

MAD TO ASK: STIGMA CREATION AND THE QUESTIONABLE CHARACTER OF STATE BAR MENTAL HEALTH INQUIRIES

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ABSTRACT

State Bar Character and Moral Fitness screenings are often a cause of considerable angst amongst current and aspiring law students. Many students fear that poor decisions made during college or earlier in life will prevent them from becoming lawyers. Fortunately, most students can take some solace in the fact that the Bar will only judge them on their actions, not their gender, race, or religion. Unfortunately, in forty-six out of fifty states, a growing group of students with mental illness are given no assurance they will be judged solely on the merits of their character. Members of this invisible minority are required to disclose their illness and waive their medical privacy. This Note exposes the significant role these “Mental Health Inquiries” play in contributing to the deadly stigma that surrounds mental illness, while illustrating the negligible affect such inquiries have on protecting the public or the health of the Bar.

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I. INTRODUCTION

Mental illness claims the lives of approximately 37,000 Americans annually from suicide.¹ Another 650,000 people a year attempt suicide.² In 2010, on average, 105 people committed suicide each day.³ For individuals aged eighteen to twenty-five, suicide is the third leading cause of death, accounting for 20 percent of deaths in that age range.⁴ With some exceptions, proper mental health treatment can lessen and possibly eliminate the effects of illnesses, and consequently reduce suicides.⁵ Unfortunately, individuals with mental illnesses face significant hurdles to obtaining treatment, including financial barriers, access issues, and social stigma.⁶ Of these issues, none may be more debilitating and fixable than

¹ Jennifer Schreiber & Larry Culpepper, *Suicidal Ideation and Behavior in Adults*, UPTODATE, <http://www.uptodate.com/contents/suicidal-ideation-and-behavior-in-adults> (last updated Feb. 15, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON

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stigma.

This Note examines the legal community's role in reinforcing and increasing the stigma surrounding mental illnesses through mental health inquiries on character and fitness examinations. In particular, it will survey current mental health inquires and bar proceedings, and discuss their legality, social value, and contributions to stigma. This Note will also examine the shortcomings of the Americans with Disabilities Act ("ADA") as a tool to challenge and limit these inquires. Finally, this Note will offer solutions to mitigate the stigmatizing effects of mental health inquires through a comprehensive and transparent inquiry coupled with modifications in bar procedures aimed at severing mental health from examinations of "character." The proposed modifications are designed to reduce the stigmatizing effects of character and fitness examinations, and to use the examinations as a mechanism to lessen stigma and incentivize treatment.

II. HISTORY OF SCREENING FOR CHARACTER AND FITNESS

The current character and fitness examinations date back to ancient Rome and thirteenth century England.⁷ As the Anglo-American tradition of "fitness" has evolved, it has not been immune to the forces of sexism, nativism, and racism.⁸

Historically, the legal profession has been slow to reject stereotypes and open its doors to marginalized groups. For example, African Americans were not allowed in the legal profession until the Supreme Court ruled upon the issue.⁹ In the 1930s, an applicant was denied admission when he refused to submit to a "McCarthy-esque" interrogation by the state licensing board intended to exclude Communists.¹⁰ Although

GENERAL 5–9 (Howard H. Goldman et al., eds., 1999) (discussing roots, causes, and effects of stigma).

⁷ Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985).

⁸ *Id.* at 497–500 (noting that early on women were excluded from the legal profession because of the peculiarities of womanhood, specifically "its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife"). Jews and other foreigners were rejected as well as ill-suited to be in the legal profession.

⁹ George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 109 (2003); see also Sweatt v. Painter, 339 U.S. 629 (1950).

¹⁰ Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 95 (2001).

current admissions procedures no longer discriminate against women, African-Americans, immigrants, and the lower socio-economic classes, they do present significant hurdles to entry for persons with mental illnesses, an increasingly growing and marginalized group.¹¹ These hurdles are most apparent in the mental-health inquiries that are included in the character and fitness sections of forty-seven of the fifty state bar exams.¹²

All states use some method of character and fitness examination as a means of preserving the integrity of the legal profession and preventing attorney misconduct.¹³ These examinations are broad and comprehensive; they ask applicants about their criminal, academic, and employment history, among other areas.¹⁴ In forty-seven states the examinations also ask about the applicant's mental health history.¹⁵

The various mental health inquiries vary in scope depending on the particular aspects of mental health history, as well as the time period of an applicant's life covered by the inquiry.¹⁶ Several states focus the question on whether the mental illness will "affect one's ability to practice law."¹⁷ Conversely, a handful of states ask about whether a current disorder, if untreated, *would* affect the applicant's ability to practice law.¹⁸ Four states ask no questions about mental health.¹⁹ However, for reasons that will be discussed later, even in states that do not explicitly ask about an applicant's mental health history, applicants with a history of mental health problems may still be required to disclose their history if it has manifested itself through criminal activity or extended breaks in formal education.²⁰

The two primary purposes for evaluating an applicant's character and fitness have been (1) "protecting the public," and (2) "preserving the integrity of the profession."²¹ To assess the value and impact of mental

¹¹ Shepherd, *supra* note 9 (arguing that even to this day the ABA has used accreditation procedures that systematically block African Americans from the legal profession).

¹² Stephanie Denzel, *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 CONN. L. REV. 889, 908 (2011).

¹³ Rhode, *supra* note 7.

¹⁴ *Id.*

¹⁵ Denzel, *supra* note 12.

¹⁶ See *infra* Part III (discussing the different questions asked of applicants in different states).

¹⁷ See *infra* Part III (discussing the different questions asked of applicants in different states).

¹⁸ See *infra* Part III (discussing the different questions asked of applicants in different states).

¹⁹ See *infra* Part III (discussing the different questions asked of applicants in different states).

²⁰ See *infra* Part III (discussing the different questions asked of applicants in different states).

²¹ Rhode, *supra* note 7, at 507–09.

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health inquiries, they must be examined in light of these purposes. Arguing persuasively that mental health inquires protect the public requires assuming that (1) lawyers with mental illness present an increased danger to the public, (2) current mental health screening actually keeps high risk applicants from entry into the profession, and (3) that the inquires do not have negative effects on the health of those admitted to the bar through deterrence of treatment.²² A rationale based on defending the public should be viewed in the larger context of society-wide stigma and its mounting death toll, given that reinforcement of stigma independently harms the public through deterrence of treatment.²³ An additional consideration should be the protection attorneys owe to their clients with mental illness, or with family members with mental illness. Because bar inquires reinforce stigma and deter treatment, attorneys may be putting their clients at greater risk as members of the larger public.²⁴

The second goal, “preserving the integrity of the profession,” is a far more troubling purpose advanced by character and fitness examinations.²⁵ This purpose has been used as a pretext for exclusion based on sex, race, and class.²⁶ The historical argument for exclusion was that membership in one of these groups made an individual “unworthy” of the profession.²⁷ Today, to the extent mental-health inquiries are justified on the basis that a mental illness makes an individual “unworthy,” they may become vehicles for the creation of stigma.²⁸ As an increasing percentage of the overall population is diagnosed with mental illnesses, society has become more accepting and accommodating of mental illness.

By continuing to use antiquated character and fitness examinations, state bar associations may risk distancing themselves from the more open-minded attitudes of the general public. As issues surrounding mental illness appear to be growing in importance in law and society, the exclusion of individuals with mental health issues from the profession risks making the profession less able to confront the rising challenges posed by mass shootings, suicides, and the broken mental health system.

²² Bauer, *supra* note 10, at 149–51.

²³ *Id.*

²⁴ *See infra* Part IV (illustrating the deterrent effects of mental health inquires on current law students).

²⁵ Rhode, *supra* note 7, at 510.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See infra* Part IV (discussing stigma).

III. CURRENT LANDSCAPE OF MENTAL HEALTH INQUIRIES

Of the forty-six states that ask about an applicant's mental health history, there are roughly two different groups, based on their questioning approaches.²⁹ States in the "broader group" ask about diagnosis or treatment for any mental health issues.³⁰ Conversely, states in the "narrow group," such as Virginia and Texas, have "narrowed" their approach to focus on specific illnesses that are generally considered to be the most severe, such as schizophrenia, bipolar disorder, and severe depression.³¹ Further variation exists within the "narrow group," as some states do not include depression, but instead ask about "schizophrenia and other psychotic disorders."³² Despite the variations in language, the scope of even the most "narrow" inquires is too detrimentally inclusive of types of mental illness.³³

The fact that almost all states ask about the diagnosis and treatment of an applicant's mental health, but not about symptom manifestations of mental illness, makes it difficult to limit the scope of the inquiry by time period. Nonetheless, states do "limit" their inquiries to varying periods of time.³⁴ As will be discussed below in a series of hypotheticals, these temporal limitations make little substantive difference in terms of the actual range of an applicant's life that is being asked about. States such as Oregon ask about mental illness with no specified time limit.³⁵ This requires applicants to answer the question affirmatively, regardless of when their treatment, diagnosis, or symptoms last occurred. Some states that do specify a time limit for the inquiry set the limit at five years, while many states set the time limit around two to three years, or even as little as twelve months.³⁶ Two states inquire only about current mental conditions; but this may not substantively limit the inquiry if applicants are supposed to reveal any current mental condition that, "if untreated," could affect their ability to practice law.³⁷

The ABA, with pressure from the courts and mental health advocates,

²⁹ Denzel, *supra* note 12, at 907–10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

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has formulated the following “narrow” model question: “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?”³⁸

This narrow inquiry still reaches many applicants. Due to the nature of diagnosis, it is questionable whether limiting the time period to five years has any actual effect on which applicants will have to answer affirmatively. Some mental illnesses have no cure, but can only be treated³⁹ Thus, the effect of this is to exponentially expand the scope of mental health inquires while rendering most attempts at narrowing the scope fruitless. For example, take a twenty-five-year-old male applicant who walks into the examination and has been previously diagnosed with bipolar disorder. He currently treats his bipolar disorder with medication and regular doctor visits. If he was initially diagnosed six months before the examination he would need to respond in the affirmative to every state that sets a time limit of six months or longer. He would also have to answer yes to any question about “current mental illnesses,” as he currently is bipolar, or has bipolar disorder. Now assume the applicant was diagnosed eleven years before the examination. While his initial diagnosis occurred outside the time limit of most of the states, he is still currently diagnosed as, and receiving treatment for, bipolar disorder. Varying time periods have little to no effect in limiting the scope of inquiry about mental health problems that carry diagnosis. Once applicants are diagnosed with a qualifying illness they will have to disclose it, regardless of the time limitation. The hypotheticals also reveal the underlying deficiency in state bars’ understanding of basic mental health concepts, such as diagnosis. This lack of understanding creates an environment ripe for the creation of stigma surrounding mental health.⁴⁰

For applicants who do not “carry” a diagnosis, and would thus only need to reveal issues related to treatment for an issue that never produced a diagnosis, such as a rape victim who receives post-rape counseling, the time period limitations would factor in more significantly. There are only a few states that ask about more than diagnosable illnesses, and in those states it is unlikely that such qualifying instances would put the candidate at risk of not passing, or even trigger further investigation.⁴¹ However, that

³⁸ Bauer, *supra* note 10, at 97–98.

³⁹ NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions/Schizophrenia> (last visited March 30, 2015) (noting that schizophrenia has no cure, but can be treated).

⁴⁰ See *infra* Part IV (discussing stigma).

⁴¹ Denzel, *supra* note 12, at 907–10.

is not to say that such cases carry with them the potential for undesirable results; for instance it could require the forced disclosure of post-rape counseling for rape victims who do not want to discuss their rape with a state bar.

Many states include directions in the preamble to mental health inquires. Such directions generally take a one of a few different forms.⁴² For example, in Colorado, applicants are informed that the inquiry is not asking about situational counseling.⁴³ Applicants are also assured that solely their disclosure of a previous mental health problem is not “regularly” a reason to deny an application.⁴⁴ Georgia goes a step further, saying that no one has even been denied solely on the basis of mental illness.⁴⁵ While these preambles are helpful to the extent that they help alleviate uncertainty and reassure applicants, they hardly eliminate all doubt about whether disclosure will be disqualifying and leave plenty of uncertainty. In almost every state, once an applicant responds affirmatively to a mental health inquiry, the applicant is then required to consent to the full release of all medical records relating to mental health.⁴⁶ Again, the rape hypothetical is pertinent here because the information would need to be disclosed.⁴⁷

To address many of the issues presented above, states have developed conditional admissions programs whereby mental health issues may lead applicants to be admitted on the condition they seek regular treatment.⁴⁸ These programs may contribute to the creation of a negative stigma by reinforcing the notion that a lawyer with a mental illness, like a bar applicant, needs to be watched with a closer eye.⁴⁹ Even states that do not ask about mental health at all do not fully resolve the issue. Without specifically asking applicants about their mental health status, a bar application may still stigmatize their mental illness. Presumably, an individual whose illness has resulted in criminal behavior or gaps in academic study will be asked to explain those behaviors. That inquiry could be viewed as a mental health inquiry. Because of the premium the bar places on candor, applicants whose mental health histories have played

⁴² *Id.* at 909.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 925–26.

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a role in an event triggering an affirmative response will have to disclose their histories. This type of disclosure is important because it means that fully eradicating mental health inquiries fails to eliminate the stigmatizing power of the screening process. Moreover, this may even increase the stigma by tying mental health inquiries exclusively to negative, potentially disqualifying, behaviors.

Regardless of the form of the inquiry, disclosing a mental illness may trigger a further inquiry depending on the state, severity of illness, and extent of the disclosure.⁵⁰ These further inquiries may result in additional character and fitness examinations.⁵¹ It is relevant that these hearings are procedurally and substantively identical to hearings held for applicants with criminal backgrounds as well as applicants with significant academic dishonesty.⁵² These hearings present additional potential sources of stigma creation.⁵³ Beyond that, they still can have adverse effects on applicants, such as delaying their admission.⁵⁴ A delay may cause the newly admitted lawyer to miss out on crucial employment opportunities, lose a position already secured, and begin to fall behind on student loan repayment.⁵⁵ These harms are particularly relevant given the current state of the legal job market and increasing prevalence of student loans.⁵⁶

In the rare case where mental health inquiries lead to outright rejection, the applicant may have significant student loan debt and a lack of employment history, among other issues, without admission into the legal profession. While admission on a conditional basis is another potential result, conditional admission generally involves delays as well as other issues addressed below.⁵⁷

Another troubling aspect of the current character and fitness examination regime is the ambiguity.⁵⁸ Due to the significant variation and ambiguity in the language of the inquiries, in addition to the general lack of transparency and public outreach by state bars, many future applicants, current law students, recent graduates, and undergraduate students, are forced to dig through their own pasts to determine whether they could pass

⁵⁰ Bauer, *supra* note 10, at 198–201.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See infra* Part IV (discussing stigma).

⁵⁴ Bauer, *supra* note 10, at 198–201.

⁵⁵ Denzel, *supra* note 12, at 909.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Rhode, *supra* note 7, at 517.

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a character and fitness examination.⁵⁹ If such individuals turn to the internet, potential applicants will likely be met with more uncertainty. Conducting a Google search with the following terms “will having a mental illness prevent me from passing the bar?” typically produces links to the following types of sources: official state bar exam websites, law related discussion boards, law school websites, and newspaper articles.⁶⁰ As the example below will illustrate, the information therein varies widely.

One potential place to look may be a law student discussion board, where individuals may have experience with the process. Such discussion boards, perhaps more than in any other forum, present a candidate with conflicting, frightening, and “reassuring” information. Examining a recent discussion on the popular site, www.jdunderground.com, illustrates the predicament of a curious applicant.⁶¹ The user initiated a discussion with the following post:

I’ve been looking at the website, but it’s kind of confusing. I also have a history of mental illness (depression) that I expect I would have to divulge, but I’m hoping this won’t necessarily preclude my admission to the bar. Is there some place I can find a list of the questions asked, or do I have to actually register and start an application to look at them?⁶²

Inquiries such as this are very common on law-student-related discussion boards.⁶³ Such inquiries may reflect an applicant’s uneasiness about going to a law dean or state board to ask questions. The lack of accessible, easily understood information is arguably illustrated by individuals’ willingness to turn to an anonymous internet discussion board for answers to such serious matters. While it may be easy to criticize the merits of searching for the answer online, such actions likely demonstrate the apprehension applicants face and the protection anonymity offers when discussing a private medical issue such mental illness.

The discussion above received nearly fifty responses; the responses contained uncertainty and conflicting information.⁶⁴ The first relevant

⁵⁹ *Id.*

⁶⁰ See the search results produced from the following link: https://www.google.com/?gws_rd=ssl#q=will+having+a+mental+illness+prevent+me+from+passing+the+bar%3F.

⁶¹ *How Thorough Is (CA) Bar Moral Character Investigation*, JDUNDERGROUND, <http://www.jdunderground.com/admissions/thread.php?threadId=28050> (last visited April 13, 2015).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

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response to the post was titled “Depression is not an issue.”⁶⁵ In the reply, the author assured the poster that the bar does not ask about mental health, nor do they even investigate it.⁶⁶ The reply cites a lack of resources as well as the responder’s personal experience.⁶⁷

However, the following additional reply eliminates the reassurance, as it is titled “Depression IS an issue.”⁶⁸ The author of this post details how in California, depression is asked about specifically, and that answering in the affirmative will require waiving medical privacy rights as well as resulting in a delay of your application for up to six months.⁶⁹ The reply warns of the danger of such delays in terms of employment and debt.⁷⁰ Moreover, the author warns about the “misinformation” from other posters claiming that depression is not an issue, and strongly advises the applicant to consult an ethics lawyer for any further questions.⁷¹ Subsequent posts contain similar advice, including exercising caution when speaking with anyone at law school or the state bar without the counsel of a lawyer.⁷² Related posts detail stories of applicants with debt and no ability to practice law because of their mental illness.⁷³

Though the information on *jdunderground.com*, like any anonymous internet source, may contain accurate information, the site’s abundance of activity surrounding the topic is illustrative of the predicament facing a bar applicant with a history of mental illness. Such applicants may be misinformed and may be apprehensive about asking more authoritative sources for more formal help. The result is that the applicant is besieged by uncertainty in an already uncertain application and admission process. Later on in the thread the applicant says he or she may either reconsider going to law school or apply to take the character and fitness examination early, allowing the applicant to avoid accruing debt for a degree that cannot be used.⁷⁴ This applicant’s experience illustrates the way the information seeking process itself can potentially devalue the individual

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

because of their illness.⁷⁵

IV. MENTAL HEALTH INQUIRIES AS VEHICLES FOR STIGMA CREATION

Mental illness is responsible for 20 percent of the deaths of individuals between age eighteen and twenty-five.⁷⁶ Proper treatment and medication can reduce the likelihood that mental illness will lead to suicide.⁷⁷ Though some failure to seek treatment is a result of a lack of sufficient resources, stigma is a significant cause of the lack of treatment.⁷⁸ Stigma deters individuals from seeking treatment by associating those seeking help with character traits such as weakness or a lack of social value, and it may result in future limitations on employment and professional licensing.⁷⁹

Mental health inquiries can create stigma and deter treatment in several ways. First, there is a fear of rejection by an admissions board.⁸⁰ For many law students, stigma is a strong deterrent to treatment; 40 percent of law students say fear of disclosure on their bar examination would deter them from seeking treatment for a mental illness.⁸¹

The deterrence of treatment created by the fear of rejection may reach beyond law students. Presumably many students' interest in law begins before the end of college. The fact that interest in law precedes law school could mean that the stigma produced by bar licensing exams begins during college, making mental health inquiries a possible contributor to lack of treatment, and resulting suicide on college campuses as well.⁸² According to the Surgeon General report, 40 percent of undergraduates experience some form of mental illness, while only 12 percent seek treatment.⁸³ Given

⁷⁵ *Id.*

⁷⁶ Schreiber, *supra* note 1.

⁷⁷ *Id.*; U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 64 (Howard H. Goldman et al. eds., 1999) [hereinafter SURGEON GENERAL].

⁷⁸ SURGEON GENERAL, *supra* note 77, at 5–11.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Schreiber, *supra* note 1 (noting that treatment helps mitigate risks associated with illness). *See generally* Clark v. Va. Bd. of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1995) (noting that bar inquiries deter treatment).

⁸³ SURGEON GENERAL, *supra* note 77, at 64 (noting that less than one third of adults those diagnosed seek treatment).

that reality, any additional deterrence is inexcusable. Even among those seeking treatment, there are fears that a licensing board may later receive information relating to diagnosis.⁸⁴ Such fears may adversely affect the treatment the patient receives out of fear that the physician may later have to disclose the information.⁸⁵ Such fears may cause patients to be less honest and forthcoming than they may otherwise be absent such concerns.⁸⁶

In addition to fear of rejection, the current mental inquiry regime creates stigma in other ways. Bar inquiries reinforce the basic misconceptions about mental health by divorcing them from their proper medical context.⁸⁷ For example, the idea that depressed lawyers are more likely to miss a deadline than lawyers with a chronic physical health condition is based on the common sense belief that depressed lawyers are less likely to take the proper precautions to protect their clients.⁸⁸ This argument stigmatizes depression by linking it with irresponsibility and weakness, whereas a similar connection not be drawn for a lawyer with a bad heart.⁸⁹ Moreover, the fact that mental health inquiries appear in close proximity to questions about an applicant's history of criminal and academic misconduct is highly stigmatizing.⁹⁰

Lastly, the formal hearings on mental health that may follow an applicant's affirmative response are significant vehicles for stigma.⁹¹ The fact that these hearings are handled in the same venue and by the same examiners who handle other fitness evaluations equates mental illness with various forms of criminal and academic misconduct.⁹² Additionally,

⁸⁴ *Clark*, 880 F. Supp. at 435 (“Broad mental health questions may inhibit the treatment of applicants who do seek counseling. Faced with the knowledge that one’s treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist. Without full disclosure of a patient’s condition, physicians are restricted in their ability to accurately diagnose and treat the patient. Thus, it is possible that open-ended mental health inquiries may prevent the very treatment, which, if given, would help control the applicant’s condition and make the practice of law possible.”).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Bauer*, *supra* note 10, at 143.

⁸⁹ *Id.* at 199.

⁹⁰ *Clark*, 880 F. Supp. at 445 (“Requiring applicants to answer Question 20(b), especially considered in relation to the preceding and succeeding questions regarding drug or alcohol addiction and hospitalization for mental illness, suggests that those answering affirmatively are somehow deficient or inferior applicants.”).

⁹¹ *Bauer*, *supra* note 10, at 199.

⁹² *Id.*

the type of deference demanded of applicants at these proceedings sends a clear message that they should be apologetic and remorseful for their illness.⁹³

V. THE ADA AND THE LEGALITY OF MENTAL HEALTH INQUIRIES

One avenue for challenging mental health inquiries and mitigating the stigma such inquiries produce is Title II of the ADA.⁹⁴ Title II protects qualified individuals with a disability from discrimination by public entities.⁹⁵ Bar examiners, as arms of the state judiciary in licensing attorneys, are covered as “public entities.” Current Department of Justice interpretation of the regulations “prohibit policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others.”⁹⁶ This discrimination may take the form of an inquiry into whether an applicant has a disability, even though Title II lacks the explicit statutory language of Title I, which prohibits inquiries into disabilities.⁹⁷ The key statutory term is unnecessary, and evaluating the legality of any inquiry into mental health history requires a showing of necessity with respect to the examination.⁹⁸

Before examining the two main forms of the “necessity test” and applying them to mental health inquires, it must be emphasized that the ADA is only an option for a small number of bar applicants. In the beginning of the ADA’s mental health jurisprudence, licensing boards argued that by their very nature an examination of character and fitness is in and of itself an evaluation of an applicant’s qualification to practice law. For that reason, the questions themselves are not subject to the ADA’s protections.⁹⁹ Courts have, however, rejected this argument, and held that the questions are necessary for the board to perform its function of determining whether an applicant poses a risk to the public if licensed as a lawyer.¹⁰⁰ A second concern involves standing. Because the ADA only protects the disabled, and therefore not everyone who suffers from

⁹³ Rhode, *supra* note 7, at 545.

⁹⁴ Bauer, *supra* note 10, at 135.

⁹⁵ *Id.*

⁹⁶ 28 C.F.R. § 35.130 (2015).

⁹⁷ *Id.*; *see also* Bauer, *supra* note 10, at 97.

⁹⁸ Bauer, *supra* note 10, at 97.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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mental illness, a large number of bar applicants who may be forced to answer a mental health inquiry affirmatively will have no standing to seek a remedy under the ADA.¹⁰¹ A mental illness only gives rise to liability under the ADA if it qualifies as a disability, meaning that it must substantially interfere with major life activities.¹⁰² Under most state inquiries, an individual with a diagnosis of depression sitting for the bar is likely a highly functioning individual who is not close to being able to claim disability status.¹⁰³ A final observation is that the population of mentally ill persons who are considered disabled under the ADA will likely not be able to prove their qualifications in ways separate from the character and fitness examinations, whether that because of behavioral problems or sheer inability to get into and complete law school.¹⁰⁴ For these reasons, the ADA, while helpful to some, only provides protection for a small number of applicants.¹⁰⁵

A. THE NECESSITY TEST

Courts have used two forms of the necessity test to evaluate whether mental health inquiries are necessary for the licensing board to pursue its function: determining whether an individual is qualified to practice law. The first test, the strict scrutiny test, requires the licensing board to show actual empirical evidence that without the mental health inquiries, unqualified individuals will gain entry into the profession.¹⁰⁶ Such a showing is a very high standard, making it difficult for any broad mental health inquiry to pass this form of scrutiny.¹⁰⁷ Courts that have applied the strict scrutiny test have found the inquiries unnecessary, and thus in violation of the ADA.¹⁰⁸ The only type of question that passes this test is whether an individual has a current condition, that, in the applicant's own assessment, would affect his or her ability to practice law.¹⁰⁹ This standard, if applied nationally, would effectively eliminate most mental health

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 135.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

inquiries.¹¹⁰

The second test, the less stringent “relaxed scrutiny” test, relies on a “common sense approach” that asks whether common sense suggests a link between the disorder being asked about and the ability to practice law.¹¹¹ Under this framework, most courts have upheld narrowly focused inquiries on certain disorders as long as the time period is limited.¹¹² Under this test, even without showing an empirical link between the diagnosis and an increased risk to the public, courts in Texas and Virginia found narrow mental health inquiries necessary to assess applicants’ insight into their disorder and their degree of cooperation with treatment recommendations.¹¹³

This common sense approach is flawed for several reasons. First, there is no common sense explanation for why a diagnosis of depression renders someone as a greater risk to the public than someone with a physical disease.¹¹⁴ Additionally, because a diagnosis is generally life long, the court’s time limitation is much less meaningful.¹¹⁵ When a state asks about a diagnosis it is really asking about the applicant’s entire life.¹¹⁶ A third and perhaps more troubling issue, is that using a test relying on common sense when it comes to an applicant’s mental illness likely rests on the assumption that common perceptions about mental illness are accurate and useful. As previously mentioned, linguistic formulations of the inquires themselves, specifically that fact they ignore the reality that a diagnosis is life long, reveal licensing boards’ fundamental misconceptions about mental illness.¹¹⁷ Moreover, given the dynamic nature of understandings of mental disorders like bipolar disorder and schizophrenia, defining an accurate fixed common understanding of mental illness is difficult. The implication is that legal approaches based on commonsense understandings of mental illness, which are clouded by stigma, may actually reinforce those misunderstandings. These self-reinforcing stereotypes are especially dangerous because they are used to

¹¹⁰ *Id.* at 141.

¹¹¹ *Id.* at 152.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 163.

¹¹⁵ NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions/Schizophrenia> (last visited March 30, 2015) (noting that schizophrenia has no cure, but can be treated).

¹¹⁶ *See supra* Part II (discussing the different scopes of questions faced by applicants).

¹¹⁷ *Id.*

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block individuals from a profession charged with bringing justice and preventing discrimination created by stereotyping.

Assuming the commonsense approach is informed by accurate depictions of mental illness, there is some merit to the idea that particular disorders, such as Bipolar I and schizophrenia, do necessitate inquiry.¹¹⁸ Disorders such as schizophrenia may skew a person's judgment and taint their perception such that they do not realize they are even suffering symptoms at all.¹¹⁹ This lack of insight differentiates these individuals from an attorney with a physical condition who presumably can recognize when his or her condition will require extra precautions to protect clients.¹²⁰ Thus, any type of mental health inquiry should be directed at those who are unable to acknowledge, and thus accommodate for, their mental illness.

The prime illustrative hypothetical for a commonsense link between mental illness and attorney misconduct would be an attorney with Bipolar I that is manifested through a manic episode. During the episode, the attorney is likely to be unaware of and may even insist that everything is okay.¹²¹ The disorder itself makes it hard for individuals to recognize the risk they pose to their clients. Additionally, symptoms common to manic episodes have significant overlap with common forms of attorney misconduct, such as misappropriation of client funds.¹²² The same holds true to some extent for schizophrenia, in which thoughts themselves are disordered in such a way that it renders an individual incapable of recognizing the influence of the disorder.¹²³ These disorders contrast sharply with depression, because depression does not prevent lawyers from realizing their own ineffectiveness.¹²⁴

In sum, the ADA is limited to protecting only a small group of applicants. Of the applicants it does protect, it does not protect them from inquiries that are narrowly tailored to certain diagnoses that have a common sense relationship to the ability to practice law.

¹¹⁸ Bauer, *supra* note 10, at 168.

¹¹⁹ *Id.* at 172.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

VI. DO MENTAL HEALTH INQUIRIES ADVANCE THE PURPOSES
OF CHARACTER AND FITNESS EXAMINATIONS?

A. PROTECTING THE PUBLIC: THE MICHAEL CLAYTON FACTOR

In 2007, Hollywood attempted to depict the way mental illness affects the legal profession in the film *MICHAEL CLAYTON*.¹²⁵ The main character, played by George Clooney, spends much of the film attempting to fix the mess created by a senior partner and top litigator, Arthur Edens.¹²⁶ Edens, one of the best class action defense attorneys in the country, is bipolar, although he has been asymptomatic for the past eight years.¹²⁷ At the outset of the film, while taking the deposition of a particularly sympathetic class member, Edens begins acting erratically and shows all the symptoms of a manic episode.¹²⁸ His mania leads him to forget about his loyalty and responsibility to his client, as he feels sympathetic to the plaintiff class.¹²⁹ As a result, he begins circulating confidential internal memos, violating various attorney-client privileges and professional responsibilities.¹³⁰ Edens represents exactly the type of situation that mental health inquiries are intended to prevent.¹³¹

There is very little evidence that character and fitness mental health examinations protect the public in a meaningful way. There is an argument that through deterrence of treatment, these inquiries actually put the public at a greater risk by decreasing the overall mental health of the practicing bar. One reason these inquiries do not protect the public is the infrequency with which they result in an affirmative answer.¹³² Because of the low expected answer rate compared to the overall population percentage that receives mental health treatment or has a mental disorder, there are serious concerns about a lack of candor from applicants.¹³³ Moreover, of those who answer affirmatively, only a small percentage is denied admission.¹³⁴ The final piece to the puzzle involves the lack of any correlation between

¹²⁵ *MICHAEL CLAYTON* (Section Eight Productions, Mirage Enterprises, Castle Rock Entertainment 2007).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Bauer, *supra* note 10, at 145.

¹³³ *Id.*

¹³⁴ Rhode, *supra* note 7, at 514.

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attorney discipline and disclosure of mental health issues.¹³⁵ There simply are not many Edens out there; in fact evidence suggests there are none. Mental health inquires locate only a fraction of those with mental disorders; of those located, even fewer are denied admission.¹³⁶ Given the lack of correlation between disclosure and discipline, those denied may have been at a greater risk of denial in the first place.

Given the lack of any positive protection, the presence of any increased danger to the public makes inquiries a threat to the public's safety. As inquiries create stigma in a variety of forms, and that stigma deters proper treatment, the result is an increased risk to the public.¹³⁷ The fact that 40 percent of law students are deterred from treatment likely results in the increased number of new lawyers to the bar with untreated mental health issues.¹³⁸ While there is little connection between such disorders and bar discipline, the fact that treatment mitigates symptoms and decreases suicide risk suggests that an undiagnosed, untreated lawyer is likely more dangerous than a diagnosed and treated one. The inquiries are not keeping anyone out; they are merely pushing some people under the radar out of fear of rejection.¹³⁹

VII. POTENTIAL SOLUTIONS

Given the negative impact of mental health inquiries, one possible solution would be to make every state follow the lead of the three states that have no such inquiry.¹⁴⁰ However, there are two main flaws to their approach. First, even courts that show skepticism of mental health inquiries permit them, which would make it impossible to force states to give this line of questioning up.¹⁴¹ A second problem with removing mental health inquiries is that it still potentially leads to the disclosure of mental health histories later in the process.¹⁴² Individuals that divulge information about past criminal charges, school absentia, and other aspects of their background, will, on further inquiry, need to candidly explain the

¹³⁵ Bauer, *supra* note 9, at 140.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 150.

¹³⁹ Rhode, *supra* note 7, at 517.

¹⁴⁰ See *supra* Part II (discussing the states without mental health inquiries).

¹⁴¹ Clark v. Va. Bd. of Bar Examiners, 880 F. Supp. 430, 430 (E.D. Va. 1995)

¹⁴² See *supra* Part II (discussing the bar application process).

circumstances surrounding those incidents.¹⁴³ If mental illness was a contributing factor, then the applicant would be faced with disclosing their illness in a setting that may be more stigmatizing, as the illness is discussed in direct connection to criminal activity or academic absence.¹⁴⁴ The result is a regime that only examines mental health when it manifests itself through behavior that is deemed negative.¹⁴⁵ Finally, removing inquires prevents them from creating stigma, but it does nothing to destroy stigma, nor does it incentivize treatment. In light of the drawbacks of simply removing such questions, I propose a comprehensive and unambiguous inquiry attempting to end stigma while incentivize treatment.

I propose that all fifty state bars adopt the following questionnaire:

1. Have you even been diagnosed with any of the following mental disorders or substance abuse issues? A. Severe alcohol or drug addiction? B. Bipolar I? C. Schizophrenia?

“Severe” for the purposes of subsection A means an addiction that has forced you to enter into a residential or full-time rehabilitation center. (AA meetings, partial programs, or student health centers do not count).

2. If yes, have you manifested symptoms in the last three years?

“Manifested Symptoms,” for the purposes of question two, means that as a result of your illness or addiction, you have engaged in behavior or suffered from a mood that would negatively affect your ability to practice law or uphold the ethical obligations of the legal profession. Include any incidents during this time period when your illness or addiction (1) prevented you from working, (2) caused you to withdraw from school, or (3) resulted in adversarial interactions with the police. Only include a hospitalization, if the hospitalization was involuntary. For example, a voluntary hospitalization that did not put your job, school, or criminal record in danger need not be included as symptom manifestation.

3. Have you ever been civilly committed?

4. If yes to both 1 and 2, or if yes to only 3, please include as much information as you feel comfortable sharing. Any further details required will be followed up on. Failure to include all details now will NOT be considered a lack of candor, as we value your privacy and understand your potential discomfort revealing your personal health history.

¹⁴³ See *supra* Part II (discussing the bar application process).

¹⁴⁴ See *supra* Part II (discussing the bar application process).

¹⁴⁵ See *supra* Part II (discussing the bar application process).

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5. Everyone who answers yes to both 1 and 2, or only 3 will have a mental health hearing in which a group of attorneys, mental health professionals, and consumer attorneys will determine whether your illness or addiction should be a bar to licensing. This proceeding will not delay you being admitted to the bar in any way if it is determined you are fit to practice. The hearing will be completely confidential. You will be entitled to representation by an attorney and entitled to call witnesses on your behalf. Very few applicants are denied admission due to illness or addiction. Those that do ALL have had frequent symptom manifestation in the last three years, and that symptom manifestation has either resulted in substantial criminal, academic, or professional consequences. Isolated run-ins with the police, or withdrawing from one or two semesters will NOT be grounds for denial.

I also propose that the mental health questionnaire be entirely separate from all questions about criminal history and other moral fitness inquiries. The section should be labeled “Mental Health and Addiction Questions.” The proceedings shall be as described in the postscript of the question. These proceedings should bear no resemblance to proceedings triggered by criminal records. Additionally, these proceedings should not typically delay the decision on an applicant’s admissions.

Moreover, if an applicant is denied, the board must offer a written opinion that is made available to the applicant. They must offer an explanation, as well as directions for how applicants may go about proving, or improving their fitness. Along with these changes, each state bar should aggressively advertise their mental health inquiry process. Each law school should be visited at least once a year with a representative from the state bar of the state in which it is located to talk through the questions and procedures, as well as remind and encourage students to seek treatment.

A. PURPOSES AND ADVANTAGES

1. The Removal of Ambiguity

The proposed questionnaire seeks to define and describe every necessary term as well as detail the consequences of an affirmative response. There are no ambiguous terms such as “may,” or “often,” or “regularly will not.” Any affirmative answer will trigger a review. The review will fit the following parameters. The lack of ambiguity gives a clear message to the applicant of exactly what is required to be admitted to the bar. Undergraduates will know what will be asked of them, and they can weigh their options accordingly. This prevents the type of uncertainty

that deters applicants from seeking treatment, and steers applicants with mental illness away from the profession. It also turns information seekers away from the unreliable internet forums and towards official sources.

2. Incentivizes, Rather Than Deters, Treatment

Because the proposed questionnaire focuses on symptom manifestation, potential applicants are motivated to get treatment. A simple diagnosis with proper treatment will not trigger any subsequent inquiries. Thus, applicants struggling with their disease have an incentive to seek treatment and monitor their illness to prevent symptom manifestation. This is an advantage that is not captured by simply removing all mental health inquiries. While removing the questions entirely removes one barrier to treatment, it does not represent a positive step towards incentivizing treatment. As lawyers, we should seek to take positive steps to make the situation better, rather than simply trying to not make it worse.

3. Mitigation of Stigma and Creation of Positive Mental Illness Identity

Separating mental health inquiries from questions about criminal history helps lessen stigma.¹⁴⁶ A similar effect is achieved by reforming formal bar proceedings to appear less like criminal trials.¹⁴⁷ Severing an individual's diagnosis from symptom manifestation reduces stigma in a unique way: liberating the diagnosis of a mental illness from the symptoms associated with it fundamentally changes the message that is broadcast to applicants. The diagnosis they carry no longer necessarily excludes them from the legal profession. Allowing an applicant to self-identify as an individual with a diagnosis, and then allowing them to report their lack of symptom manifestation and bypass further inquiries, should help lessen stigma while empowering individuals with such illnesses. This process hopefully encourages individuals to take pride in their illness as a part of their identity, and lets them know that the illness does not have to be associated only with its negative symptoms.

Additionally, each applicant with a diagnosis who has not manifested symptoms sends the signal, and stands as proof to each state licensing Board, that the presence of an illness and lack of fitness are not synonymous. This could help repair the commonsense misunderstandings

¹⁴⁶ Bauer, *supra* note 9, at 199.

¹⁴⁷ *Id.*

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about mental illness.

For applicants who do trigger an additional hearing, stigma is reduced. The presence of consumer attorneys at the hearing sends the immediate signal that individuals with mental illness have a place in the legal community. Assuring applicants that their admission will not be delayed and providing them with a procedure separate from criminal inquiries, should provide greater dignity and prevent them from believing they should be sorry or apologetic about their mental health history.

VIII. CONCLUSION

Mental illness is a growing concern for colleges and universities. No solution will get very far without mitigating the stigma of mental illness. This stigma deters treatment, which is important because it may help reduce the negative effects of mental illness, such as suicide.

Any entity, government, or private organization, that institutes policies that create stigma, contributes to problems that exist regarding refusal of treatment for mental health issues and suicide. Currently, every state bar should examine their contributions to these problems through mental health inquiries on character and fitness examinations. These inquiries do not accomplish either of the traditional purposes of character and fitness examination: they do not protect the public, nor do they preserve the integrity of the profession. Additionally, mental health inquiries prevent current and potential law students from seeking treatment. Simply removing the inquiries is not enough. The bar should use the reformation of mental health inquiries as an opportunity to take positive steps toward stigma reduction and individual empowerment. State bars should make these changes, not because they are legally obligated to do so, but because they should feel morally obligated to stop contributing to stigma and the mounting death toll from suicide.