law:154

An applicant who currently satisfies all essential eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent rehabilitation from chemical dependency or successful treatment for mental or other illness, or from any other condition this Court deems appropriate, that has resulted in conduct or behavior that would otherwise have rendered the applicant currently unfit to practice law and the conduct or behavior, if it should recur, would impair the applicant’s current ability to practice law or pose a threat to the public. The [Admissions Authority] shall recommend relevant conditions that the applicant to the bar must comply with during the period of conditional admission.155

As of the 2015 bar-admission year, twenty-six states permitted an applicant who satisfies all other requirements to be admitted to the bar under a conditional admission program.156 When applicants are admitted conditionally, they have various steps or conditions they must satisfy

155. Id. at 3.
156. Comprehensive Guide to Bar Admission, supra note 1, at 5. (Not all states follow the exact wording of the ABA Model Rule for conditional admission). See Rule XVII. Admission to the Bar of the State of Louisiana (Aug. 2008), http://www.lasc.org/rules/supreme/RuleXVII.asp (“Regardless of any recommendation made by the Panel, in any matter in which the Court deems it appropriate, the Court may admit an applicant on a conditional basis subject to a probationary period.”).
during the conditional period. 157 “If the conditions have been satisfied at
the end of the conditional term, the conditions will be removed and the
applicant will gain regular admission to the bar. The applicant’s status as a
conditional applicant is kept confidential, and his clients and co-workers
are unaware of it.” 158 “Conditions attached to admission may include close
supervision by an admitted attorney; continued sobriety; drug tests;
substance abuse, psychiatric, or psychological treatment; or other forms of
monitoring.” 159

Opponents to conditional admissions programs argue that “[a]n
conditional license is inherently une val to a full license to practice law”
and that by creating two classes of law licenses applicants with mental
illness and substance abuse histories suffer discrimination. 160 However, the
expansion of conditional admission programs is a valuable tool to assist
lawyers into practice who have disclosed a mental illness or addiction.
Conditional admission programs benefit the goals of the applicant and of
the bar association. By conditionally admitting an applicant, the bar
association retains (and maybe enhances) its gatekeeping role by
monitoring applicants who may be a threat to the public. The applicant
benefit by being admitted into an environment where they are supported
and encouraged to thrive.

“The most obvious benefit of conditional admission programs is
giving applicants the chance for admission.” 161 As stated in the cases
above, most applicants can reapply in a few years; however, conditional
admission would allow them to prove themselves fit attorneys while
working in the profession. This is the clearest indication that a bar
examiner could ask for as to an applicant’s fitness to practice law. By
being denied admission, an applicant is likely to face severe financial
hardship from the increasing cost of law school and may feel ostracized by
classmates; both situations exacerbate mental health and substance abuse
problems. “A move to adopt these programs will also signal that states
understand that mental illness and addiction are personal issues that can be
overcome or managed.” 162 Bar associations play an important role in de-
stigmatizing mental illness in the profession by showing they are
sympathetic to applicants’ mental health.

Conditional admission programs may also address the problem of law
students not seeking treatment for fear of not being admitted to the bar.

157. See Model Rule on Conditional Admission, supra note 44, at 3.
158. Stephanie Lyerly, Comment, Conditional Admission: A Step in the Right
Direction, 22 GEO. J. LEGAL ETHICS 299, 306 (2009). See also Model Rule on Conditional
Admission, supra note 44.
160. Id. at 913.
161. Lyerly, supra note 158, at 316.
162. Id.
“Conditional admission programs also send the message that law students need not be fearful of seeking treatment early, and that they can be candid with this information on bar applications.” Furthermore, “[a]n applicant that has the ability to recognize his problems and the foresight to seek treatment for these problems may be even better capable of dealing with the future pressures of the job . . .”

The disclosure of matters related to mental health on the character and fitness questionnaire allows bar examiners to assess whether an applicant may benefit from conditional admission as opposed to an outright denial. If applicants are made aware that the disclosure is used to help them remain healthy during their practices, it will go a long way to de-stigmatizing mental illness and addiction in the profession.

CONCLUSION

Mental health and substance abuse disclosure on character and fitness applications is required to further the State’s goal of an effective, competent bar. However, there are modifications that can be made to balance the privacy rights of the individual and ensure that individuals disclosing a mental illness or addiction are supported through bar association services.

State bar associations are likely to receive the most benefit from asking a combination of narrow, status-based mental health questions and broad subjective questions. The scope of these questions have been sufficiently narrowed under the ADA to protect the privacy interests of the individual from disclosing more than necessary information. The problem with this line of questioning arises when it is used in an inappropriate manner, usually during the investigation or hearing stage. Bar examiners should seek to ensure that applicants who require further investigation are treated fairly and given an opportunity to succeed in a profession that they have worked hard to become a part of. This can be accomplished through the increased use of conditional admission for applicants who would otherwise not be admitted. Furthermore, the Lawyer’s Assistance Programs should be expanded to help normalize mental illness and addiction through education starting in law school and during practice and through mental health and addictions specialists sitting on the Board when considering an applicant who has a mental illness or addiction. Lastly, Lawyer’s Assistance Programs are in a great position to provide

163. Id. at 317. See also Model Rule on Conditional Admission, supra note 44. (The House of Delegates notes that “[u]tilizing a confidential conditional admission process can remove impediments to early diagnosis and treatment for chemical dependency or mental illness by encouraging law students to seek assistance and treatment early, rather than avoiding treatment for fear of being refused a license because of treatment.”).

164. Lyerly, supra note 158, at 316.
intervention and long-term monitoring to law students who identify mental illness and addiction as a problem during law school.

It is not the form of the question or that the question asked is contributing to the stigma around mental illness and addiction in the profession; it is the fact that bar examiners and bar associations are not taking the right approach. The only way to de-stigmatize mental illness and addiction in the legal profession is to create a culture of transparency related to the licensing process. “If we can keep in mind that it is about safety and wellness and not about punishment and judgment . . . the process for assisting our law students would be a smooth one.”165

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165. Karabin, supra note 9, at 36.

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