

Mental Health Inquiries: To Ask, or Not to Ask — That Is the Question

by Thomas A. Pobjecky

The necessity of mental health inquiries

In a 1989 article published in *The Bar Examiner*,¹ I discussed Florida's program of conditional admission for bar applicants suffering from psychological problems.² A review of bar discipline cases during that last decade establishes that mental illness and emotional problems are often presented as a mitigating factor for unethical conduct by practicing attorneys.³

A sampling of such cases demonstrates the seriousness of the misconduct resulting from mental or emotional problems. In *People v. Heilbrunn*,⁴ the Supreme Court of Colorado determined that an attorney's depression and resultant drug and alcohol abuse "contributed greatly" to his neglect and subsequent abandonment of clients' cases.

In another case, *In Matter of Hoover*,⁵ the Supreme Court of Arizona held that an attorney's mental illness (bipolar manic depressive psychosis) was a mitigating factor for his misappropriation of substantial funds from his client. Lastly, the Supreme Court of California observed in the case of *In re*

*Lamb*⁶ that an attorney's chronic emotional disability "contributed substantially" to her misjudgment to impersonate her husband and take the bar examination on his behalf.

Because mental illness in a practicing attorney can lead to extremely adverse consequences for the unsuspecting public, many bar examining authorities have routinely screened applicants for such problem. Self-reporting on a bar application is a commonly used tool for discovering mental or emotional disorders in applicants.

Florida's bar application solicits information in this area through the use of the following preamble and mental health inquiries:

The Board of Bar Examiners must assess effectively the mental health of each applicant. A lawyer's untreated or uncontrolled mental disorders, if severe, may result in injury to the public. Questions 26-29 request information essential to the Board's assessment. The Board assures each applicant that the Supreme Court, consequent upon

the Board's recommendation, regularly admits applicants with a history of both mental ill-health and utilization of the services of mental health professionals. The Board considers satisfactory mental health to include (1) the current absence of an untreated, uncontrolled mental illness that interferes with law practice and (2) the unlikelihood of a relapse of a prior mental illness that would interfere with law practice. With respect to either, evidence of treatment by a mental health professional is useful. The Board encourages applicants to seek the assistance of mental health professionals, if needed.

26. Yes No

Are you or have you ever been addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including dates.

27. Yes No

Have you ever been hospitalized, institutionalized or admitted to any medical health facility (either voluntarily or involuntarily) for treatment or evaluation for any mental, nervous or emotional

condition, drug or alcohol use? If yes, state the name and complete address of each hospital, institution or other treatment facility, the dates of treatment, and the name of each individual in charge of your treatment or evaluation.

28. Yes No

Have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservator or committee? If yes, give full details as to court, date and circumstances.

29.

a. Yes No

Have you ever consulted a psychiatrist, psychologist, mental health counsellor 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.

b. Yes No

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. Yes No

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. Psychotropic medication shall mean any prescription drug or compound affecting the mind, behavior, intellectual functions, perceptions, moods, or emotions, and includes anti-psychotic, anti-depressant, anti-manic and anti-anxiety medications.

As with other inquiries on Florida's bar application, the mental health inquiries are intentionally broad in scope to eliminate subjective decision making by bar applicants as to what must be disclosed.⁷

In my earlier article on Florida's program of conditional admission, I indicated that the bar application "is the most effective investigative tool available to examiners [for] discovering preliminary information about an individual's past which may reflect adversely upon the applicant's character and fitness to practice law."⁸

During this past year there have been, however, two significant developments which have prompted concern among bar examiners re-

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garding the continuing use of mental health inquiries on a bar application. These developments are: Title II of the Americans With Disabilities Act as implemented by rule of the Department of Justice effective January 26, 1992; and the decision of the Board of Judges of the District of Columbia Court of Appeals to eliminate its bar application question on mental health treatment.

Americans with Disabilities Act

The Americans With Disabilities Act (ADA) was enacted on July 26,

1990. The ADA is organized five titles⁹ and provides comprehensive civil rights protection covered individuals in the areas: employment, state and local government services, public accommodations and telecommunications. Title II of the ADA prohibits discrimination on the basis of disability by public entities. Title coverage extends to all activities. State and local governments including the legislative and judicial branches regardless of receipt of Federal funds.

The Department of Justice is the responsible agency for Title II. rule¹¹ enacted by the Department implementing Title II was effective January 26, 1992.

The protections and rights afforded by the ADA are extended to an individual with a disability having a physical or mental impairment that substantially limits a major life activity or had a record of such an impairment or is regarded as having such an impairment.¹²

The phrase "physical or mental impairment" means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, muscular, skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairment

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cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.¹³

The Department of Justice rule implementing the ADA contains several prohibitions against discrimination. Those prohibitions which are arguably applicable to bar examining authorities are set forth below:

(6) A public entity may not administer a licensing or certification program in a manner that subjects *qualified* individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out any individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be *necessary* for the provision of the ser-

vice, program or activity being offered.¹⁴

Based upon the above-quoted provisions, a strong argument can be made that the use of mental health inquiries on a bar application are legally permissible under the ADA. It can be argued that such inquiries are needed to determine a *qualified* applicant. Stated slightly differently, it is *necessary* for the protection of the public to screen

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out would-be lawyers who are not mentally fit or emotionally stable to fulfill the duties and responsibilities of a member of the legal profession.

These arguments are convincingly supported by such reasoning as contained in a 1983 decision of the Supreme Court of Florida.¹⁵ In that case, the court approved an earlier version of an inquiry on Florida's bar application pertaining to past treatment for emotional disturbance or nervous or mental disorder.

In upholding the legality of such question, the court reasoned:

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...further 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.¹⁶

Decision by the Board of Judges of the District of Columbia Court of Appeals

Prior to February 20, 1992, the bar application for the District of Columbia required disclosure of information pertaining to mental health and drug and alcohol abuse through the following questions:

Question 27:

Have you ever been addicted to or treated for or counseled concerning the use of any drugs, including alcohol?

Question 28:

Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?



Question 29:
 Have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?

Effective February 20, 1992, the Board of Judges of the District of Columbia Court of Appeals discontinued using question 28 and limited questions 27 and 29 to a five-year period prior to the execution of the bar application. The decision of the D.C. Court of Appeals was unpublished.¹⁷

It has been suggested that the D.C. Court of Appeals modified its bar applications to conform to the ADA. On the contrary, the action taken by that court is not supported

by any reasonable interpretation of the ADA and its implementing rule.

Although the D.C. Court of Appeals eliminated the inquiry on past treatment or counseling for mental, emotional or nervous disorder, the court retained (with a five-year limitation) the inquiry on past treatment or counseling for drug or alcohol abuse. Yet, "drug addiction" and "alcoholism" are also specifically covered by the ADA.¹⁸ If the ADA were to mandate the removal of mental health inquiries on a bar application, then questions regarding alcohol and drug treatment should also be barred.

The action of the D.C. Court of Appeals is reasonably viewed as a policy decision based upon the competing interests between a bar

applicant's privacy and an examiner's need for information. The D.C. Court of Appeals sided with the applicant and drew a line and its decision should not be viewed as a persuasive (and alone authoritative) interpretation of the ADA.

Alcoholism v. Mental Illness

By the modification of its bar application, the D.C. Court of Appeals apparently concluded that it is more important for bar examiners to inquire about treatment for drug and alcohol abuse but unimportant to

about treatment for mental illness. Implicit in such a conclusion is a perception that alcoholism and drug addiction are much more serious problems than mental illness. Such perception, however, is contrary to case law from that court's jurisdiction.

In the case of *In re Peek*,¹⁹ attorney Peek was retained in 1978 to prosecute a civil complaint. Peek's client "had been forcibly abducted from a common area of her apartment building, dragged into an adjacent, unlocked, abandoned laundry room, and forcibly raped." Peek eventually filed suit three years later on the last day before expiration of the statute of limitations. Peek never undertook any discovery on the suit.

In 1985, the suit was dismissed pursuant to defense motions to dismiss for failure to prosecute. Peek never opposed the motions nor did he seek reinstatement of the complaint. In 1986, Peek advised his client that her case was "in limbo right now" but that he was "taking the steps to get it on the calendar as soon as possible." The client subsequently retained another attorney and a malpractice action brought against Peek by his former client was settled in 1987.

In determining the appropriate sanction for Peek's professional neglect and misrepresentation, the D.C. Court of Appeals noted that Peek suffered from chronic depression and that his "misconduct was substantially affected by his mental problems." The court ordered a four month suspension (with the final two months stayed) and probation for two years consisting of outside supervision of Peek's professional responsibilities and weekly counseling for Peek with his psychiatrist.

In another case, *In re Larsen*,²⁰ the undisputed facts established that Larsen had intentionally misappropriated funds belonging to a

client. The facts further established that Larsen's misconduct resulted from his mental illness (bipolar disorder). Although the D.C. Court of Appeals normally disbars an attorney for misappropriation, the court stayed its order of disbarment and, instead, placed Larsen on supervised probation for a period of three years because of the mitigating factor of his mental illness.

The *Larsen* and *Peek* decisions should leave no doubt that substantial harm to a client can result from

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the conduct of a mentally impaired attorney. Thus, there is simply no rational basis to distinguish between a bar applicant who has a history of treatment for a mental illness and a bar applicant who has a history of treatment for drug or alcohol abuse.

Both of these applicants present a serious question of fitness as to their present ability to practice law in an ethical and competent fashion. Both of these applicants should be identified by inquiries on the bar application to enable bar examiners to evaluate the sufficiency of their treatment and to determine their current fitness.

During the past decade, courts have recognized the problem of alcoholism among members of the

legal profession. As observed by the Supreme Court of Florida in 1982:

Business and professional groups, including The Florida Bar, have only recently openly acknowledged and addressed the problem of the alcoholic businessman and professionals. This problem must be *directly confronted*; a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole. Too often, attorneys will recognize that a colleague suffers from alcohol abuse, but will ignore the problem because they do not want to hurt the individual or his or her family. This attitude can have disastrous results both for the public and for the individual attorney. If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This court has responsibility to assure that the public is fully protected from attorney misconduct.²¹

Such observations are equally applicable to the problem of mental illness. For the protection of the public, such problems must be *directly confronted* by bar examiners in their bar applications and during their background investigations. Ignoring the problem of mental illness as the D.C. Court of Appeals has apparently decided to do will not, unfortunately, make the problem go away.

The Need for Mental Health Inquiries

The argument has been advanced that bar application questions pertaining to mental health are really not needed. The argu-

ment is based on the proposition that serious mental health problems in bar applicants will be discovered during other aspects of the character and fitness background investigation.

In addition to self-reporting on the bar application, the other primary method of discovering character and fitness problems of bar applicants is through contact with third parties such as references and employers. Although contacting third parties is an essential investigative function,²² it is simply insufficient if used exclusively. Reasons for such insufficiency include the following:

Third parties may be unaware of an applicant's mental problems due to their limited dealings with and limited knowledge of the applicant's personal life. Even with sufficient dealings or knowledge a lay person may not perceive anything unusual or bizarre in the applicant's conduct which would justify notification to bar examiners of a possible mental problem.²³

Furthermore, third parties may be unwilling to disclose adverse information about an applicant's mental or emotional stability because of a concern for their personal safety or a fear of being sued by such applicant. This author has written numerous letters to non-responsive attorneys reminding them of their ethical obligation to respond to a request for information from a bar examining authority.²⁴

Third party comments may also be unreliable. Submission of derogatory and untruthful remarks about an applicant's mental health by a third party may be the result of animosity between the applicant and the third party.

Lastly and perhaps most importantly, the bar applicant is the best source of accurate, detailed information. Thus, a balanced and thorough identification of information

regarding an applicant's mental fitness is best achieved when self-reporting and third party contacts are used together.

Conclusions

In a 1984 case, the Supreme Court of Indiana had before it an attorney who had engaged in extensive misconduct. The attorney had also been diagnosed as suffering from mental illness, specifically: "manic depression in the manic stage, active psychosis, schizophrenia and possible paranoia."

In determining that disbarment was the appropriate sanction, the court reasoned:

In making our determination, this Court is not unmindful of these unfortunate circumstances which are, undoubtedly, intertwined with the Respondent's law practice. Against these findings we must weigh our duty to maintain a competent Bar and protect the public from further unethical conduct. Respondent's specific acts of misconduct, taking his client's funds under the most bizarre circumstances, without any authority and in flagrant violation of the rules, and his engaging in deception and misrepresentation strike at the very core of the attorney's basic obligation to his client, trust. Furthermore, there is no evidence to convince this Court that the Respondent's problems have been solved and further incidents of misconduct will not occur. This court must safeguard the public from unfit attorneys, whatever the cause of unfitness may be.²⁵

Similarly, it is recommended that bar examiners must safeguard the public from unfit bar applicants, whatever the cause of unfitness may be. This is especially true because "a bar applicant is not sim-

ilarly situated with an attorney: ready admitted to practice [and therefore,] a higher standard of good moral character may be applied..."²⁶

Bar examiners are, therefore, encouraged to continue to use inquiries on their bar applications to obtain information in the areas of potential unfitness including mental illness. As demonstrated by the case law discussed above, mental illness can adversely impact on an individual's fitness to practice law.

In determining the significance of an attorney's mental problems as a mitigating factor for professional misconduct, the Supreme Court of Oklahoma observed:

Our primary object is to protect the public and to preserve its confidence in the legal profession as well as in the judicial authority charged with the licensing function. The relationship between a lawyer and a client calls for the exercise of the highest degree of integrity and fidelity. *Nothing less will be tolerated.*

For the practice of their profession lawyers are licensed by this court. The maintenance of strict integrity among the members of our bar is one of this court's constitutional responsibilities. Every licensed lawyer is presented to the public as a person worthy of confidence in his (or her) delivery of professional services. If a practitioner is shown to be unfit, it is this court's duty—for the public's immediate protection—promptly to withdraw from that individual the endorsement given to him (or her) by the license to practice.²⁷

Such observations are equally applicable to the primary objective of bar examining authorities.

In determining whether applicants have established good moral character sufficient to demonstrate their fitness and capacity to pra-

tice law, bar examiners must consider the mental and emotional stability of bar applicants. For the protection of the public, *nothing less should be tolerated.*

Endnotes

1. Pobjecky, "Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask," 58 *The Bar Examiner* 14 (1989).

2. Conditional admission in Florida is available in exceptional cases for applicants with drugs, alcohol or psychological problems. Fla. Sup. Ct. Bar Admiss. Rule, Art. III, Section 3.c.

3. See Annotation, "Mental or Emotional Disturbance as Defense to or Mitigation of Charges Against Attorney in Disciplinary Proceeding," 26 *A.L.R.* 4th 995 (1983).

4. 814 P.2d 819 (Colo. 1991).

5. 779 P.2d 1268 (Ariz. 1989).

6. 776 P.2d 765 (Cal. 1989).

7. Florida's law school community proposed the following re-wording of question 29: "Have you ever had a substantial mental disorder that significantly impaired your judgment, behavior or your ability to cope with ordinary demands of life?" This proposal was rejected because the subjective modifiers "substantial" and "significantly" would provide bar applicants with the basis to conceal even the most serious mental problems.

8. Pobjecky, *supra* note 1 at 16.

9. Title I-employment; title II-public services and public transportation; title III-public accommodations and private transportation; title IV-telecommunications; title V-miscellaneous provisions.

10. Title II is divided into subtitle A (public services) subject to the regulation of the Department of Justice and subtitle B (public transportation) subject to the regulation of the Department of Transportation. References in this article to title II are limited to subtitle A only.

11. 28 CFR Part 35.

12. 28 CFR Section 35.104 Definitions.

13. *Id.* (emphasis original).

14. 28 CFR Section 35.130(b) (emphasis supplied).

15. *Florida Board of Bar Examiners Applicant*, 443 So.2d 71 (Fla. 1983).

16. *Id.* at 75 (citation omitted).

17. Notification of the decision is being provided to prospective applicants by insert to the District of Columbia's bar application.

18. See text at note 11 above.

19. 565 A.2d 627 (D.C. App. 1989).

20. 589 A.2d 400 (D.C. App. 1991).

21. *The Florida Bar v. Larkin*, 420 So.2d 1080, 1081 (Fla. 1982) (emphasis supplied).

22. In that some applicants are untruthful in making disclosures on their bar applications, bar examiners should not rely solely upon the bar application. See e.g.: *In re Application of Sandler*, 588 N.E. 2d 779 (Ohio 1992) (falsification of bar application warrants the revocation of applicant's license to practice law); *In re Mitani*, 387 N.E. 2d 278 (Ill. 1979) (attorney's false and deceptive answers on bar application warrant disbarment).

23. "While Hoover was allegedly psychotic, he was engaged in complicated contract negotiations on behalf of the clients his law firm was representing. Although conflicting evidence from lay witnesses existed, some lay witnesses testified that Hoover demonstrated no unusual or bizarre behav-

ior during the time frame in which the misappropriation occurred." *Hoover, supra* note 5 at 1276 (Judge Roll, dissenting).

24. "[A] lawyer...shall not...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority...." ABA, Model Rules of Professional Conduct Rule 8.1 (1983).

25. *Matter of Carmany*, 466 N.E. 2d 16, 23 (Ind. 1984) (citations omitted).

26. *Frasher v. West Virginia Board of Bar Examiners*, 408 S.E. 2d 675 (W. Va. 1991). See also *Florida Board of Bar Examiners re H.H.S.*, 373 So.2d 890, 892 (Fla. 1979).

27. *State ex rel. Oklahoma Bar Association v. Colston*, 777 P.2d 920, 925 (Okla. 1989) (citations omitted) (emphasis supplied).



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