



U.S. Department of Justice

Civil Rights Division

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

January 21, 2014

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

Dear Ms. Richards:

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

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

In contrast, questions and inquiries based on an applicant's *status* as a person with a mental health diagnosis do not serve the worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws.

I. Background

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

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

42 U.S.C. § 12132.

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

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

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

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

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?

Applicants who respond affirmatively to Questions 25 or Question 26 must complete a form authorizing each of their treatment providers “to provide information, without limitation, relating to mental illness . . . , including copies of records, concerning advice, care, or treatment provided. . . .” They also must complete a form describing their condition and treatment or monitoring program. Applicants who respond affirmatively to Question 27 are required to “furnish a thorough explanation.”

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

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

II. Analysis

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

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

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

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

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

a Character Report; they do not effectively identify unfit attorney applicants; and they have a deterrent effect that is counterproductive to the states' objective of ensuring that licensed attorneys are fit to practice.

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

Attorney licensing entities can achieve their objective of identifying applicants who are not fit to practice law without utilizing questions that focus on an applicant's status as a person with a mental health disability. Questions designed to disclose the bar applicant's prior misconduct, including the applicant's academic, employment, and criminal history, which are part of the Request for Preparation of a Character Report, would serve the legitimate purposes of identifying those who are unfit to practice law, and would do so in a non-discriminatory manner. *See New Jersey*, 1993 WL 413016, at *7 (finding that inquiry into applicants' behavior is the proper and necessary inquiry); Am. Bar Ass'n Bar Admissions Resolution, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597, 598 (June 1994) (stating that specific, targeted questions may be asked about an applicant's behavior or conduct, or a current impairment of the applicant's ability to practice law).

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

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

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

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

undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor."); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 141 (2001) ("there is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney"); *id.* at 141-42 n.153 (observing that the only small retrospective study of attorneys "provides no support at all for the notion that individuals with mental health treatment histories are more likely than others to engage in misconduct as attorneys").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

Jocelyn Samuels
Acting Assistant Attorney General