MENTAL HEALTH AND THE LEGAL PROFESSION: THE FLORIDA BOARD OF BAR EXAMINERS CONTINUES TO VIOLATE THE AMERICANS WITH DISABILITIES ACT

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I. INTRODUCTION

Given the rigorous demands of law school and its competitive format, it comes as no surprise that roughly seventeen percent of law students suffer from depression and twenty-three percent from mild to moderate anxiety.[1] Yet, the fear of social stigma discourages nearly half of all law students who think that they need mental health treatment from obtaining it, perpetuating the secrecy of students' struggles and negative attitudes toward mental health treatment in law school.[2] What is more troubling is that students perceive that the legal profession itself views mental health treatment with suspicion, as forty-five percent of surveyed students reported not seeking treatment due to the "potential threat to bar admission."[3]

Unfortunately, this fear is not without merit for law students in Florida, as the Florida Board of Bar Examiners inquires into the mental health status of applicants as part of its character and fitness investigation, regardless of whether they have engaged in problematic

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1. *Survey of Law Student Well-Being*, AM. BAR ASS'N (Jan. 18, 2019), https://www.americanbar.org/groups/lawyer_assistance/research/law_student_survey/ (reporting that out of the respondents, seventeen percent "screened positive for depression" and twenty-three percent for mild to moderate anxiety). Further, studies show that symptoms of psychological distress, including depression and anxiety, often increase dramatically in law school—sometimes reaching fifteen times the general rates. Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114 (2002).

2. AM. BAR ASS'N, *supra* note 1 (stating that forty-seven percent of respondents who believed that they needed professional mental health or emotional assistance were discouraged from obtaining it due to social stigma).

3. *Id.* Even if the potential threat is low, many students are unwilling to take that risk and thus forego treatment. *See* Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 543 (2008).

conduct. Perverse consequences accompany such a disclosure requirement, including discouraging necessary mental health treatment, increasing mental distress, prompting self-medication with alcohol or controlled substances, incentivizing dishonesty on the bar application, and straining or even destroying the bond between mental health professionals and those students who have sought treatment.[4] While these objectionable effects alone should prompt the Florida Board of Bar Examiners to revise the Florida Bar Application mental health disclosure question, its violation of federal law certainly must.

In Part II, this Article discusses the enactment and pertinent parts of the Americans with Disabilities Act of 1990 (ADA)[5] and ADA Amendments Act of 2008 (ADAAA),[6] which establish the protection afforded to Florida Bar applicants from discrimination based on disability status. Further, Part II details how the cases challenging the Florida Board of Bar Examiners have developed from constitutional claims to ADA-violation claims. Part III then provides a brief history of the Florida Bar Application mental health disclosure questions, including how they have been amended over time and what events prompted those changes. In Part IV, this Article provides an in-depth analysis of the current Florida Bar Application mental health disclosure question—Question 25—and its accompanying preamble, with a focus on framing and ADA compliance. This Article argues that the Florida Board of Bar Examiners is not complying with the ADA because Question 25 is overly broad, is unrelated to protecting the public and the judicial system, and thus violates the ADA by discriminating against applicants with mental disorders by subjecting them to additional burdens solely due to their disability status. As such, Part V suggests a simple solution that has been authorized by the Department of Justice (DOJ) as being ADA compliant.

4. *See* Alyssa Dragnich, *Have You Ever: Now State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 683 (2015); Michelina Lucia, *Trial by Surprise: When Character and Fitness Investigations Violate the ADA and Create Dangerous Lawyers*, 38 LAW & INEQ. 205, 207–08 (2020) ("In response to these questions and procedures, many students hide their mental illness resulting from the intense pressures of law school because they fear the extreme stigmatization surrounding mental illness in the legal community. . . . Even though the Model Rules of Professional Conduct call for self-care to ensure diligent lawyering, law students typically do the opposite." (footnotes omitted)).

5. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

6. ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as amended in scattered sections of 42 U.S.C.).

II. BACKGROUND

A. Americans with Disabilities Act

In 1990, Congress expressed deep concern that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous,"[7] particularly given the lack of "legal recourse to redress such discrimination."[8] Accordingly, Congress passed the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[9] and "clear, strong, consistent, enforceable standards addressing [such] discrimination."[10] The ADA serves as a legal framework that can hold the federal government accountable for enforcement of these explicit standards.[11]

In pertinent part,[12] the ADA protects certain individuals with physical and mental disabilities from discrimination on the basis of those disabilities regarding both employment under Title I[13] and public services under Title II.[14] To have access to the protections of the ADA, an individual must have "a physical or mental impairment that substantially limits one or more . . . major life activities,"[15] "a record of such an impairment,"[16] or be "regarded as having such an impairment."[17] A mental impairment is defined as "[a]ny mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability."[18] Further, major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[19]

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7. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(9) (Supp. 1990).
8. *Id.* § 12101(a)(4).
9. *Id.* § 12101(b)(1).
10. *Id.* § 12101(b)(2).
11. *Id.* § 12101(b)(3).
12. In full, the ADA consists of five titles: Title I–Employment, Title II–Public Services, Title III–Public Accommodations and Services Operated by Private Entities, Title IV–Telecommunications, and Title V–Miscellaneous Provisions. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327.
13. *Id.* (codified as amended at 42 U.S.C. §§ 12111–12117).
14. *Id.* (codified as amended at 42 U.S.C. §§ 12131–12161).
15. 42 U.S.C. § 12102(2)(A) (Supp. 1990).
16. *Id.* § 12102(2)(B).
17. *Id.* § 12102(2)(C).
18. 28 C.F.R. § 35.107(c)(1)(i) (2018).
19. 28 C.F.R. § 35.104(2) (1992). To date, the list of major life activities has been expanded to include "[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking,

Once deemed to have a disability under the ADA, Title I provides protections for "qualified" individuals against discrimination in the realm of employment.[20] Qualified individuals with disabilities are those who "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position . . . and, with or without reasonable accommodation, can perform the essential functions of such position."[21] Thus, Title I protects qualified individuals from discrimination with regard to employment so long as they are able to carry out "the fundamental job duties of the employment position"[22] or could do so with reasonable accommodations that would not result in an undue hardship on their employers.[23] Moreover, Title I prohibits employers from "mak[ing] inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[24] Instead, employers may only ask about the applicant's ability to perform the functions of the job.[25]

Conversely, Title II of the ADA, which governs public services,[26] does not provide the same explicit protection found in Title I that prohibits employers, during the preemployment process, from asking qualified individuals with disabilities about the existence and severity of their disabilities.[27] Accordingly, it is unclear if entities covered by Title II may inquire regarding the existence and severity of an individual's disability.[28] However, the federal regulations that supplement Title II clearly state that public entities are prohibited from imposing "eligibility

standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working." 28 C.F.R. § 35.108(c)(1)(i) (2018); *see infra* notes 39–40 and accompanying text regarding the ADAAA.

20. 42 U.S.C. § 12112(a) (Supp. 1990).

21. 29 C.F.R. § 1630.2(m) (2018).

22. *Id.* § 1630.2(n). Courts will consider which functions the employer believes are essential to such a position. *See* 42 U.S.C. § 12111(8) (Supp. 1990).

23. 42 U.S.C. § 12111(8), (9), (10) (Supp. 1990); *id.* § 12112(b)(5)(A).

24. *Id.* § 12112(c)(2)(A).

25. *Id.* § 12112(c)(2)(B).

26. *Id.* §§ 12131–12161.

27. Title II does not include the express language found in Title I regarding "inquiries . . . as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." *Compare id.* §§ 12131–12161, *with id.* § 12112(c)(2)(A).

28. *See* Nancy Paine Sabol, *Stigmatized by the Bar: An Analysis of Recent Changes to the Mental Health Questions on the Character and Fitness Questionnaire*, 4 MENTAL HEALTH L. & POL'Y J. 1, 12 (2015) ("A number of courts, the DOJ, and numerous commentators have concluded that these provisions limit the questions that bar licensing entities may ask bar applicants about their mental health history."). Sabol explains how, "[d]espite the lack of an express prohibition, the[se] regulations . . . have the effect of prohibiting licensing entities from asking applicants questions about their mental health history or asking about applicants' diagnoses or treatment for mental health conditions." *Id.* This argument relies, in part, on the DOJ's letter to the Louisiana Supreme Court. *Id.*; *see infra* notes 110–114 and accompanying text.

criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."[29]

Under Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[30] In the context of public services, qualified individuals with disabilities are those "who, with or without reasonable modifications to rules, policies, or practices, . . . meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[31] However, Title II provides a small exception for public safety:[32] public entities are not required "to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others."[33]

29. 28 C.F.R. 35.130(b)(8) (2018). Under Title II, a public entity is "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any commuter authority . . . ." 42 U.S.C. § 12131(1)(A)–(C) (Supp. 1990). As instrumentalities of the state, state bar examiners are covered under Title II. *Id.*; *see* Sabol, *supra* note 28, at 9. Further, the DOJ regulations connected to Title II prohibit a public entity from administering "a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6) (2018). Therefore, as an instrumentality of the state that also administers a licensure program, the Florida Board of Bar Examiners is prohibited from discriminating against qualified individuals with disabilities or imposing unnecessary eligibility criteria that tends to screen out such individuals. 42 U.S.C. § 12132 (Supp. 1990). Nonetheless, Title II does not expressly prohibit the Florida Board of Bar Examiners from generally inquiring regarding an individual's disability. *Id.* §§ 12131–12161.

30. 42 U.S.C. § 12132 (Supp. 1990).

31. *Id.* § 12131(2).

32. The Florida Board of Bar Examiners tactfully uses this exception to justify its mental health inquiry. *See* Florida Bar Application (2019) ("The Board of Bar Examiners, as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance use issue that impaired or could impair the applicant's ability to meet the essential eligibility requirements for the practice of law."); FLA. BAR ADMISS. R. 1-14.1 ("The primary purposes of the character and fitness investigation . . . are to protect the public and safeguard the judicial system."). Thus, the legal scope, applicability, and public health exception of Title II in large part determine whether the Florida Bar Application mental health disclosure question is ADA compliant.

33. 28 C.F.R. § 35.139(a) (2019). To determine whether an individual poses a direct threat, the public entity must assess each case individually, using reasonable judgment rooted in "current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures . . . will mitigate the risk." *Id.* § 35.139(b).

Then, after multiple U.S. Supreme Court decisions that narrowly interpreted the ADA,[34] Congress passed the ADA Amendment Act of 2008 (ADAAA) to clarify the ADA's intended protections.[35] The ADAAA substantially broadened the category of individuals with disabilities by altering what it means to be "regarded as having such an impairment."[36] As amended, the ADA considers an individual as being "regarded as" having an impairment if the individual "has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[37] Additionally, the ADA expressly requires that "[t]he definition of disability . . . be construed in favor of broad coverage of individuals . . . , to the maximum extent permitted . . . ."[38] Finally, Congress added eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating to the already expansive list of major life activities,[39] and it specifically included language to articulate that the list is not meant to be exhaustive.[40]

B. From Constitutional Claims to ADA Compliance

The enactment of the ADA and the ADAAA profoundly expanded the standing of applicants with disabilities to sue state bar examiners for discrimination. Before 1990, the Rehabilitation Act of 1973[41] allowed individuals to sue for discrimination based on their disabilities.[42]

34. 42 U.S.C. § 12101(a)(4), (5) (Supp. 2008). Namely, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and its companion cases, as well as Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). *Id.*

35. *Id.* § 12101(a)(6) ("[A]s a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.").

36. *Id.* § 12102(3)(A).

37. *Id.* Thus, applicants who answer "yes" to the Florida Bar Application mental health disclosure question are clearly covered under the ADA because they are consequently perceived by the Florida Board of Bar Examiners as having a mental impairment, regardless of whether the perceived impairment limits—or is even perceived to limit—a major life activity. *See id.*

38. *Id.* § 12102(4)(A).

39. *Id.* § 12102(2)(A).

40. *Id.* ("[M]ajor life activities include, *but are not limited to* . . . ." (emphasis added)).

41. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

42. *See* 29 U.S.C. § 701(b)(2) (Supp. 2018) (explaining that one purpose of the Act is "to maximize opportunities for individuals with disabilities . . . for competitive integrated employment"); 29 U.S.C. § 701(c)(2) (2012) ("It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principle[] of . . . respect for the privacy, rights, and equal access . . . of the individuals."); *Id.* § 794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or . . . conducted by any Executive agency or by the United States Postal Service.").

Realistically, however, this protection was afforded only if the entity engaging in the discrimination received funding from the federal government,[43] which precluded applicants from using the Rehabilitation Act to challenge mental health questions included in the Florida Bar Application.[44] Instead, before the ADA was enacted, Florida Bar applicants unsuccessfully relied on constitutional grounds to argue that the Florida Board of Bar Examiners violated their privacy and due process rights by requiring expansive mental health disclosures.[45]

In *Florida Board of Bar Examiners Re: Applicant*,[46] the Florida Supreme Court examined the authority of the Florida Board of Bar Examiners to inquire into an applicant's mental health history in light of the constitutional right to privacy.[47] The applicant claimed that the Florida Board of Bar Examiners violated his right to privacy by refusing to process his application until he answered a particular mental health disclosure question and executed its accompanying authorization and release form.[48] Ultimately, the court held that the Florida Board of Bar Examiners' decision did not violate the applicant's constitutional right to privacy.[49] It reasoned that admission to The Florida Bar is a privilege, not a right, and, therefore, the applicant's right to privacy was limited by his initial decision to apply for admission.[50] In other words, the applicant "assumed the burden of demonstrating his fitness for admission into the Bar[,] . . . [which] encompasses mental and emotional fitness as well as character and educational fitness."[51]

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43. *See* 29 U.S.C. § 794(a) (2012) (providing protection from discrimination for individuals with disabilities "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service").

44. *See* Catherine C. Cobb, Comment, *Challenging a State Bar's Mental Health Inquiries Under the ADA*, 32 HOUS. L. REV. 1383, 1388 (1996).

45. *See, e.g.*, Fla. Bd. Of Bar Examiners Re: Applicant, 443 So. 2d 71, 72 (Fla. 1983) (ruling that the Florida Board of Bar Examiners did not violate the applicant's privacy or due process rights by requiring him to complete the application and execute a release before processing his application).

46. 443 So. 2d 71 (Fla. 1983).

47. *Id.* at 72.

48. *Id.* The question that the applicant refused to answer—Question 28(b) at the time—asked:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?
> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

Id. at 72–73. The applicant also made a due process claim. *Id.* at 72. The court held that the Florida Board of Bar Examiners' action did not violate the applicant's due process rights either. *Id.* at 76.

49. *Id.* at 72.

50. *Id.* at 74 ("In this case, the applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right.").

51. *Id.*

The court recognized the applicant's limited privacy right but found that this right was not "unconstitutionally intruded upon by the Board's requirements" because the Florida Board of Bar Examiners' actions satisfied the strict scrutiny standard.[52] Significantly, it clarified a typical justification for such an inquiry into applicants' mental health that persists to this day:

> It is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not otherwise be asked of persons not applying for a position of public trust and responsibility. Because of a lawyer's constant interaction with the public, a wide range of factors must be considered which would not customarily be considered in the licensing of tradesmen and businessmen. . . . The inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder . . . furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.[53]

Thus, given the wide range of potential conditions affecting an applicant's fitness to practice law and the lack of uniformity among those suffering from such conditions, the court concluded that "[t]he means employed by the Board [could not] be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities."[54] It further reasoned that the Florida Board of Bar Examiners afforded extra protection to an applicant's privacy right by holding the information that it obtained in confidence and limiting the authorization and release form to information relevant to applicants' character and fitness as it relates to practicing law.[55]

In his dissent, Justice Adkins asserted that while "mental fitness and emotional stability" are necessary for an individual to practice law

52. *Id.* While the applicant agreed that the state had a compelling interest in ensuring that those admitted to the Bar were fit to practice law, he argued that the means were overly broad. *Id.* at 75. The court, however, found that Question 28(b) and its accompanying release were the least intrusive means that the Florida Board of Bar Examiners could have used to ensure that it obtained the requested information, which it stated was imperative to the Florida Board of Bar Examiners' determination of whether applicants were fit to practice law. *Id.*

53. *Id.* (citation omitted).

54. *Id.* at 76.

55. *Id.*

without injuring the public, the inquiry in question and its accompanying authorization and release form were overly broad and could be narrowed without affecting the Florida Board of Bar Examiners' ability to determine whether an applicant was fit to practice law.[56] He suggested that the Florida Board of Bar Examiners add a time frame from which it requests applicant mental health information, in both the question and the authorization and release form, and that it rephrase the question "in terms which elicit information with regard to problems which, in the judgment of the medical community, impact on one's fitness to practice law."[57] Despite Justice Adkins's argument, the majority's holding effectively foreclosed constitutional claims regarding applicant mental health disclosure questions in Florida.

After Congress enacted the ADA, applicants were able to shift their claims to demand that the Florida Board of Bar Examiners comply with Title II of the ADA. In 1994, the plaintiffs in *Ellen S. v. Florida Board of Bar Examiners*[58] claimed that Question 29 of the Florida Bar Application, which inquired into applicants' mental health,[59] and the authorization and release form, which was required for applicants who answered any portion of Question 29 in the affirmative,[60] violated Title II.[61] In response, the Florida Board of Bar Examiners filed a motion to dismiss, arguing that (1) Florida law permitted the inquiry, (2) Title II did not

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56. *Id.* at 77 (Adkins, J., dissenting).

57. *Id.* Since 1983, the Florida Bar Application mental health disclosure questions have, in fact, been narrowed. *See infra* notes 110–131 and accompanying text.

58. 859 F. Supp. 1489 (S.D. Fla. 1994).

59. *Id.* at 1491. Question 29 of the Florida Bar Application, at that time, read as follows:

> a. . . . Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? If yes, state the name and complete address of each individual you consulted and the beginning and ending dates of each consultation.
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> b. . . . Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem? If yes, state the name and complete address of each individual who made each diagnosis.
>
> c. . . . Have you ever been prescribed psychotropic medication? If yes, state the name of each medication and the name and complete address of each prescribing physician.

Id. at 1491 n.1.

60. *Id.* at 1491. The authorization and release form required applicants to "authorize the release of any and all mental health records and waive all confidentiality as to the content of the consultations." *Id.*

61. *Id.* at 1491. The plaintiffs also challenged the letter of inquiry that the Florida Board of Bar Examiners sent to all past treating professionals and its investigations and hearings, which it had the discretion to hold to obtain additional information if an applicant answered any section of Question 29 in the affirmative. *Id.* Notably, the United States and the Advocacy Center for Persons with Disabilities, Inc., filed separate amicus briefs in support of the plaintiffs' position. *Id.* at 1490.

explicitly prohibit it, and (3) the Florida Board of Bar Examiners had not discriminated against the plaintiffs as a matter of law.[62]

First, the Florida Board of Bar Examiners relied on *Bar Examiners* for the proposition that Question 29 was an inquiry vital to the determination of applicants' fitness to practice law.[63] The U.S. District Court for the Southern District of Florida swiftly distinguished the case, stating that *Bar Examiners* did not support the Florida Board of Bar Examiners' argument because the issue before the Florida Supreme Court in that case was solely whether the mental health question violated the state or federal constitution, as the ADA had not yet been passed.[64] It reasoned that, while state law authorizes the Florida Board of Bar Examiners to investigate the character and fitness of bar applicants, it may not do so if it violates federal law.[65]

Next, the Florida Board of Bar Examiners argued that, even if Florida law did not shield it from the ADA, it was not a covered public entity as defined by Title II of the ADA.[66] The Florida Board of Bar Examiners further asserted that, if it were considered a public entity, Title II would not prohibit it from asking Question 29 because it only generally prohibits discrimination against qualified individuals,[67] while Title I explicitly prohibits employers from preemployment inquiries about the existence and severity of qualified individuals' disabilities.[68] The district court rejected the Florida Board of Bar Examiners' argument, however, as the legislative history clarified that Congress chose not to list specific discriminatory actions for Title II—as it had done for both Title I and Title III—precisely to broaden the types of discriminatory actions protected against by Title II.[69] Moreover, it

62. *Id.* at 1492. In support of the argument that the Florida Board of Bar Examiners had not discriminated against the plaintiffs, the Florida Board of Bar Examiners asserted that it had not denied the plaintiffs admission and had no actual knowledge of their disabilities. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1493.

67. *Id.* At the time, Title II of the ADA "state[d] that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.'" *Id.* at 1492–93 (quoting 42 U.S.C. § 12132 (1990)).

68. *Id.* at 1493; *see supra* notes 26–27 and accompanying text.

69. *Ellen S.*, 859 F. Supp. at 1493. The legislative history explicitly states, "The Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition . . . to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited . . . be identical to those set out in the applicable provisions of titles I and III . . . ." H.R. REP. NO. 101-485(11), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

explained that the DOJ regulations that accompany, and should be read together with, the ADA further prove that Title II applies to the "licensing and regulation of attorneys."[70]

Finally, the court dismissed the Florida Board of Bar Examiners' argument that it did not discriminate against the plaintiffs because it neither denied the plaintiffs admission to the Bar nor possessed actual knowledge regarding their disabilities.[71] It explained that Title II regulations prohibit public entities from subjecting individuals with disabilities to additional burdens based on such disabilities.[72] The court concluded that the Florida Board of Bar Examiners need not deny the plaintiffs licensure in order to discriminate against them.[73]

To support this proposition, the district court analogized the case to *Medical Society of New Jersey v. Jacobs*,[74] in which a New Jersey court found that the state's board of medical examiners discriminated against applicants based on their disabilities by using mental health treatment inquiries to screen individuals and impose additional burdens on such medical license applicants.[75] The *Jacobs* court found that "[t]he questions were problematic because 'they substitute[d] an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior.'"[76] Further, it clarified that discrimination of the medical license applicants occurred before the board of medical examiners denied their admission "because 'the extra investigation of qualified applicants' constituted 'invidious discrimination under the Title II regulations.'"[77] Following the same logic, the court in *Ellen S.* concluded that Question 29 and its accompanying information requests were discriminatory because they placed an additional burden on the plaintiffs, regardless of whether the plaintiffs were denied admission.[78]

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70. *Ellen S.*, 859 F. Supp. at 1493 (clarifying that the following DOJ regulations connect Title II to the bar admissions process implemented by the Florida Board of Bar Examiners: "28 C.F.R. § 35.130(b)(6) prohibits a public entity from administering 'a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.' 28 C.F.R. § 35.130(b)(8) restricts a public entity from imposing or applying 'eligibility criteria that screen out an individual with a disability . . . from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.'" (alteration in original)).

71. *Id.* at 1494.

72. *Id.* at 1493–94.

73. *Id.* at 1494.

74. No. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993).

75. *Ellen S.*, 859 F. Supp. at 1494.

76. *Id.* (quoting *Jacobs*, 1993 WL 413016, at *7) (footnote omitted).

77. *Id.* (quoting *Jacobs*, 1993 WL 413016, at *8).

78. *Id.*

The *Ellen S.* court, however, did not follow the *Jacobs* court's holding on the permissibility of the mental health disclosure questions themselves. The *Jacobs* court did not find that the mental health disclosure questions were discriminatory; instead, it held that the investigation that occurred once applicants answered those questions in the affirmative was discriminatory under Title II.[79] The *Ellen S.* court was not convinced by the *Jacobs* court's decision, reasoning:

> While the *Jacobs* court provided a thoughtful analysis, the holding that the questions themselves did not violate the ADA is questionable. Even if one accepted this flawed conclusion, the facts of the instant case provide a different result because an affirmative response to the first part of [Q]uestion 29 automatically triggers subsequent questions and possible subsequent investigation.[80]

Turning to the Florida Board of Bar Examiners' argument that it did not discriminate against the plaintiffs because it had no actual knowledge of the plaintiffs' disabilities, the *Ellen S.* court explained that the Florida Board of Bar Examiners did not support the assertion that actual knowledge of the disabilities was required to prove that it discriminated against the plaintiffs.[81] Accordingly, the court denied the Florida Board of Bar Examiners' motion to dismiss.[82]

However, ADA claims have failed since this case, as Title II does not shield individuals with disabilities from denial of admission to The Florida Bar if such applicants have a history of behavior revealing that they are unfit to practice law in the state.[83] In *Stoddard v. Florida Board of Bar Examiners*,[84] the plaintiff claimed that the Florida Board of Bar Examiners violated Title II of the ADA by, among other things,[85]

79. *Id.* at 1494 n.7.

80. *Id.*

81. *Id.* at 1494.

82. *Id.* at 1496. The Florida Bar Application mental health disclosure questions have been narrowed several times since *Ellen S.*, and thus the holding in that case does not resolve the issue of ADA compliance as it stands today. *See infra* notes 145–187 and accompanying text.

83. Otherwise, the purpose of the Florida Board of Bar Examiners' character and fitness investigation would be circumvented. *See* FLA. BAR ADMISS. R. 1-14.1 ("The primary purposes of the character and fitness investigation . . . are to protect the public and safeguard the judicial system."); *id.* at R. 2-12 ("All applicants . . . must produce satisfactory evidence of good moral character, an adequate knowledge of the standards and ideals of the profession, and proof that the applicant is otherwise fit to take the oath and to perform the obligations and responsibilities of an attorney."); *id.* at R. 3-11 ("A record manifesting a lack of honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission.").

84. 509 F. Supp. 2d 1117 (N.D. Fla. 2006), *aff'd*, 229 F. App'x 911 (11th Cir. 2007).

85. *Id.* at 1120 ("Mr. Stoddard asserts the Board has violated . . . the [ADA] by inquiring into his mental health and circulating information to Board members involved in reviewing his application, all with the effect of delaying his application and damaging his reputation.").

inquiring into his mental health.[86] Although it agreed that the plaintiff was covered under the protections of Title II, the court dismissed his ADA claim for failure to state a claim on which relief may be granted because of his background.[87] The court agreed that "[i]t may be . . . that neither his mental health nor anything in his background should preclude his entry into [T]he Florida Bar" and "that in some circumstances the mere act of inquiring about or investigating a real or perceived physical or mental impairment constitutes discrimination in violation of the ADA."[88] Nonetheless, it reasoned that his application was "rife with red flags,"[89] considering the plaintiff's voluntary admission in his application of his "25–plus–year history of physical and mental illness, a complete financial collapse . . . , a bitter divorce, three hospitalizations for acute psychosis . . . , and a . . . bankruptcy involving 20 years of financial instability and sporadic employment."[90] Further, the plaintiff was diagnosed with bipolar disorder while his application was being processed.[91] Thus, the court explained its conclusion:

> That an applicant has bipolar disorder or any of a variety of other mental health conditions does not, without more, preclude his admission to [T]he Florida Bar, but neither does such a mental health condition insulate the applicant from a full inquiry into his background and fitness to practice law. The Board thus could properly make the same thorough investigation of Mr. Stoddard's background as it made of every other applicant. And this inquiry could properly include both mental health issues and other apparently unrelated indicia of fitness . . . .[92]

Notably, *Hobbs v. Florida Board of Bar Examiners*[93] was pending on the issue of whether the former Florida Bar Application mental health disclosure questions complied with the ADA before the parties settled in

86. *Id.*
87. *Id.* at 1125–26.
88. *Id.* at 1124.
89. *Id.*
90. *Id.* at 1120 (quoting Stoddard v. Supreme Court, No. 03-11662, 87 Fed. App'x 713 (table), at *2–3 (11th Cir. Oct. 24, 2003) (unpublished opinion)).
91. *Id.*
92. *Id.* at 1124.
93. No. 4:17-cv-00422-RH-CAS (N.D. Fla. filed Sept. 20, 2017).

early 2019.[94] The plaintiff in that case alleged, in part,[95] that the mental health disclosure questions in the Florida Bar Application, as well as the subsequent policies and procedures regarding further investigation and potential conditional admission, violated the ADA because they were overly broad, not rationally related to the Florida Board of Bar Examiners' "purported obligation to protect the public," and discriminatory on the basis of individuals' disabilities.[96] While the plaintiff struggled with a combination of mental health and substance use issues, as well as manifestations of those struggles that were apparent in his past conduct, the underlying issue of whether the Florida Bar Application mental health disclosure questions themselves violated the ADA was unaffected by those circumstances. And while a judicial resolution of *Hobbs* would have helped to clarify this ADA-compliance issue, it would not have resolved the issue of whether the current Florida Bar Application mental health disclosure question violates the ADA, as the Florida Board of Bar Examiners insulated itself by recently amending that section.[97]

The plaintiff in *Hobbs*, a veteran who served in the U.S. Army for ten years, had struggled with mental health and substance use issues after leaving the military.[98] Although those struggles had previously manifested in conduct—namely, two arrests for drunk driving—the plaintiff had since undergone mental health treatment and maintained a high grade point average in law school.[99] Additionally, in his application,

94. Order Dismissing the Complaint in Part at 17, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 30); Raychel Lean, *Florida Board of Bar Examiners Settles Suit Alleging Discrimination Over Mental Health*, DAILY BUS. REV. (Mar. 27, 2019, 3:54 PM), https://www.law.com/dailybusinessreview/2019/03/27/florida-board-of-bar-examiners-settle-suit-alleging-discrimination-over-mental-health/; Stephanie Francis Ward, *ADA Lawsuit About Florida Bar Examiners' Mental Health Requirements Allowed to Proceed*, ABA J. (July 9, 2018, 2:49 PM), http://www.abajournal.com/news/article/ada_lawsuit_about_florida_bar_examiners_mental_health_requirements.

95. Count II of the complaint alleged that the questions violated the Rehabilitation Act. Complaint at 23, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1). *See supra* notes 41–45 and accompanying text.

96. Complaint at 19–23, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1).

97. While *Hobbs* was pending, the Florida Board of Bar Examiners amended the mental health disclosure questions. *See infra* notes 145–187 and accompanying text. Yet, it made only one substantive change and the new question still violates the ADA. *Id.* Given this recent amendment, if the *Hobbs* court had found that the questions at issue violated the ADA, the new question would likely have remained valid until it was specifically challenged in a new lawsuit. As such, it appears that the Florida Board of Bar Examiners positioned itself so that it was effectively shielded from a holding in *Hobbs* finding that the current mental health disclosure question violates the ADA.

98. Samantha Joseph, *He Got Help for Mental Illness. Now He Says Florida Bar Examiners Are Using That Against Him*, DAILY BUS. REV. (July 5, 2018), https://www.law.com/dailybusinessreview/2018/07/05/he-got-help-for-mental-illness-now-he-says-florida-bar-examiners-is-using-that-against-him/.

99. *Id.*

he included a letter from his personal psychologist indicating that he was fit to practice law.[100] In response, however, the Florida Board of Bar Examiners still required that the plaintiff submit all of his medical records and undergo a full medical evaluation by a doctor chosen from a list that it created, potentially costing him up to $5,000.[101] Instead of submitting to such procedures, the plaintiff withdrew his application but expressed his plan to reapply at a later date.[102] Thus, if the case had not settled, the outcome of *Hobbs* would have moved the issue of the Florida Board of Bar Examiners' ADA compliance one step closer to resolution.

III. FLORIDA BAR APPLICATION MENTAL HEALTH QUESTIONS: A BRIEF HISTORY

Before Congress enacted the ADA, states were afforded wide discretion in determining which applicants were fit for the practice of law within their borders. In 1957, the U.S. Supreme Court declared that boards of bar examiners may ultimately decide, with few restrictions, whether applicants are qualified for admission to practice law so long as they do not exclude individuals in such a way that violates their due process or equal protection rights.[103] The Court explained 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."[104] Therefore, at that time in history, if the Florida Board of Bar Examiners proposed a basis for denying an applicant that was not invidiously discriminatory, then a court would likely have upheld its decision.[105]

With this broad discretion and the lack of clear legal recourse available to applicants with disabilities to challenge discrimination by bar examiners before 1990,[106] the Florida Board of Bar Examiners was

100. *Id.*

101. Ward, *supra* note 94. It also gave him the option of holding an investigative hearing, which could have cost him an additional $250. *Id.* As of March 2019, however, the Florida Board of Bar Examiners "will pay up to $3,000 per applicant for evaluations" related to mental health or substance use issues. Gary Blankenship, *FBBE Will Pay for Required Mental Health, Substance Abuse Evaluations*, THE FLA. BAR: FLA. BAR NEWS (Apr. 4, 2019), https://www.floridabar.org/the-florida-bar-news/fbbe-will-pay-for-required-mental-health-substance-abuse-evaluations/.

102. Ward, *supra* note 94.

103. Schware v. Bd. of Bar Exam. of N.M., 353 U.S. 232, 238–39 (1957).

104. *Id.* at 239 (citations omitted).

105. *See id.*

106. *See supra* notes 41–102 and accompanying text regarding the ADA's impact on discrimination challenges against state bar examiners; *supra* notes 45–57 and accompanying text

able to maintain extremely broad mental health disclosure questions in its application.[107] For example, in 1983, Question 28(b) asked whether applicants had "ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder," without limiting the inquiry to any specific time frame or "severe" diagnoses.[108] Then, Congress's enactment of the ADA and the DOJ's subsequent involvement prompted the Florida Board of Bar Examiners to incrementally narrow its mental health disclosure questions.

Well after Congress enacted the ADA and ADAAA, the Florida Bar Application mental health questions remained broad.[109] This changed, however, beginning in February 2014 when the DOJ wrote a letter to the Louisiana Supreme Court declaring that the state's attorney licensure system failed to comply with Title II of the ADA.[110] The DOJ stated that "questions based on an applicant's status as a person with a mental health diagnosis do not serve the Court's worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws."[111]

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regarding the unsuccessful constitutional claims that plaintiffs used to challenge state bar examiners before 1990.

107. *See, e.g.*, Fla. Bd. Of Bar Examiners Re: Applicant, 443 So. 2d 71, 72–73 (Fla. 1983).

108. *Id.*

109. *See, e.g.*, Keith W. Rizzardi, *Victims of Disorganized Thinking: When Law Students with Mental Health Issues Confront Florida's Unconstitutional Inquisition*, 4 MENTAL HEALTH L. & POL'Y J. 87, 88 (2015) ("[E]ven as recently as 2012, Question 28 . . . asked 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.'"); Florida Bar Application (2014) ("26.a. . . . During the last 10 years, have you been hospitalized for treatment of any of the following: schizophrenia or other psychotic disorder, bipolar or major depressive mood disorder; drug or alcohol abuse; impulse control disorder, including kleptomania, pyromania, explosive disorder, pathological or compulsive gambling; or paraphilia such as pedophilia, exhibitionism, or voyeurism?"); *id.* ("26.b. . . . During the last 5 years, have you received treatment for (whether or not you were hospitalized) or have you received a diagnosis of any of the following: schizophrenia or other psychotic disorder, bipolar or major depressive mood disorder; drug or alcohol abuse; impulse control disorder, including kleptomania, pyromania, explosive disorder, pathological or compulsive gambling; or paraphilia such as pedophilia, exhibitionism, or voyeurism?"); *id.* ("26.c. . . . During the past twelve months have you been hospitalized for treatment of any mental, emotional, or psychiatric illness, whether or not the diagnosis was one listed in Item 26.a?"); *id.* ("26.d. . . . Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner?").

110. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to the Honorable Bernette J. Johnson, Chief Justice, La. Supreme Court (Feb. 5, 2014) (on file with author).

111. *Id.* at 1–2. The Louisiana Bar Application questions at issue read as follows:

> 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)

As further explained by the DOJ, "[t]he Court can, should, and does fulfill this important responsibility by asking questions related to the conduct of applicants."[112] In addition to finding that Louisiana's conditional licensing system discriminated against individuals on the sole basis of their disabilities, the DOJ also found that the Louisiana Supreme Court's applicant evaluation process violated the ADA[113] by:

> (1) making discriminatory inquiries regarding bar applicants' mental health diagnoses and treatment; (2) subjecting bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment as revealed during the character and fitness screening process; (3) making discriminatory admissions recommendations based on stereotypes of persons with disabilities; (4) imposing additional financial burdens on people with disabilities; (5) failing to provide adequate confidentiality protections during the admissions process; and (6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment.[114]

In response, the National Conference of Bar Examiners (NCBE) quickly amended its three standard mental health-related questions to comport with the DOJ findings, with an effective date of March 20, 2014.[115] The first amended question asked applicants about their mental

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> which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?
>
> 26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?
>
> 27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?

Id. at 5.

112. *Id.* at 1.

113. *Id.* at 2.

114. *Id.* The DOJ specified that these findings were based on an investigation of the Louisiana Admission Committee's character and fitness screening process as it related to mental disabilities. *Id.* at 2 n.2. This required a narrow analysis of its use of the National Conference of Bar Examiners (NCBE) Questions 25–27. *Id.* The NCBE has since amended its questions to reflect this investigation. Sabol, *supra* note 28, at 4.

115. Sabol, *supra* note 28, at 4; *see* Anna Stolley Persky, *State Bars May Probe Applicants' Behavior, But Not Mental Health Status, Says DOJ*, ABA J. (June 2014), http://www.abajournal.com/magazine/article/state_bars_may_probe_applicants_behavior_but_not_mental_health_status. The then-NCBE president expressed, "[W]hile NCBE is not a covered entity under Title II of the Americans with Disabilities Act, we are mindful of the pressure that DOJ has brought to bear upon jurisdictions that use our questions." *Id.*

health history, specifically, "[w]ithin the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"[116] In the second amended question, the NCBE focused further on applicants' fitness to practice law given their mental health "conditions or impairments" in asking:

> A. 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) that in any way affects your ability to practice law in a competent, ethical, and professional manner?
>
> B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program? . . . As used in Question 26, "currently" means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.[117]

Finally, the NCBE inquired into applicants' use of such conditions or impairment as a mitigating factor, as follows:

> Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?[118]

Currently, the Standard NCBE Application, as revised in February 2020, has kept the wording of all three questions substantively the same.[119]

Furthermore, in the wake of the DOJ involvement, the American Bar Association's (ABA) House of Delegates passed a resolution in 2015 "urging lawyer licensing entities to focus on behavior rather than

116. Sabol, *supra* note 28, at 23.
117. *Id.* at 25.
118. *Id.* at 30.
119. *See* Sample Application, *Character and Fitness Investigations*, NAT'L CONF. OF BAR EXAMINERS (revised Feb. 20, 2020), http://www.ncbex.org/dmsdocument/134.

diagnosis when asking about mental health."[120] In full, the resolution states:

> RESOLVED, That the American Bar Association urges state and territorial bar licensing entities to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner.
>
> FURTHER RESOLVED, That state and territorial bar licensing entities are not precluded from making reasonable and narrowly-tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and a mental health condition either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.[121]

Thus, the DOJ and ABA appear to agree that states inquiring into bar applicants' mental health history, in the absence of problematic conduct, are at least dangerously close to violating the ADA.

Soon after issuing its letter to Louisiana, the DOJ sent the Florida Board of Bar Examiners[122] a similar warning letter.[123] In response, the Florida Board of Bar Examiners adopted amended questions largely mirroring these new NCBE questions.[124] Yet, it chose not to follow the ABA House of Delegates' advice of replacing questions regarding mental health history, diagnosis, and treatment with those focused solely on conduct and "narrowly-tailored follow-up inquiries" when necessary.[125] Interestingly, however, in the midst of the *Hobbs* litigation, the Florida

120. Lorelei Laird, *Bar Licensing Groups Urged to Tread Carefully When Asking About Mental Health*, ABA J. (Aug. 3, 2015, 1:46 PM), http://www.abajournal.com/news/article/house_urges_bar_licensing_groups_to_tread_carefully_when_asking_about_menta.

121. ABA House of Delegates, Resolution 102 (2015).

122. The Florida Board of Bar Examiners also uses the NCBE to conduct its character and fitness investigations for certain applicants. *See Character and Fitness Investigations*, NAT'L CONF. OF BAR EXAMINERS, http://www.ncbex.org/character-and-fitness (last visited Jan. 11, 2021).

123. Laird, *supra* note 120.

124. Sabol, *supra* note 28, at 4–5, 5 n.14. Effective January 2015. Florida Bar Application (2018). These questions were in effect from January 2015 through October 2018, until the most recent amendment. *See infra* notes 145–187 and accompanying text.

125. ABA House of Delegates, Resolution 102 (2015); *see infra* notes 145–187 and accompanying text.

Board of Bar Examiners discreetly[126] amended the mental health disclosure questions.[127] In terms of formatting, the Florida Board of Bar Examiners separated Questions 25 and 26, which previously combined mental health and substance use inquiries, so that Question 25 solely addresses mental health and Question 26 solely addresses substance use.[128] Additionally, it removed a grossly overbroad inquiry into current mental health conditions that have or may impair or limit applicants' ability to practice law.[129] Finally, the Florida Board of Bar Examiners modified the preamble for Question 25.[130] Part IV critically analyzes these amendments to uncover a framing "fabrication"[131] and an ADA violation.

IV. THE DISCRIMINATORY NATURE OF QUESTION 25

This Part analyzes the reframing of the newly amended Florida Bar Application's preamble and Question 25 and, more importantly, explains how Question 25 violates the ADA despite the Florida Board of Bar Examiners' attempt to positively reframe its role in the admissions process.

A. Preamble

As amended,[132] Question 25 of the Florida Bar Application is introduced as follows:[133]

> The Board of Bar Examiners, as part of its responsibility to protect the public, must assess whether an applicant manifests any mental health or substance use issue that impaired or could impair the

126. The Florida Board of Bar Examiners has historically achieved notable secrecy regarding the bar admissions process. *See* Rizzardi, *supra* note 109, at 91–93. It does not publicize specific changes to questions and only recently made the current questions available online. *See Frequently Asked Questions*, FLA. BOARD OF BAR EXAMINERS, https://www.floridabarexam.org/web/website.nsf/faq.xsp (last visited Jan. 11, 2021). This Author obtained copies of past questions from the general counsel of the Florida Board of Bar Examiners, but even those disclosures and documentation were limited.

127. Florida Bar Application (2019) (effective Nov. 1, 2018). For the full text and analysis, see *infra* notes 145–187 and accompanying text. The changes, however, did not bring the Florida Bar Application in line with the ABA House of Delegates' 2015 Resolution: the question still inquires into disability status regardless of whether an applicant has demonstrated problematic conduct. *Id.*

128. Florida Bar Application (2019).

129. *Id.*

130. *Id.*

131. For a brief explanation of frame analysis, see *infra* note 137.

132. Effective November 1, 2018. Florida Bar Application (2019).

133. *Id.* Question 26, now solely addressing applicant substance use, is also introduced by this preamble. *Id.*

> applicant's ability to meet the essential eligibility requirements for the practice of law.
>
> The Board supports applicants seeking mental health or substance use treatment, and views effective treatment by a licensed professional as enhancing the applicant's ability to meet the essential eligibility requirements to practice law.
>
> Seeking counseling to assist with stress or anxiety will not adversely affect the outcome of a Florida Bar Application. The Board does not request that applicants disclose such counseling.[134]

Before November 1, 2018, however, the preamble read:

> The Board of Bar Examiners must assess effectively the mental health of each applicant. A lawyer's untreated or uncontrolled mental disorder, if severe, could result in injury to the public. Questions 25 and 26 request information essential to the Board's assessment. Answering Questions 25 and 26 in the affirmative is not automatically disqualifying for admission to The Florida Bar. The Board assures each applicant that the Supreme Court, upon the Board's recommendation, regularly admits applicants with a history of both mental disorders and treatment by mental health professionals. The Board considers satisfactory mental health to include (1) the current absence of an untreated, uncontrolled mental disorder that impairs or limits an applicant's ability to practice law in a competent and professional manner, (2) the unlikelihood of a relapse of such a prior mental disorder, and (3) the applicant's having a history of appropriate treatment. With respect to any of the above, evidence of treatment by a mental health professional is useful. The Board encourages applicants to seek the assistance of mental health professionals, if needed. [135]

When the current preamble is compared to the former preamble, which had remained fundamentally the same over several preceding versions of the mental health disclosure questions,[136] it is evident that the Florida Board of Bar Examiners has decided to reframe its role regarding mental health evaluation in the admissions process by using "fabrication." Fabrication, as defined by Erving Goffman in relation to his frame analysis semantics theory, is "the intentional effort of one or more individuals to manage activity so that a party of one or more others will

134. *Id.*
135. Florida Bar Application (2018).
136. *Id.*; Florida Bar Application (2014).

be induced to have a false belief about what it is that is going on."[137] To start, on a surface level, the Florida Board of Bar Examiners reworked the preamble from one large block paragraph to several concise, more comprehensible paragraphs. By merely increasing the ease of the preamble's readability, it began reframing the mental health disclosure section to make it appear pleasant and welcoming rather than overwhelming or unclear. This change in structure was the Florida Board of Bar Examiners' first step toward reframing itself as the legal profession's friendly admissions officer.

On a deeper level, this shift in tone was paralleled by a stark contrast in language choice—a positive framing effort that scholars have exposed in other writings, such as news coverage.[138] In the previous preamble, the language was harsh and disarming, likely provoking an adverse reaction by applicants toward the Florida Board of Bar Examiners at the outset of the mental health disclosure section. For example, words and phrases such as "uncontrolled," "severe," and "injury to the public"[139] were used in a manner that could be interpreted as placing blame on the applicants or categorizing them as "broken" or "dangerous" simply for having mental disorders. The Florida Board of Bar Examiners shifted this narrative in the current preamble, as it carefully reframed its role from actively defending against "threatening" individuals with "uncontrolled" mental disorders to a passive gatekeeper ensuring that the public and applicants are safe and supported.

Likewise, this positive narrative is evident in the current preamble's newly compassionate tone, which not only purports to "support applicants seeking mental health . . . treatment" but even expresses that treatment may "enhanc[e] the applicant's ability to meet

137. ERVING GOFFMAN, FRAME ANALYSIS 83 (1974). While frame analysis is beyond the scope of this Article, it is helpful in analyzing the shift in the Florida Board of Bar Examiners' tone in the preamble and Question 25. "Frames" are conceptualized as "the culturally determined definitions of reality that allow people to make sense of objects and events." Emily Shaw, *Frame Analysis*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/frame-analysis. Fabrication, a key aspect of the theory, is particularly applicable here. While focused on an individual's presentation in social situations, frame analysis is often used to uncover discourse in communications from larger institutions. *See, e.g.*, Zhongdang Pan & Gerald M. Kosicki, *Framing Analysis: An Approach to News Discourse*, 10 POL. COMM. 55 (1993) (applying frame analysis to reporting).

138. *See, e.g.*, Catherine A. Luther & M. Mark Miller, *Framing of the 2003 U.S.-Iraq War Demonstrations: An Analysis of News and Partisan Texts*, 82 JOURNALISM & MASS COMM. Q. 78, 90 (2005) (illustrating how journalists positively frame pro-war demonstrations with words such as "freedom" and "peaceful," while calling anti-war demonstrations "violen[t]" and "disorderly").

139. Florida Bar Application (2018).

the essential eligibility requirements to practice law."[140] Notably, the phrase "essential eligibility requirements," which was added to the current preamble and repeated in two separate paragraphs, comes straight from the ADA.[141] As such, the Florida Board of Bar Examiners appears to have seized ADA language and placed it in the preamble in an attempt to both appeal to applicants and suggest compliance with its requirements. In reality, however, it still imposes the same additional burdens on Florida Bar applicants with particular mental disorders via Question 25, despite this reframing effort.

Finally, the last paragraph of the current preamble explicitly addresses a concern of countless Florida Bar applicants: whether attending counseling for stress and anxiety, often caused by law school itself, will negatively affect their application status.[142] By clarifying that applicants need not report this information,[143] the Florida Board of Bar Examiners has reframed this narrative to suggest that it is bestowing a new right on applicants, when in fact applicants never had an obligation to disclose counseling for stress and anxiety in the first place.[144] Certainly it is laudable and valuable that the Florida Board of Bar Examiners is attempting to clarify and increase awareness regarding the specific types of mental disorders and treatment that applicants must disclose on their Florida Bar Applications. However, this does not detract from the fact that the Florida Board of Bar Examiners was the author of this confusion to begin with by requesting disclosure of disability status rather than simply requesting disclosure of problematic conduct. Yet, when reading the preamble in conjunction with the current mental health disclosure question, it is abundantly clear that the Florida Board of Bar Examiners is not prepared to take that logical step.

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140. Florida Bar Application (2019). In contrast, the previous preamble used phrases such as "[a]nswering . . . in the affirmative is not *automatically* disqualifying" and "[t]he Board encourages applicants to seek the assistance of mental health professionals, *if needed*," fostering a negative tone regarding mental disorders and mental health treatment despite the fact that such a disorder or treatment would not foreclose admission to The Florida Bar. Florida Bar Application (2018) (emphasis added). It also included a numerical list of "satisfactory mental health," which was completely removed in the current preamble. *Id.*; Florida Bar Application (2019). This may foster a less clinical tone, which could benefit the Florida Board of Bar Examiners' reputation, but by not defining the term effectively, it is now afforded even more subjective discretion in determining whether an applicant has reached "satisfactory mental health."

141. *See* 42 U.S.C. § 12131(2) (Supp. 1990).

142. Florida Bar Application (2019) ("Seeking counseling to assist with stress or anxiety will not adversely affect the outcome of a Florida Bar Application. The Board does not request that applicants disclose such counseling.").

143. *Id.*

144. *See* Florida Bar Application (2018) (excluding stress and anxiety from the list of disorders).

B. Question 25

As recently revised and condensed,[145] the current mental health disclosure question reads:

> Within the past 5 years, have you been treated for, or experienced a recurrence of, schizophrenia or any other psychotic disorder, a bipolar disorder, or major depressive disorder, that has impaired *or could impair* your ability to practice law?
>
> If your answer to Item 25. is "yes," please: (i) identify each condition for which you received treatment or had a recurrence; (ii) state the beginning and end dates of any treatment (or state "present" if no end date); (iii) state the name and address of each professional who treated you; and (iv) identify any medication that was prescribed for you during treatment. Please direct each treating professional to provide *any information or records that the Board may request* regarding treatment, which includes, *without limitation*, hospitalization.[146]

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145. Effective November 1, 2018. Florida Bar Application (2019). Previously, there were two questions related to mental health disclosure, which asked:

> 25. . . . Within the past 5 years have you been diagnosed with, suffered from, or been treated for a mental illness involving a severe thought disorder (including, but not limited to, schizophrenia), a severe mood disorder (including, but not limited to, major depressive disorder or bipolar disorder) or substance use disorder (including, but not limited to, abuse of or addiction to/dependence on alcohol, marijuana, cocaine, or prescription medications)? If yes, identify which of the listed conditions you were diagnosed with, suffered from or were treated for, state the beginning and ending dates of each consultation or treatment period, and state the name and address of the treating doctor(s) or professional(s) who treated you or who made such diagnosis. Also state the name(s) of any medication prescribed for you during treatment. Please direct each such professional and any hospital and/or other facility in which you were treated to furnish to the Board any information or records the Board may request with respect to any hospitalization, consultation, treatment or diagnosis relating to any such listed condition. "Professional" includes a physician, psychiatrist, psychologist, psychotherapist or mental health counselor.
>
> 26. . . . Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner? If yes, are the limitations or impairments caused by your mental health condition reduced or ameliorated because you receive ongoing treatment (with or without medications) or participate in a monitoring or counseling program? If yes, describe such condition and any treatment or program of monitoring or counseling. "Currently" does not mean on the day of, or even in the weeks or months preceding the completion of this application; rather, it means recently enough so that the condition may have an ongoing impact on your functioning as a licensed attorney.

Florida Bar Application (2018).

146. Florida Bar Application (2019) (emphasis added).

Again, the Florida Board of Bar Examiners' revision of the mental health disclosure section reflects a shift in tone and positive reframing. Much like the revised preamble, it increased the readability of the questions by condensing the two previous mental health disclosure questions into one, which it entirely separated from the substance use inquiry.[147] It minimized repetitive language and concisely restructured the newly formulated question.[148] Specifically, the Florida Board of Bar Examiners broke the question into succinct, indented paragraphs, increasing comprehensibility.[149] Additionally, it streamlined the list of supplementary information that must be disclosed if an applicant answers affirmatively.[150] Therefore, the amendments were largely structural.

Wisely, however, the Florida Board of Bar Examiners did remove the invasive catch-all question requesting disclosure of any "current[] . . . mental health condition" that impairs or limits, or has the potential to impair or limit, an applicant's ability to practice law.[151] Due to its breadth, some scholars have likened this Florida Bar Application question to the Indiana Bar Application question considered to be "quite possibly the most expansive bar application question in the country" by one court,[152] as "the question itself [wa]s so open-ended that it could

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *See* Rizzardi, *supra* note 109, at 101–03. The Indiana Bar Application mental health question at issue asked, "[f]rom the age of 16 years to the present, have you been diagnosed with or treated for any mental, emotional or nervous disorders?" ACLU v. Individual Members of the Indiana Board of Bar Examiners, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *9 (S.D. Ind. Sept. 20, 2011). Notably, a question similar to the one recently removed from the Florida Bar Application was upheld in the Indiana case. *Id.* at *10, *13. The Indiana question asked whether the applicant had "any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, [the applicant's] ability to practice law in a competent and professional manner." *Id.* at *2. In contrast, the Florida question specifically asked about mental health conditions not previously disclosed that the applicant was currently suffering from yet incongruously defined "current" as "not . . . on the day of, or even in the weeks or months preceding" but rather "recently enough so that the condition may have an ongoing impact on your functioning as a licensed attorney." Florida Bar Application (2018). With such a broad interpretation of "current," the question could indeed be characterized as "so open-ended that it could easily put a bar applicant in a confusing bind." *ACLU*, 2011 WL 4387470, at *9. Despite the Indiana court's holding, scholars argue that the "if untreated could impair" language in the Florida and Indiana questions violates the ADA by effectively forcing all individuals with mental disorders to disclose their conditions regardless of if they are treating them appropriately or have never demonstrated problematic conduct. *See, e.g.*, Dragnich, *supra* note 4, at 709–10 ("But as worded, the question is senseless. If the candidate *is* treating her condition and experiencing no impairment, a hypothetical inquiry about what might happen if she discontinued treatment is pointless. It is rather like asking

easily put a bar applicant in a confusing bind."[153] Despite this deletion and the pleasant new format of the mental health disclosure section, the Florida Board of Bar Examiners maintained its broad release request for applicants who answer Question 25 affirmatively, requiring such applicants to "direct each treating professional to provide *any* information or records that the Board may request regarding treatment, which includes, *without limitation*, hospitalization."[154] Further, at the end of the inquiry regarding whether the listed mental disorders have impaired or could impair an applicant's ability to practice law, it removed the phrase "in a competent and professional manner," increasing its discretion.[155] It also removed a sentence that defined who it considered to be a treating "professional," which could potentially require applicants to disclose more information from categories of professionals not previously listed.[156] By making these changes, regardless of its potentially progressive intentions, the Florida Board of Bar Examiners creates the impression that it is requesting only pertinent mental health information from applicants, but its inquiry continues to violate the ADA.

As detailed in Section II.A, the ADA provides Florida Bar applicants with protection from discrimination based on their disabilities in the bar admissions process. First, the Florida Board of Bar Examiners is a public entity for the purposes of Title II of the ADA because it is an instrumentality of the state and administers a licensure program.[157] Thus, it is prohibited from discriminating against "qualified" individuals

'If you stop studying, are you at risk of failing any of your classes?'"). When this language is removed, as it is in the NCBE question, such a question is permissible. *Id.* at 710.

153. *ACLU*, 2011 WL 4387470, at *9.

154. Florida Bar Application (2019) (emphasis added).

155. *Id.*; *see supra* note 140. For example, an applicant could have major depressive disorder that, as determined by the applicant's psychologist, does not impair the applicant's ability to practice law in a competent and professional manner but could impair the applicant's ability to practice law in some general, inconsequential way protected by the ADA, such as requiring the occasional but unexpected day off to accommodate an appointment with a psychologist. *See supra* notes 20–23 and accompanying text (detailing the ADA's protection of individuals with disabilities from discrimination if they can meet the essential eligibility requirements of a profession, even if that requires reasonable accommodation by their employers). Given the updated wording of Question 25, however, such an applicant would be unsure of whether the Florida Bar Application requires disclosure of that information. Despite this apparent dilemma, the Florida Board of Bar Examiners would still likely require the applicant to disclose such information, as it has historically refused to rely on an applicant's personal psychologist's assessment regarding the applicant's ability or fitness to practice law. *See, e.g.*, Complaint at 11–15, Hobbs v. Fla. Bd. of Bar Exam'rs, No. 4:17-cv-00422-RH-CAS (N.D. Fla. filed Sept. 20, 2017).

156. Florida Bar Application (2019).

157. *See supra* note 29 and accompanying text.

with disabilities.[158] Next, given the broadened coverage due to the ADAAA, Florida Bar applicants who answer Question 25 in the affirmative are protected under the ADA because the Florida Board of Bar Examiners thus perceives them as having mental impairments.[159] Finally, the U.S. District Court for the Southern District of Florida in *Ellen S.* concluded that application questions themselves can violate the ADA, as an affirmative response places additional burdens on applicants based on their disabilities by "automatically trigger[ing] subsequent questions and possible subsequent investigation."[160] The DOJ later made this clear, declaring that broad mental health inquiries based on status violate the ADA.[161] Therefore, the protections of the ADA are applicable in analyzing Question 25 of the Florida Bar Application.

Regardless of how it is framed by the Florida Board of Bar Examiners, Question 25 of the Florida Bar Application is overly broad, is unrelated to the protection of the public and the judicial system, and thus violates the ADA by discriminating against applicants with mental disorders by subjecting them to additional burdens on the sole basis of their disability status. As a public entity, the Florida Board of Bar Examiners is prohibited by the ADA from imposing eligibility criteria that tends to screen out individuals with disabilities from full and equal enjoyment of bar admission—unless necessary to its purpose[162]—including subjecting them to additional burdens based on such disabilities.[163] As stated by the Florida Board of Bar Examiners itself, the

158. 42 U.S.C. § 12132 (2018). To qualify for protection, individuals with disabilities must, "with or without reasonable modifications to rules, policies, or practices, . . . meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). Absent conduct that calls into question an applicant's ability to practice law, Florida Bar applicants with mental disorders are "qualified" under the ADA, as they are otherwise able to meet the essential eligibility requirements for the practice of law, even if reasonable accommodations are necessary.

159. *See supra* note 37 and accompanying text.

160. Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1494 n.7 (S.D. Fla. 1994). Similarly, the court in *Stoddard* noted that "in some circumstances the mere act of inquiring about or investigating a real or perceived physical or mental impairment constitutes discrimination in violation of the ADA," but it recognized that *Stoddard* was not the case to make such a ruling because the plaintiff displayed specific conduct that called into question his ability to practice law. Stoddard v. Fla. Bd. of Bar Examiners, 509 F. Supp. 2d 1117, 1124 (N.D. Fla. 2006), *aff'd*, 229 F. App'x 911 (11th Cir. 2007). Florida Bar applicants, however, are still subjected to additional burdens—via subsequent questions and possible investigation—even without displaying such conduct.

161. Letter from Jocelyn Samuels, *supra* note 110, at 1–2. The DOJ stated that "questions based on an applicant's status as a person with a mental health diagnosis do not serve the Court's worthy goal of identifying unfit applicants, are in fact counterproductive to ensuring that attorneys are fit to practice, and violate the standards of applicable civil rights laws." *Id.*

162. 28 C.F.R. § 35.130(b)(8) (2018).

163. *Ellen S.*, 859 F. Supp. at 1494; *see supra* notes 69–70 and accompanying text (explaining that, as interpreted by the *Ellen S.* court, the federal regulations connected to Title II prohibit the imposition of such additional burdens based on disability status).

express purposes of its mental health inquiry are to "protect the public and safeguard the judicial system"; yet, there is no evidence of a "connection between asking about mental health on a bar application and future rates of attorney misconduct[,] . . . mirror[ing] what psychologists and psychiatrists have said for years: that there is no connection between a diagnosis of mental illness and future misconduct as an attorney."[164] Thus, given the breadth of Question 25 in regard to protecting the public and safeguarding the judicial system, as well as the additional burden imposed by the automatic request for additional information and potential investigation triggered by an affirmative response, the Florida Board of Bar Examiners' use of Question 25 clearly violates the ADA.

In terms of breadth, Question 25 extends too far in three respects: (1) the time frame, (2) the listed mental disorders, and (3) the request for a blanket release regarding past treatment. First, while a five-year time frame for an inquiry regarding problematic conduct related to an applicant's mental health would undoubtedly be related to such an applicant's fitness to practice law, it is disproportionate when based on status alone. With an average age of twenty-four years old for first-year law students in the United States,[165] this time frame forces most applicants with applicable mental disorders to trace back through most of their undergraduate education to verify their mental health treatment. While seemingly simple, this search becomes increasingly difficult considering that many college students see several different treating professionals through free counseling resources on campus.[166] These professionals are often doctoral or master's-level students logging hours for licensure and, therefore, many have graduated by the time that the Florida Bar applicant contacts the campus counseling center for information.[167] Moreover, it is a common counseling philosophy, especially on college campuses,[168] for treating professionals

164. FLA. BAR ADMISS. R. 1-14.1 ("The primary purposes of the character and fitness investigation . . . are to protect the public and safeguard the judicial system."); Dragnich, *supra* note 4, at 678.

165. Sally Kane, *Going to Law School at a Later Age*, THE BALANCE CAREERS, https://www.thebalancecareers.com/going-to-law-school-at-a-later-age-2164519 (last updated Nov. 1, 2018).

166. *See* Cliff Peale, *Students Flood College Counseling Offices*, USA TODAY (Apr. 7, 2014, 7:40 AM ET), https://www.usatoday.com/story/news/nation/2014/04/07/college-students-flood-counseling-offices/7411333/.

167. *See, e.g.*, *Doctoral Internship in Counselor Education*, U. OF FLA.: COUNSELING & WELLNESS CENTER, https://counseling.ufl.edu/training/trainees/counselor/ (last updated Feb. 14, 2020).

168. Campus counseling centers typically do not charge students, and thus the treating professionals are not required to report diagnoses to insurance companies for payment. *See* Peale, *supra* note 166.

to not discuss clients' diagnoses with them unless requested or particularly beneficial for treatment.[169] Therefore, Florida Bar applicants could be required to track down countless past treating professionals, who may not be employed by the counseling centers at that time, to obtain the requested information. At times, such applicants must verify their diagnoses to determine if they are listed on the Florida Bar Application; although this could be the first time that their diagnoses are revealed to them, they could be given over the phone by a receptionist or via a letter written by an unfamiliar counseling director, all without a debriefing by the applicants' original counselors. Undoubtedly, this experience alone could be detrimental to such applicants' mental health. With these considerations in mind, the five-year time frame begins to appear much broader than it did at first blush.

Beyond the overly broad time frame, the list of mental disorders is equally troublesome, consisting of schizophrenia, any psychotic disorder, bipolar disorder, and major depressive disorder.[170] The Florida Board of Bar Examiners has asserted that this list is narrowly tailored because it focuses only on "*severe* mental illnesses."[171] While such a pointed disclosure request, without an inquiry into problematic conduct, is still discrimination based on applicants' disability status,[172] the Florida Board of Bar Examiners' underlying argument fails on its own. For example, given that delusions and hallucinations are typical symptoms of schizophrenia and other psychotic disorders and that manic or hypomanic episodes are essential to a bipolar disorder diagnosis,[173] it is reasonable for the Florida Board of Bar Examiners to have a cursory concern regarding applicants with these diagnoses. However, major depressive disorder, while to some may sound like a rare form of depression, is simply the clinical term for certain depressive episodes and does not have those same potentially concerning symptoms in its diagnostic criteria.[174] Although it may seem reasonable for the Florida Board of Bar Examiners to be apprehensive regarding the

169. *See* Louis Hoffman, *Do I Want a Diagnosis from My Therapist?*, GOODTHERAPY BLOG (Feb. 22, 2018), https://www.goodtherapy.org/blog/do-i-want-diagnosis-from-my-therapist-0222184.

170. Florida Bar Application (2019).

171. Motion to Dismiss Plaintiff's Complaint by Defendants Florida Board of Bar Examiners & Michele A. Gavagni (& Inc. Memorandum of Law in Support) at 23, Hobbs v. Fla. Bd. of Bar Examiners, No. 4:17-cv-00422-RH-CAS (N.D. Fla. filed Sept. 20, 2017) (No. 10).

172. *See infra* notes 177–187 and accompanying text.

173. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87–88, 123–27, 132–35 (5th ed. 2013).

174. *See id.* at 160–62. For a brief overview of the types of depression, see Adam J. Shapiro, Comment, *Defining the Rights of Law Students with Mental Disabilities*, 58 U. MIAMI L. REV. 923, 929–30 (2004).

other major depressive disorder criteria, nearly three out of every ten lawyers suffer with depression.[175] Therefore, despite an understandable concern, individuals with mental disorders are undeniably capable of leading fulfilling and successful lives, which includes the ability to practice law in a competent and professional manner. Presumably, despite such a diagnosis, these individuals are capable of meeting the legal profession's essential eligibility requirements, as The Florida Bar does not inquire into existing members' mental health once they are admitted.[176] Accordingly, there is no valid reason to question the ability of applicants with mental disorders to do so solely because of their disability status—that is, if their disorders have not manifested in problematic conduct.

Finally, the request for disclosure of subsequent information by those applicants who answer Question 25 in the affirmative is overbroad, is unrelated to protecting the public and judicial system, and triggers a violation of the ADA because it places an additional burden on certain applicants solely on the basis of their disability status. While each subsequent request for information in Question 25 places an additional burden on applicants who answer it affirmatively, in violation of the ADA,[177] the Florida Board of Bar Examiners' request for a blanket release with the applicants' treating professionals regarding such treatment is particularly alarming.[178] Due to this request, when individuals decide to

175. Dina Roth Port, *Lawyers Weigh In: Why is There a Depression Epidemic in the Profession?*, ABA J. (May 11, 2018, 7:00 AM CDT), http://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession.

176. *See* Complaint at 21, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1) ("The lack of rational relation to the practice of law is demonstrated by the fact that the mental health status for applicants for [T]he Florida Bar is vastly different from current members of [T]he Florida Bar that suffer from mental illness or substance abuse. There is no legitimate basis to distinguish an applicant with mental illness or a history of substance abuse pre or post admission . . . ."). If the true concern is applicants' ability to practice law in a competent and professional manner, The Florida Bar would take over where the Florida Board of Bar Examiners leaves off with continuing, comparable inquiries into current Florida Bar members' mental health histories in order to protect the public. For a discussion of the impact of such a "double standard," including how it may discourage—while reinforcing the stigma of—mental health treatment, see Ann Hubbard, *Improving the Fitness Inquiry of the North Carolina Bar Application*, 81 N.C. L. REV. 2179, 2182 (2003).

177. Gathering and submitting information—which is not required of all applicants—on the sole basis of applicants' disability status is absolutely an additional burden placed on such applicants, regardless of its potential ease. The circumstances surrounding the mental health treatment of college students, however, may make this task exceptionally difficult. *See supra* notes 165–169 and accompanying text. Law students suffering from these mental disorders may therefore decide to forego additional mental health treatment or perhaps even lie on their Florida Bar Applications.

178. Florida Bar Application (2019). Through its investigation process, the Florida Board of Bar Examiners is authorized to obtain information, take testimony, and compel the production of documents from treating professionals relating to applicants' character and fitness. FLA. BAR ADMISS. R. 3-21. Additionally, it may require an applicant to undergo an evaluation conducted by a mental

pursue a career as an attorney in Florida, the sacred and confidential relationships that they had relied on indefinitely maintaining with their mental health professionals seemingly become endangered solely because of their disability status. The applicants are expected to give the Florida Board of Bar Examiners the right to obtain "*any* information or records . . . regarding treatment . . . includ[ing], *without limitation*, hospitalization" if they hope to become an attorney.[179] Without even considering the perverse effects of this requirement,[180] it is nearly impossible to articulate a viable argument that Question 25 is in compliance with the ADA given the additional burden that it places on certain applicants solely based on their disability status—specifically, the automatic subsequent request for information and potential investigation triggered by an affirmative response.[181] Accordingly, the Florida Board of Bar Examiners is at imminent risk of being found in violation of the ADA, unless it decides to take its amendments a step further.

Certainly, considering the position of power that attorneys have within the attorney-client relationship and the pivotal role that they play within the judicial system generally, it is encouraging that the Florida Board of Bar Examiners takes its responsibility of "protect[ing] the public and safeguard[ing] the judicial system" seriously.[182] Still, to comply with the ADA, it must ensure that the additional burden placed on the subset of applicants with particular mental disorders is triggered only when applicants display problematic conduct. Despite admirable intentions, as it stands today, the Florida Board of Bar Examiners still subjects applicants with particular mental disorders to additional burdens on the sole basis of their disability status,[183] in clear violation of the ADA. Since applicants with mental disorders do not pose an inherent threat to the public without a showing of problematic conduct,[184] the

health professional from a list of approved professionals compiled by the Florida Board of Bar Examiners. *See, e.g.*, Complaint at 14, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1). At the Florida Board of Bar Examiners' request, an applicant may also be required to attend and pay for an investigative hearing, costing $250. FLA. BAR ADMISS. R. 3-22.1.

179. Florida Bar Application (2019) (emphasis added). This could conceivably include, for example, the remarkably sensitive details of an applicant's mental health treatment session notes.

180. *See supra* notes 3–4 and accompanying text.

181. Florida Bar Application (2019).

182. FLA. BAR ADMISS. R. 1-14.1.

183. Absent a showing of problematic conduct related to the listed mental disorders, of course. This Author fully recognizes that a showing of such conduct warrants additional investigation to ensure the safety of the public and the sanctity of the judicial system. For a solution, see *infra* pt. V.

184. *See* Dragnich, *supra* note 4, at 678 (explaining that there is no evidence of a "connection between asking about mental health on a bar application and future rates of attorney misconduct[,] . . . mirror[ing] what psychologists and psychiatrists have said for years: that there is

automatic request for additional information and potential investigation triggered by an affirmative response to Question 25 is rooted in a mere suspicion that an applicant's diagnosis alone poses a threat. Quite inconsistently, The Florida Bar does not seem to recognize this risk when it comes to currently licensed attorneys, as they are not required to disclose such mental health information to maintain continued licensure.[185] Likewise, neither the Florida Board of Bar Examiners nor The Florida Bar request comparable information about diagnosis and treatment from applicants or licensed attorneys with physical disabilities that could pose a similar risk to the public or the judicial system.[186] Accordingly, the Florida Board of Bar Examiners' invasive inquiry singles out applicants with specific mental disorders who have never demonstrated problematic conduct and, thus, constitutes discrimination in blatant violation of the ADA—a sentiment echoed by the DOJ and ABA.[187]

V. AN AUTHORIZED SOLUTION: NARROW QUESTION TO FOCUS ON CONDUCT

Presumably, the Florida Board of Bar Examiners had admirable intentions in formulating Question 25 of the Florida Bar Application, doing what it believed was best while faced with an indisputably difficult situation—striking a balance between protecting the public and safeguarding the judicial system while ensuring that its actions do not discriminate against applicants with disabilities. Good intentions alone,

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no connection between a diagnosis of mental illness and future misconduct as an attorney"); Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 121 (2003) (revealing that "the public exaggerate[s] both the strength of the association between mental illness and violence and their own personal risk" and that "research supports the view that the mentally ill are more often victims than perpetrators of violence").

185. *See* Complaint at 20–21, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1).

186. *See* Complaint at 10, *Hobbs*, No. 4:17-cv-00422-RH-CAS (No. 1) ("The Board does not ask applicants with potentially dangerous physical disabilities (including cognitive impairment from diabetes, thyroid disorders or a traumatic neurological event) to disclose details regarding their prior diagnoses, treatment or prognosis. If such questions were necessary to protect the public, the Board would require individuals with potentially harmful physical disabilities to answer them."); Dragnich, *supra* note 4, at 687 ("Hypothyroidism, a fairly common physical disorder and one that is generally regarded as mild, can cause hallucinations and psychosis in some cases. Yet, no bar examiner inquires into the thyroid status of bar applicants. Many other physical conditions could render an attorney unfit to practice. But states do not ask about physical disabilities in the same way that they pry into mental disabilities." (citations omitted)). For a comparison of the differing stigmas associated with mental and physical disabilities, see Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 454 (2010) ("Mental disabilities . . . often carry a far greater social stigma than physical disabilities, even when compared to physical disabilities that are more biologically severe and more costly to accommodate.").

187. *See supra* notes 110–114, 120–121, 152 and accompanying text.

however, cannot bring the Florida Board of Bar Examiners in compliance with the ADA. Fortunately for it, Florida is not the first state to face this dilemma. In 2014, the Louisiana Supreme Court, after taking the brunt of the DOJ's public ADA criticism,[188] entered into a settlement agreement with the United States that detailed its amendments of the Louisiana Bar Application mental health section to bring it into compliance with the ADA.[189] Therefore, the solution for the Florida Board of Bar Examiners is simple: avoid subjecting Florida to the DOJ's scrutiny[190] by following the Louisiana Supreme Court's lead in adopting amendments that shift the mental health inquiry to a focus on conduct instead of disability status.[191]

Generally, the Florida Board of Bar Examiners would have to stop requesting information about applicants' mental health diagnoses or treatment unless an applicant voluntarily disclosed the information either in response to the below amended questions or "to explain conduct or behavior that may otherwise warrant denial of admission" or, alternatively, a third party informs the Florida Board of Bar Examiners that an applicant had asserted this information to explain such conduct or behavior.[192] When applicable, these inquiries should be "narrowly, reasonably, and individually tailored," and the Florida Board of Bar Examiners should first request follow-up statements from both the applicant and the applicant's treating professional before investigating further.[193] Unless the applicant's treating professional is unable "to resolve the [Florida Board of Bar Examiners'] reasonable concerns regarding the applicant's fitness to practice law," the professional's statement should "be accorded considerable weight" and the Florida Board of Bar Examiners should refrain from requesting any medical records regarding the same.[194] If necessary to resolve

188. *See supra* notes 110–114 and accompanying text.

189. Press Release, United States Department of Justice, Settlement Agreement Between the United States of America and the Louisiana Supreme Court under the Americans with Disability Act (Aug. 15, 2014), https://www.ada.gov/louisiana-supreme-court_sa.htm [hereinafter Settlement Agreement]. For an overview of the underlying case, see Devin Chatterton, *Louisiana and the Department of Justice Agreement Elucidates the Lack of Adherence to the ADA*, 28 GEO. J. LEGAL ETHICS 417, 425–27 (2015).

190. In addition to extensive, and thus costly, reporting, monitoring, and enforcement requirements imposed on the Louisiana Supreme Court. Settlement Agreement, *supra* note 189, at §§ 25–34.

191. As this Article focuses on the mental health question itself as an ADA violation, not conditional admission or confidentiality, only those portions of the Settlement Agreement are discussed.

192. *Id.* at § 13(c).

193. *Id.*

194. *Id.*

reasonable concerns, requests for medical records and releases should also be narrowly tailored to "provide access only to information that is reasonably needed to assess the applicant's fitness to practice law."[195] Finally, if the Florida Board of Bar Examiners' reasonable concerns are still not resolved after implementing all of the above means, only then should it be able to request an independent medical examination in a manner that is convenient for the applicant.[196]

Beyond this general framework, the Florida Board of Bar Examiners must amend Question 25 to bring it into compliance with the ADA requirements by narrowing its focus from applicants' disability status to specific problematic conduct. In addition to bringing the Florida Bar Application in line with the ADA, a focus on conduct instead of status is all that is necessary to protect the public and safeguard the judicial system because, as the DOJ has asserted,[197] problematic conduct is the true concern for the legal profession. Additionally, law schools and the application of the Florida Rules of Professional Conduct, respectively, are ostensibly responsible for screening and monitoring individuals for problematic conduct that impairs their ability to practice law competently and professionally.[198] Thus, while also conserving valuable resources, the Florida Board of Bar Examiners could confidently, and simply, adopt the following question from the Louisiana Settlement Agreement, specifically drafted to ensure ADA compliance:

> Within the past 5 years, have you engaged in any conduct that:
> (1) resulted in an arrest, discipline, sanction or warning;
> (2) resulted in termination or suspension from school or employment;
> (3) resulted in loss or suspension of any license;
> (4) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an employer, educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; or
> (5) endangered the safety of others, breached fiduciary obligations, or constituted a violation of workplace or academic conduct rules?

195. *Id.*
196. *Id.*
197. *See supra* notes 110–114 and accompanying text.
198. *See* Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternative Means*, 8 GEO. J. LEGAL ETHICS 401, 434 (1995) ("It appears that the bar examiners' priority is to protect the public from attorney misconduct, an admirable and necessary task. The best way to [do so] . . . is to monitor the attorneys, using means such as Model Rule 8.3, ABA Model Rules and Guidelines for Impairment, and attorney assistance programs . . . .").

> If so, provide a complete explanation and include all defenses or claims that you offered in mitigation or as an explanation for your conduct.
> __ Yes __ No
> If you answered yes, furnish the following information:
> Name of entity before which the issue was raised (i.e., court, agency, etc.) _____
> Address _____
> City _____ State _____ Zip _____
> Telephone (_____)
> Country_____ Province _____
> Nature of the proceeding _____
> Relevant date(s) _____
> Disposition, if any _____
> Explanation _____[199]

Understandably, the Florida Board of Bar Examiners may be concerned that such an amendment may restrict its access to valuable information regarding an applicant's fitness to practice law. To address this concern, again mirroring Louisiana's course of action,[200] it could add the current NCBE questions word for word.[201] Accordingly, by employing a DOJ-authorized solution of adopting these four thoroughly scrutinized mental health disclosure questions, the Florida Board of Bar Examiners could both ensure that it complies with the ADA and gain access to all of the information lawfully available to it. Again, the solution is indisputably simple.

VI. CONCLUSION

Despite its enormous responsibility to protect the public and safeguard the judicial system in the bar admissions process, the Florida Board of Bar Examiners violates the ADA via its inquiry into the mental health status of applicants in Question 25 of the Florida Bar Application. The mental health disclosure question is overly broad, is unrelated to protecting the public and the judicial system, and thus violates the ADA by discriminating against applicants with mental disorders by subjecting them to additional burdens because of their disability status. Fortunately, if it decides to do so, the Florida Board of Bar Examiners can avoid the wasted resources and embarrassment that would result from a DOJ or court's finding that Question 25 violates the ADA. By

199. Settlement Agreement, *supra* note 189, at § 14.
200. *Id.* at 12.
201. *See supra* notes 115–119, 152 and accompanying text regarding the NCBE questions.

implementing the core portions of a solution crafted by the United States and the Louisiana Supreme Court, the Florida Board of Bar Examiners could ensure its compliance with the ADA with an inquiry that was publicly authorized by the DOJ. Accordingly, the only difficult part of this solution is convincing the Florida Board of Bar Examiners of the gravity of its ADA violation.