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# ***71** FITNESS TO PRACTICE LAW: A QUESTION OF CONDUCT, NOT MENTAL ILLNESS

Phyllis Coleman
Ronald A. Shellow

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Only those who are fit should be licensed to practice law. The Florida Supreme Court promulgates rules for admission to the Bar which include criteria for determining fitness. The Board of Bar Examiners evaluates applicants using these standards. Inquiries about treatment for mental illness and substance abuse are part of the evaluation. These questions miss the mark.

The court and bar examiners have not proven, nor could they, that fitness to practice is directly related to absence of either mental illness or addiction. These inquiries are based on prejudice against mental illness. Many people with emotional problems are excellent attorneys, while other lawyers with no psychiatric disorder are disciplined for misconduct.

The rules for admission provide "[a]n attorney should be one whose conduct justifies . . . trust. . . ." [FN1] Because the most accurate predictor of conduct is past behavior, the board should ask an applicant about history of impairment--whatever the cause--portending inability to perform competently as a lawyer.

Inquiries about treatment for mental problems invade the applicant's right to privacy. In a society which stigmatizes the mentally ill, compelling an individual to disclose he or she has sought treatment constitutes injury--even if admission to practice is neither denied nor delayed. This injury is not justified by the few, if any, people these questions identify as likely to harm the public or the profession. In addition, the Americans with Disabilities Act of 1990 (ADA) prohibits these inquiries because they impose additional burdens on individuals with disabilities.

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This article reviews questions about treatment for mental illness and substance abuse on the Florida bar application. It suggests failure to understand mental illness leads bar examiners and courts to write and uphold inappropriate, ineffective inquiries. After discussing relevant portions of the ADA, the article explains how and why the act prohibits these questions. Finally, it proposes questions to elicit meaningful information on the only legitimate issue: an applicant's competence to practice.

The Questions

To determine which individuals are fit, bar examiners inquire into aspects of applicants' private lives. One series of questions concerns treatment for mental illness and substance abuse.

The Florida Supreme Court conceded positive answers implicate the applicant's privacy and confidentiality rights in Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (1983). Applicant had refused to answer the question about regular treatment for mental disorders. Deciding the state's interest in protecting the public outweighed the individual's privacy rights, the court rejected state and federal constitutional arguments. The inquiries further a "legitimate state interest . . . . 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." [FN2]

Undoubtedly an attorney must enjoy sufficient mental stability "to handle his responsibilities." But a person does not lack the stability to practice competently just because the person was treated for emotional problems or substance abuse. In fact, new medical research reveals close to half the people who consult a mental health professional do not have a diagnosable mental illness. [FN3] Further, a person who obtains treatment may be a better lawyer than one who fails to recognize a problem or refuses to seek help.

In Applicant, the Florida Supreme Court held the government's need for disclosure outweighed the individual's privacy interest. Since that 1983 decision, inquiries have been expanded, [FN4] increasing the threat to an applicant's right to privacy. Because the court used a balancing test, [FN5] more intrusive questions could tilt the balance in favor of an applicant's privacy rights. But virtually unlimited support of the need for such information, and dicta that the questions satisfy the highest level of scrutiny mean, if challenged, the new questions are also likely to be approved.

John Moore, executive director of the ***72** Board of Bar Examiners, strongly supports these questions, claiming they identify people who lie. [FN6] Surely bar examiners can find a less harmful way.

These inquiries injure applicants and the public. Concerns about responding to these questions cause some applicants to reject or postpone treatment. [FN7] A paragraph which "assures" applicants the board "regularly admits" people with a history of mental illness or treatment by mental health professionals is insufficient to allay these fears. Many applicants recognize that, even if the board ultimately recommends admission, those who have received treatment face additional investigation and possible delay. [FN8]

Mental Illness

Bar examiners and the Florida Supreme Court misunderstand or ignore important facts about the nature, effect, and prevalence of mental illness. Only approximately one-third of the 28 percent of Americans suffering from a diagnosable mental illness are disabled by their psychiatric conditions. [FN9] One-third of those with an illness consult a mental health professional, not necessarily the same people as are disabled by their condition. Even if a causal relation exists between mental disorders and diminished ability to practice competently, it makes no sense to heighten scrutiny of only those applicants who seek treatment, especially because 46 percent of those treated have

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no diagnosable mental illness. [FN10] The conclusion is simple: Current questions identify the wrong people.

In Applicant, the court recognized there is "no precise list of medical conditions that may affect a person's fitness to practice law and no uniformity among people who suffer from those conditions." [FN11] This means mere presence of a medical condition is not an accurate predictor of fitness, and individuals react differently to the same conditions. But the court rejected the logical solution: questions inquiring about impairment.

Even if the court was correct in affirming the questions, and even if the same analysis could be applied to the current more invasive inquiries, the questions must be eliminated, or at least modified, for another reason: They violate the ADA.

Americans With Disabilities Act of 1990

Congress passed the ADA to protect the 43 million disabled Americans from discrimination in various aspects of their lives. [FN12] Specific detailed provisions of the act prevent employers from discriminating in hiring, promoting, or firing based on disability and ensure reasonable accommodations [FN13] if requested. The ADA prohibits medical inquiries or exams during the interview process, but permits asking if an applicant can perform essential job functions. Under limited circumstances, some medical inquiries are permitted, but to protect employees from unauthorized disclosure of private information, Title I requires this information "be collected and maintained on separate forms and in separate medical files and . . . treated as a confidential medical record." To further protect the applicant's privacy, disclosure is limited. [FN14]

The Florida Supreme Court approved the questions, partially based on perceived limited disclosure. [FN15] But private medical information is available to anyone with access to the applications. Providing the protection mandated by the ADA--separate forms and separate medical files--would strengthen the board's argument. Thus, the individual's privacy would be better protected, this provision of the act would be satisfied, and the board would get information. Maintaining medical information separately, however, is not sufficient to comply with the act. Because the board has failed to prove invasive information it seeks is "job-related and consistent with business necessity," it cannot ask these questions. [FN16]

Title II prevents discrimination in benefits provided by a state "instrumentality." The board is an instrumentality of the state. The benefit is licensure as a member of The Florida Bar.

An employer can defend against charges of discrimination by proving "qualification standards, tests, or selection criteria . . . are job-related and consistent with business necessity." [FN17] A "public entity may not administer a licensing or certification program in a manner that subjects qualified individuals . . . to discrimination" based on disability. [FN18] This means the covered entity--in this case the board--cannot deny a benefit-- admission to the Bar--without proving criteria are related to ability to practice. But, without proof, the board and court assert mental disorder is causally related to fitness to practice. These assertions "reflect the fundamental prejudices and misconceptions which the ADA sought to combat, without achieving their purpose of insuring competent and qualified attorneys." [FN19]

An employer may reject an applicant who poses a "direct threat" to the health or safety of others. [FN20] Bar examiners may also exclude applicants who pose a "direct threat" to the public. The assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge . . . ." [FN21] Just as this article suggests, " f or individuals with mental and emotional disabilities, the employer must identify the specific behavior on the part of the employee that would pose the direct threat." [FN22]

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Responding to an ADA challenge, the Court of Appeals for the District of Columbia recently eliminated questions concerning treatment for mental conditions ***73** and limited questions about treatment for substance abuse and hospitalization to five years. [FN23] This compromise moves the result in the right direction, but the court, bar examiners, and even some mental health advocates missed the real solution. Because the issue is whether--based on past conduct, not status--the applicant's competence is likely to be impaired, bar examiners should inquire about behavior. Questions about treatment for mental health and substance abuse do not help predict applicants who will not, or cannot, competently practice. Further, time limits on hospitalization or treatment for substance abuse are not responsive to the interests of the public or applicant.

The Florida Response

Because attorneys occupy a position of trust, the board is justified in investigating fitness and moral character. A "record of conduct" should prove an applicant's "character and fitness . . . assure the protection of the public and safeguard the justice system." [FN24] But mental illness is no more a character issue than cancer or other illness. If disease manifests in injurious behavior, the conduct implicates moral character, not the illness. Therefore, bar examiners have the right to ask only about behavior, not illness or disability.

Thomas **Pobjecky,** general counsel for the Florida Board of Bar Examiners, disagrees. He claims questions about treatment for mental illness and substance abuse are necessary to determine fitness to practice law. "In determining whether applicants have established good moral character sufficient to demonstrate their fitness and capacity to practice law, bar examiners must consider the mental and emotional stability of bar applicants." [FN25]

After discussing two disciplinary cases, **Pobjecky** concludes they "should leave no doubt that substantial harm to a client can result from the conduct of a mentally impaired attorney." [FN26] Ironically, he missed the point of his own statement. The lawyer's misconduct, not mental disorder, caused harm to clients and made him unfit. Moreover, contrary to **Pobjecky's** assertions, Florida Bar proceedings for the last three years fail to highlight mental disorders as a major cause for disciplinary actions. [FN27]

If mental disorders do contribute to misconduct, the argument for asking about treatment as part of the application process is actually weakened because the questions failed to identify applicants whose conduct as lawyers later cause problems. Further, even though advocates of the questions concede these inquiries exclude few, if any, applicants, **Pobjecky** concludes bar examiners must continue to ask "[f]or the protection of the public." [FN28]

**Pobjecky** also summarily rejected the argument the ADA applies to licensing. He claims, without proof, that attempts to apply the act are "not supported by any reasonable interpretation" of the ADA and its regulations. [FN29] He is wrong.

In fact, a state court in Maine recently held the act does apply. [FN30] Bar examiners are an instrumentality of the state and thus cannot discriminate based on disability. "Although it is certainly permissible . . . to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA," current questions are contrary to the act. As a result, applicants cannot be required to answer these questions. [FN31]

**Pobjecky** also disagrees with the D.C. court's modifications because there is "simply no rational basis to distinguish . . . treatment for mental illness and . . . drug or alcohol abuse." Mr. **Pobjecky's** conclusion is puzzling--the ADA itself distinguishes between mental illness and substance abuse, specifically excluding illegal drug users from protection.

Questions about substance abuse or hospitalization within the past five years target more closely what the public

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has a right to know. Neither substance abuse nor mental illness relate directly to ability to practice law; conduct does. Substance abuse might result in behavior which increases the risk a lawyer might injure a client. But virtually unlimited questions concerning any substance abuse within an arbitrarily defined time limit are not narrowly tailored to obtain information needed to protect ***74** the public. Inquiries about hospitalization are justified as evidence of functional impairment in performing ordinary, work-related tasks. But hospitalization for physical illness implies similar functional interference. Consequently, if this is an appropriate inquiry, boards should ask about all hospitalizations. Otherwise the questions are exposed as what they seem to be--further stigmatization based on myths and prejudice about mental illness.

Suggested Questions

1) Have you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution? If so, explain.

2) Has your grade point average ever varied by half a letter grade or more between two terms? If so, explain.

3) Have you ever been absent from school or a job for more than 30 consecutive days? If so, explain.

4) Have you ever been fired from, asked to leave, or had disciplinary action taken against you in any job? If so, explain.

5) Have you ever been evicted or asked to vacate a place in which you lived? If so, explain.

6) Have you ever been arrested for D.U.I.? If so, explain the circumstances, including outcome.

7) Have you had any blackouts or periods of intoxication associated with alcohol or any other drug within the past six months? If so, explain.

Conclusion

The public has an interest in ensuring only those who are fit to be licensed to practice law. But inquiries which focus on treatment for mental illness or substance abuse do not aid in determining fitness. In addition, these questions violate the ADA by discriminating based on disability. The only support for this discrimination is myths, stereotypes, and prejudice. Because the board has failed to meet its burden of proving discriminatory questions are job-related, the questions must be eliminated. Instead, to determine fitness, inquiries should focus on whether past conduct indicates an applicant will competently practice law.

Phyllis Coleman graduated from the University of Florida College of Law and is a professor at the Shepard Broad Law Center, Nova University.
Ronald A. Shellow is a clinical professor of psychiatry at the University of Miami.

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[FN1]. Rules of the Supreme Court Relating to Admission to the Bar III.B.2.b. (emphasis added).

[FN2]. Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71, at 73-75 (1983).

[FN3]. William Narrow, Darrell Regier, Donald Rae, Ronald Manderscheid, Ben Locke, Use of Services by Persons with Mental and Addictive Disorders; Findings from National Institute of Mental Health, Epidemiologic

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Catchment Program, 50 Arch. Gen. Psych. 95 (1993).

[FN4]. Question 29.c. goes so far as to ask if psychotropic medicine-- defined as "any prescription drug or compound affecting the mind, behavior, intellectual functions, perceptions, moods, or emotions. . . ."--has ever been prescribed for the applicant. This definition includes virtually every prescription and nonprescription drug.

[FN5]. Applicant, 443 So. 2d at 75-76.

[FN6]. John Murawski, Fitness vs. Stereotype; Can Bar Examiners Seek Psychiatric Records, Legal Times at 1 (Jan. 13, 1992).

[FN7]. Stephen T. Maher & Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applications, 23 Ind.L.Rev. 821, 830-33 (1990).

[FN8]. Deborah L. Rhodes, Moral Character as a Professional Credential, 94 Yale L.J. 491, 581-83 (1985).

[FN9]. Twenty-eight percent encompasses all mental disorders, including substance abuse. Darrell A. Regier, William E. Narrow, Donald S. Rae, Ronald W. Manderscheid, Ben Z. Locke, Frederic K. Goodwin, The de Facto US Mental and Affective Disorders Service System; Epidemiologic Catchment Area Prospective 1- Year Prevalence Rates of Disorders and Services, 50 Arch. Gen. Psych. 85 (Feb. 1993).
Presence of mental illness does not necessarily mean an individual's performance is impaired. In fact, "[o]nly 9 percent [of the population] report some disability associated with mental disorder. In a given year, 10.9 percent of the population seek some mental health treatment; half of them meet criteria for a mental disorder." Advisory Council to the National Institute of Mental Health, Report to the Congress (March 1993).

[FN10]. Narrow, supra note 3, at 95.

[FN11]. Applicant, 443 So. 2d at 75. The court recognized "medical" conditions may affect a person's fitness, but bar examiners only ask about treatment for psychiatric--not physical--illness.

[FN12]. The act protects disabled individuals, people with a history of disability, and those regarded as having a disability.

[FN13]. Some applicants are admitted on conditions such as monitoring by a physician or attending A.A. Conditional admission may be a reasonable accommodation under the ADA for some applicants. However, inquiries examiners use to determine applicants in this category violate the act, thus invalidating the whole procedure.

[FN14]. 42 U.S.C. § 12112(d)(3)(A, (B) (1990).

[FN15]. Applicant, 443 So. 2d at 75.

[FN16]. Although in Title I, this section states a disabled individual cannot "be denied a job or benefit." 42 U.S.C. § 12113(a) (emphasis added). This language supports the argument that at least this section of Title I applies to situations other than employment.

[FN17]. 42 U.S.C. § 12113(a). Regulations and interpretive guidance provide Title I applies to Title II. Some commentators suggest this is only true when the state is an employer. They are wrong--at least to the extent they

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deny protection to bar applicants.

[FN18]. 28 C.F.R. 35.130(b)(6), 56 Fed.Reg. at 35718.

[FN19]. Bar Examiners Run Afoul of New Disabilities Law, The Connecticut Law Tribune, 10 (Aug. 10, 1992) quoting Joe Doe memorandum of law.

[FN20]. 28 C.F.R. § 1630.1(r).

[FN21]. Id.

[FN22]. Interpretive Guidance § 1630.2(r) (emphasis added). This argument is buttressed by the different treatment for physical disability in which "the employer must identify the aspect of the disability that would pose the direct threat." Id.

[FN23]. Charles L. Reischel, The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health, 61 The Bar Examiner 10, 16-21 (Aug. 1992).

[FN24]. Rules for Admission, III.B.2.b.

[FN25]. Thomas **Pobjecky,** Mental Health Inquiries: To Ask, or Not to Ask-- That Is the Question, 61 The Bar Examiner 31, 36-37 (Aug. 1992). **Pobjecky** inappropriately links moral character with mental illness.

[FN26]. Id. at 35.

[FN27]. The Florida Bar Grievance System, Monthly Statistics (July 1, 1989- June 30, 1992).

[FN28]. **Pobjecky,** supra note 25, at 37.

[FN29]. Id. at 34.

[FN30]. In re Applications Anne Underwood and Judith Ann Plano, Docket No. BAR-93-21 (Dec. 7, 1993) (unpublished opinion).

[FN31]. Id. at 4. These questions are similar to the Florida inquiries.

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