

2020

Trial by Surprise: When Character and Fitness Investigations Violate the ADA and Create Dangerous Lawyers

Michelina Lucia

Follow this and additional works at: <https://scholarship.law.umn.edu/lawineq>

Recommended Citation

Michelina Lucia, *Trial by Surprise: When Character and Fitness Investigations Violate the ADA and Create Dangerous Lawyers*, 38 LAW & INEQ. (2020).

Available at: <https://scholarship.law.umn.edu/lawineq/vol38/iss1/8>

Trial by Surprise: When Character and Fitness Investigations Violate the ADA and Create Dangerous Lawyers

Michelina Lucia†

Table of Contents

Introduction	206
D) “We Have Strict Statutes and Most Biting Laws”: the ADA, Character and Fitness Questions, and Legal Protections Against Discrimination	212
A) The Purpose of the Americans with Disabilities Act	212
B) The ADA Applied to Licensure	213
(1) Dangerous Applicants: The Direct Threat Defense	
(2) Defining “Direct Threat”	215
C) Whom to Sue? State Supreme Courts’ Responsibility to Adhere to the ADA While Administering Licenses	218
D) Character and Fitness Questions Nationally	219
(1) Questions on Serious Mental Illnesses	219
(2) Questions on Emotional, Nervous, or Mental Disorders	220
(3) U.S. Department of Justice Emphasizes the Importance of Questioning Conduct, Not Disability Status	222
II) To Be (in Therapy) or Not to Be: That is the Question for Lawyers and Law Students	227
A) Definitions of Competence in Lawyers	227
B) Mental Health in the Legal Profession.....	229

†. J.D. Candidate, 2020, University of Minnesota Law School. Thanks to Professors Jill Hasday and Stephen Befort, Nicole Heringer, and Stephanie Gruba for improving the quality and direction of the paper. Thanks also to Daniel Rife, Nicole Heringer (again), and Michael Gale-Butto for listening and providing thoughtful comments and encouragement as my research developed. Finally, thanks to Barnett Rosenfield for introducing me to the topic in the first place.

C) Violative Questions Deter Law Students from Seeking Treatment	232
III) “The Purest Treasure . . . is a Spotless Reputation”: A Study of Minnesota’s Character and Fitness Questionnaire.....	233
A) The Black Box: MBLÉ’s Application for Admission to the Bar	234
(1) Minnesota’s Questions and Procedures on Mental Health Are Overly Broad	234
B) How to Make Question 4.37(b) Effective and Not Violate the ADA	243
C) The MBLÉ Should Investigate Poor Health Choices in Question 4.41, Not Past Medical Records	247
D) Burden of Proving Direct Threat in Minnesota	247
E) Shifting the Burden of Proof Back to the MBLÉ	249
F) Authorizations: Giving Up All Privacy Rights to the MBLÉ	250
G) Ensuring MBLÉ’s Authorization is Safe	251
H) Minnesota’s Evaluation in Practice: A Trial by Surprise	251
(1) MBLÉ’s Processes and Procedures to Evaluate Character and Fitness	251
(2) Trial by Surprise: Character and Fitness Hearings as Explained by Practicing Attorneys	256
I) The Legal Community Should do More to Ensure That Students Seek Mental Health Treatment When They Need It	261
IV) “Our Remedies Oft in Ourselves Do Lie”: Final Observations	263

Introduction

Congress enacted the Americans with Disabilities Act (ADA) in 1990.¹ Since that time, employers and other entities have been forced to change many practices to make disabilities less of a barrier to employment.² Yet, discrimination persists. A common area of

1. Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101–12213 (1994)).

2. U.S. Dep’t of Labor, *Accommodations*, OFF. OF DISABILITY EMP. POL’Y, [htt](#)

employment discrimination is in professional licensure. Applicants for professional licenses must often disclose details of their mental health in order to pass character and fitness investigations.³ These investigations—when conducted by the Board of Law Examiners of various states—can include providing sensitive therapist’s notes, submitting to psychological evaluations, and participating in meetings and hearings that implement a trial-by-surprise approach.⁴ In these investigations, the Board of Law Examiners enshroud hearings in a veil of secrecy so they can gauge the reaction of applicants.⁵ Law students with mental illness are particularly susceptible to facing a disparate negative impact⁶ by invasive mental health questions. In response to these questions and procedures, many students hide their mental illness resulting from the intense pressures of law school because they fear the extreme stigmatization surrounding mental illness in the legal community.⁷ Multiple recent psychological studies shed light on the extremely high prevalence of mental illness in the legal community.⁸ This

[ps://www.dol.gov/odep/topics/Accommodations.htm](https://www.dol.gov/odep/topics/Accommodations.htm) [<https://perma.cc/Q5N5-LG7J>] (stating that employers have had to make adaptations such as physical changes like “installing a ramp or modifying a rest room” and “modifying the layout of a workspace,” accessible communications like “providing sign language interpreters or closed captioning at meetings and events” and “making materials available in Braille or large print,” policy enhancements like “modifying a policy to allow a service animal in a business setting” and “adjusting work schedules so employees with chronic medical conditions can go to medical appointments and complete their work at alternate times or locations,” and accessible and assistive technologies like “ensuring computer software is accessible,” “providing screen reader software,” and “using videophones to facilitate communications with colleagues who are deaf.”).

3. See Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the “Others” in the Name of “Protection,”* 2018 U. ILL. L. REV. 345, 366–367 (2018) (noting that lawyers, doctors, veterinarians, dentists, and law enforcement professionals must pass board-approved character and conduct requirements that attempt to predict future bad behavior). While issues of ADA violations in the context of professional licensure can conceptually include any character and fitness evaluation for professional licensure, asking questions about mental health, ADA violations in other professional licensure contexts are beyond the scope of this Article.

4. *Id.*

5. See *infra* text accompanying notes 303–305.

6. MINN. STATE BD. OF LAW EXAM’RS, 2018 ANNUAL REPORT 10 (July 19, 2019) [hereinafter 2018 ANNUAL REPORT], <https://www.ble.mn.gov/wp-content/uploads/2019/08/2018-BLE-Annual-Report.pdf> [<https://perma.cc/5SGX-N5QE>] (stating that the Minnesota Law Examiners Board inquires into mental health issues, which can lead to applicants being conditionally admitted). The ADA establishes a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1) (2018).

7. See *infra* text accompanying notes 162–164.

8. See, e.g., Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. ADDICTION MED. Jan./Feb.

research also shows the disturbing trend of lawyers and law students not seeking mental health assistance due to fears they will not be licensed or will lose their license.⁹ The super-competitive atmosphere of the legal community encourages law students and lawyers to push mental health to the background in order to gain a perceived advantage in the legal field. Even though the Model Rules of Professional Conduct call for self-care to ensure diligent lawyering, law students typically do the opposite.¹⁰

While law students feel pressure from their surrounding community to hide mental illnesses that the student or legal community may perceive as weaknesses, state boards evaluating character and fitness are uniquely situated to ensure that law students know that part of what makes attorneys competent to practice law is ensuring they take care of their mental health. Unfortunately, these boards are also able to cement the idea into law students' minds that mental illness is something that makes others automatically question the student's ability to practice law. Depending on how the board handles its public communications and the language in its application, the board can encourage law students to downplay their mental illness or be open about struggles they have overcome or are in the process of overcoming. Regrettably, the Minnesota State Board of Law Examiners (MBLE) is one of the former boards, helping to cement the stigma of mental illness as an automatic barrier to practicing law.¹¹ These practices disincentivize law students from seeking mental health treatment.¹²

2016, at 46, 51 (describing the various psychological studies' results that demonstrate that attorneys have abnormally high rates of mental health symptoms).

9. *Cf. id.* (“[I]n light of the pervasive fears surrounding [attorneys'] reputation that many identify as a barrier to treatment, it is not at all clear that these individuals would avail themselves of the resources at their disposal while working in the competitive, high-stakes environment found in many private firms.”).

10. MODEL RULES OF PROF'L CONDUCT r. 1.3, cmt. 2 (AM. BAR ASS'N 2018) (stating that a “lawyer's work load must be controlled so that each matter can be handled competently.”).

11. 2018 ANNUAL REPORT, *supra* note 6, at 10 (illustrating that the MBLE inquiries into applicants' mental health may place applicants on conditional admissions for mental health-related misconduct).

12. See JESSIE AGATSTEIN ET AL., YALE LAW SCH. MENTAL HEALTH ALL., FALLING THROUGH THE CRACKS: A REPORT ON MENTAL HEALTH AT YALE LAW SCHOOL 3–4 (2014), https://law.yale.edu/system/files/falling_through_the_cracks_120614.pdf [https://perma.cc/2MXB-UPLH] (explaining that law students “overwhelmingly feared exclusion and stigma from a variety of sources, including state bar associations, faculty, administrators, and peers”); see also Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEG. EDUC. 116,

The ADA provides law students with disabilities protections so they can achieve competitive employment.¹³ The ADA also provides these protections when entities administer professional licenses.¹⁴ Individuals administering professional licenses will not be liable under the ADA for discrimination if the person with a disability is a direct threat to the health or safety of others.¹⁵ This is known as the direct threat defense.¹⁶ Boards of Law Examiners are responsible for investigating bar applicants' character and fitness and administering the bar examination.¹⁷ Character and fitness questions protect the public from those who would abuse the power lawyers possess by only licensing the most trustworthy and honest applicants.¹⁸ Using the direct threat defense, the states' Boards of Law Examiners do not provide transparency in the investigative process. Instead, their invasive questions about applicants' mental health in character and fitness applications investigate far beyond what is necessary to conduct an individualized assessment of the applicant to ensure they are not a direct threat.¹⁹

148–50 (2016) (stating that only a small percentage of law students seek assistance for alcohol/drugs or mental health issues, and there is a correlation between mental health issues and apprehension regarding character-and-fitness questions).

13. 42 U.S.C. §§ 12101(a)(5), (b)(2)–(4) (2018).

14. 28 C.F.R. §§ 35.130(b)(6), (8) (2018).

15. 28 C.F.R. § 35.139(a) (2018); 28 C.F.R. §§ 35.130(b)(6), (8) (2018), *id.* Pt. 35, App. B (explaining the direct threat defense to the ADA).

16. Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377, 379–85 (2018).

17. 2018 ANNUAL REPORT, *supra* note 6, at 1 (explaining that the Minnesota Board of Law Examiners “investigates bar applicants’ character and fitness and administers the Minnesota bar examination.”); *see also Supreme Court Offices: Board of Bar Examiners*, WIS. COURT SYS., <https://www.wicourts.gov/courts/offices/bbe.htm> [<https://perma.cc/XN2K-XSNL>] (explaining that the Wisconsin Board of Bar Examiners evaluate the skills, character, and fitness of lawyers in addition to writing and grading the bar examination); *About*, ILL. BD. OF ADMISSIONS TO THE BAR (2019), <https://www.ilbaradmissions.org/about> [<https://perma.cc/8EMY-N25Y>] (noting that the Illinois Board of Admissions to the Bar administers the character and fitness process, bar examination, and reviews the approval of applications for admission on motion).

18. Lusk, *supra* note 3, at 349; *see also, e.g.*, MINN. STATE BD. OF LAW EXAM’RS, RULES FOR ADMISSION TO THE BAR, r. 1 [hereinafter RULES FOR ADMISSION], <https://www.ble.mn.gov/rules/> [<https://perma.cc/7XPV-D35Z>] (noting that the purpose of the MBLE is “to ensure that those who are admitted to the bar have the necessary competence and character to justify the trust and confidence that clients, the public, the legal system, and the legal profession place in lawyers.”).

19. *See generally* Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430 (E.D. Va. 1995) (demonstrating a challenge to the Virginia Board of Law Examiners’ character and fitness mental health questions); Applicants v. Tex. State Bd. of Law Exam’rs, No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994) (demonstrating a

This Article compares empirical data from interviews with Minnesota attorneys²⁰ to the language of Minnesota's Character and Fitness Questionnaire as well as to official reports and rules published by the MBLE. This Article also analyzes these sources against multiple, recent psychological studies on lawyers and law students to argue that the MBLE's Character and Fitness Questionnaire violates the ADA in word and practice. This Article will demonstrate how the Minnesota Character and Fitness Questionnaire asks overly broad questions that act as a screening device to ask about mental disability status, requires unduly expansive authorizations to access medical records, allowing for investigations with unknown limits and procedures, and places additional burdens on applicants with mental disabilities by not providing transparent evaluations of character and fitness. This Article further illustrates that these questions and investigations likely do not to follow the U.S. Supreme Court's established direct threat defense—an affirmative defense to violating the ADA.²¹ This Article reveals that the MBLE does not follow the Eighth Circuit's holding that the party bringing such an affirmative defense bears the burden of proving the person with a disability poses a direct threat—instead the MBLE places this burden on the applicant.²² Finally, this Article will articulate that these procedures cause fear and undue anxiety in law students prompting them to hide their mental illness in case their applications for licensure are denied.

challenge to the Texas Board of Law Examiners' character and fitness mental health questions); *In re Underwood*, 1993 WL 649283 (Me. Dec. 7, 1993) (describing the Maine Board of Law Examiners' character and fitness mental health questions).

20. This Article uses information obtained from interviews and/or lectures from William Wernz, Retired Partner, Dorsey & Whitney LLP, Eric Cooperstein, Law Office of Eric T. Cooperstein, Ed Kautzer, President at Revelson & Kautzer, and Joan Bibelhausen, Executive Director for Minnesota's Lawyers Concerned for Lawyers. In addition, the author interviewed the Director of the Minnesota State Board of Law Examiners. Due to the Minnesota State Board of Law Examiners' unwillingness to have this interview used, this Article instead compiles the Board's officially published materials to examine what the Board states is its process for examining character and fitness relating to mental health. Finally, this Article incorporates recent news reports on the Minnesota Supreme Court's public stance on mental health in Minnesota's legal community.

21. *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 287–88 (1987) (outlining the current form of direct threat defense).

22. MINN. BD. OF LAW EXAM'RS, APPLICATION FOR ADMISSION 9 (2018) [hereinafter APPLICATION FOR ADMISSION], <https://www.ble.mn.gov/wp-content/uploads/2017/01/Bar-Application-Fill-In.pdf> [<https://perma.cc/AXD9-TKV9>] (instructing applicants before the mental health questions that “[y]ou bear the burden of demonstrating that you possess the qualifications necessary to practice law.”).

This Article will confirm how these procedures, rather than flagging potentially dangerous applicants, actually create the very dangerous lawyers the MBLÉ is trying to prevent. While this Article uses the Minnesota Character and Fitness Questionnaire as a case study, similar issues on violations of the ADA in character and fitness investigations can, and have, arisen in other states.²³ This Article contributes to the national discussion of ADA violations in the professional licensure context by providing solutions to national issues of ADA violations and mental illness stigma.

Part I discusses the purpose of the ADA, its protections, and discusses the ADA challenges to character and fitness questions nationally. Part II describes what makes lawyers competent and discusses the recent psychological studies showing the poor mental health atmosphere of the legal community.

Part III describes Minnesota's character and fitness questionnaire and the procedures the MBLÉ uses to evaluate applicants' fitness to practice law. This Part shows how Minnesota's questionnaire violates the ADA and the Eighth Circuit's ruling. Part III also discusses competence and mental health issues facing the legal profession. It argues how violative questions and obfuscatory procedures deter law students from seeking treatment that, in turn, harms the legal community. This Part provides remedies to these issues and argues that the MBLÉ should provide more clarity in their evaluation process for those answering affirmatively to mental health questions. It argues that the MBLÉ should follow the U.S. Supreme Court's direct threat defense analysis by publicly affirming their commitment to using this defense, and publicly affirming that it is committed to adhering to the Eighth Circuit's burden of proof requirement. If the MBLÉ will not make these changes, this Part calls on the Minnesota Supreme

23. See generally *ACLU of Ind. v. Individual Members of the Ind. State Bd. of Law Exam'r*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470 (S.D. Ind. Sept. 20, 2011) (illustrating that Indiana faces issues regarding the state's character and fitness investigations); *Applicants v. Tex. State Bd. of Law Exam'r*, No. A 93 CA 740 SS, 1994 WL 923404 (showing that Texas faces issues regarding the state's character and fitness investigations); *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333 (R.I. 1996) (demonstrating that Rhode Island faces issues regarding the state's character and fitness investigations); *In re* Underwood, 1993 WL 649283 (demonstrating that Maine faces issues regarding the state's character and fitness investigations); Press Release Number: 14-860, Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities, Dep't of Justice: Office of Pub. Affairs (August 15, 2014), <https://www.justice.gov/opa/pr/departement-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates> [<https://perma.cc/N3H4-69GK>] (showing that Louisiana faces issues regarding the state's character and fitness investigations).

Court to establish a committee to review the MBLE's practices and evaluative procedures to ensure that it adheres to the ADA. Part IV concludes by calling on the legal community to facilitate these changes.

I: “We Have Strict Statutes and Most Biting Laws”²⁴: the ADA, Character and Fitness Questions, and Legal Protections Against Discrimination

A) The Purpose of the Americans with Disabilities Act

Congress enacted the ADA to establish a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”²⁵ Congress intended to “provide clear, strong, consistent, enforceable standards” to address disability discrimination²⁶ and establish the Federal Government’s role in enforcing standards to protect individuals from discrimination.²⁷ Among other things, the ADA prohibits discrimination by overprotective rules, exclusions, qualification standards, and actions to relegate people to jobs with lesser benefits or opportunities.²⁸ The ADA’s purpose is to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals”²⁹ William D. Goren, an attorney with twenty-three years of practice on ADA cases, described the ADA as essentially a “starting line” statute that places people with disabilities at the same starting point as those without disabilities.³⁰

To be protected by the ADA, one must meet the definition of disability under the ADA. The ADA defines an individual with a disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual;”³¹ an

24. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 1, sc. 3.

25. 42 U.S.C. § 12101(b)(1) (2018).

26. *Id.* § 12101(b)(2).

27. *Id.* § 12101(b)(3), (4).

28. *Id.* § 12101(a)(5). The general anti-discrimination provision highlights the importance of protecting individuals with disabilities from being ostracized from the workplace, stating, “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (2018).

29. § 12101(a)(7).

30. WILLIAM D. GOREN, UNDERSTANDING THE ADA 1 (4th ed. 2013).

31. § 12102(1)(A).

individual having “a record of such an impairment;”³² or “[r]egarded as having such an impairment”³³ by establishing that the person was “subjected to an action prohibited under this chapter [Equal Opportunities for Individuals with Disabilities] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”³⁴ Essentially, the ADA protects individuals who are discriminated against based on a disability they currently have, they had in the past, or that others think they have.³⁵

B) *The ADA Applied to Licensure*

1. Dangerous Applicants: The Direct Threat Defense

Although the ADA prohibits local government and state services from discriminating based on disability,³⁶ these government and state services will not be liable in some circumstances when administering professional licenses. Congress directed the Department of Justice (DOJ) to promulgate regulations on the ADA providing an additional source of protective laws.³⁷ Some of the DOJ’s regulations relate to administering professional licenses—such as a license to practice law. As a general rule, public entities cannot “directly or through contractual or other arrangements, utilize criteria or methods of administration: . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability[.]”³⁸ Public entities cannot “[a]dminister a licensing or certification program in a manner that subjects qualified individuals” to discrimination based on disability.³⁹ These licensing entities cannot

impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, *unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.*⁴⁰

32. *Id.* § 12102(1)(B).

33. *Id.* § 12102(1)(C).

34. *Id.* § 12102(3)(a).

35. *See id.* §§ 12102(1)(A)–(B), (3).

36. 28 C.F.R. §§ 35.130(b)(6), (b)(8) (2018).

37. 42 U.S.C. § 12134(a) (2018).

38. 28 C.F.R. §§ 35.130(b)(3), (b)(3)(i) (2018).

39. *Id.* § 35.130(b)(6).

40. *Id.* §§ 35.130(b)(8) (emphasis added).

However, a public entity can prevent a person from obtaining a license if the person “poses a direct threat to the health or safety of others.”⁴¹

In these circumstances, a licensing entity can bring what is known as a direct threat defense. If posing a direct threat, the individual is not “qualified” for protection within the meaning of the ADA “[i]f [they] pose a direct threat to the health and safety of others.”⁴² Establishing that a person is a direct threat was a defense to discrimination established long before the ADA and was later adopted into the ADA.⁴³ Because it is an affirmative defense to discrimination, the public entity bears the burden of proving direct threat.⁴⁴

The licensing entity must show the applicant poses a direct threat to the health or safety of others. Direct threat to the health or safety of others is found after making:

an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury

41. 28 C.F.R. § 35.139(a) (2018); 28 C.F.R. Pt. 35, App. B (2018).

42. *See* R.W. v. Bd. of Regents of the Univ. Sys. of Ga., 114 F. Supp. 3d 1260, 1283 (N.D. Ga. 2015) (noting that a person is “not ‘qualified’ within the meaning of the statute if he poses a direct threat to the health and safety of others”) (citing *Onishea v. Hopper*, 171 F.3d 1289, 1296–97 (11th Cir. 1999)).

43. *See* Ann Hubbard, *Understanding and Implementing the ADA’s Direct Threat Defense*, 95 NW. U.L. REV. 1279, 1298 (2001) (explaining how the direct threat first appeared in a narrower form as an amendment to Section 504 of the Rehabilitation Act of 1973, developed, by the Supreme Court, to its current form in *School Board of Nassau County v. Arline*, and was adopted by Congress into the ADA and the direct threat defense). Congress, in enacting the ADA and direct threat defense, adopted prior established protections of disabled individuals. *See also* 42 U.S.C. § 12201(a) (2018) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (explaining that, in interpreting the ADA, the Supreme Court is “informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question.”).

44. *Equal Emp’t Opportunity Comm’n v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 572 (8th Cir. 2007) (establishing that the employer bears the burden of proving direct threat in the Eighth Circuit). Circuits differ as to whether the burden of proof rests on the plaintiff or defendant. Some circuits place the burden on the plaintiff to show they are not a direct threat. Others (like the Eighth Circuit) place the burden on the defendant to show the individual is not a direct threat. The Tenth Circuit, in *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004), took a different approach, placing the burden on the individual if their essential job duties implicate safety, but in all other cases, placing the burden on the employer. STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, *DISABILITY LAW: CASES AND MATERIALS* 220 (2017).

will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.⁴⁵

The threat cannot “be based on generalizations or stereotypes about the effects of a particular disability.”⁴⁶ Further, this individualized assessment does not generally require a physician’s involvement.⁴⁷ The assessment can draw from public health authorities like the U.S. Public Health Service, Centers for Disease Control, and the National Institutes of Health, which includes the National Institute of Mental Health.⁴⁸ As an added protection for individuals with disabilities, the entity *must* rely on “particularized facts about the specific person’s condition” in order to support their decision without violating the ADA.⁴⁹ This addition protects individuals from being evaluated based on stereotypical perceptions of the disability.⁵⁰ In other words, a public entity, such as a board of law examiners, may refuse to license an applicant so long as it can show, after an individualized assessment, that the disability poses a direct threat to the health or safety of others. The question to ask is, what makes a law student applying for a license to practice law a “direct threat”?⁵¹ Does “direct threat” include being a bad lawyer for someone? If so, how bad must a lawyer be before they are considered a “direct threat”?

2. Defining “Direct Threat”⁵²

There are only a few cases describing what a direct threat to the health or safety of others looks like in the context of the above federal regulation. Courts have considered four factors in determining direct threat. These factors were taken from *School Board of Nassau County, Florida v. Arline*, a Supreme Court case, and are commonly referenced when discussing the direct threat defense.⁵³ Although heard by the Supreme Court before the ADA’s

45. 28 C.F.R. § 35.139(b) (2018).

46. 28 C.F.R., Part 35, App. B at 702.

47. *Id.*

48. *Id.*

49. *Lowe v. Ala. Power Co.*, 244 F.3d 1305, 1305 (11th Cir. 2001).

50. *Id.*

51. 28 C.F.R. § 35.139(a) (2018).

52. *R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, 114 F. Supp. 3d 1260, 1283 (N.D. Ga. 2015) (citing *Onishea v. Hopper*, 171 F.3d 1289, 1296–97 (11th Cir. 1999)) (applying the direct threat defense).

53. *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 287–88 (1987) (discussing a direct threat a teacher who tested positive for HIV posed to students). Although this case was decided before the ADA was enacted in 1990, because

adoption, *Arline* was adopted by the ADA along with other, prior established protections of individuals with disabilities.⁵⁴ This decision makes *Arline*'s interpretation of the direct threat defense binding in all jurisdictions. According to the Supreme Court in *Arline*, in analyzing whether direct threat exists, parties must look at "(a) the nature of the risk . . . , (b) the duration of the risk . . . , (c) the severity of the risk . . . , and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."⁵⁵ The risk *must be significant*.⁵⁶ The risk must also be determined from the standpoint of the entity refusing to accommodate the individual with a disability.⁵⁷ The assessment "must be based on medical or other objective evidence."⁵⁸ Further, health care professionals' *objectively reasonable* views, rather than their individual judgments, should be given weight.⁵⁹ The Eighth Circuit definitively established that the person bringing the affirmative

Congress incorporated previously established protections of disabled individuals, the four-factor analysis set out in *Arline* still applies to potential ADA violations today. See Hubbard, *supra* note 43. The fact that this case involves an individual with HIV makes the comparison to law students more attenuated. However, *Arline* was the first case to formulate the current direct threat defense analysis by the Supreme Court. See *id.* at 1298.

54. See 42 U.S.C. § 12201(a) (2018) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (explaining that, in interpreting the ADA, the Supreme Court is "informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question."). See also Hubbard, *supra* note 43, at 1298 (explaining how the direct threat "first appeared, in a narrower form, as an amendment to Section 504 of the Rehabilitation Act of 1973," was then developed by the Supreme Court into its current form in *Arline*, and was finally adopted by Congress into the ADA and the direct threat defense).

55. *Arline*, 480 U.S. at 287–88 (1987) (internal quotation omitted); *R.W.*, 114 F. Supp. 3d at 1284. These factors are extremely similar to those listed in 28 C.F.R. § 35.139(b); however, § 35.139(b) does not include the fourth "probability of potential harm" step but instead finishes with the assessment of "whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139(b) (2018). Whether imminence of potential harm is materially different from the probability that the potential injury will actually occur is unknown. Regardless, the impact of leaving this last step out of 28 C.F.R. § 35.139(b) is beyond the scope of this Article.

56. *Abbott*, 524 U.S. at 649 (citing *Arline*, 480 U.S. at 287).

57. *Id.*

58. *Id.* (citing *Arline*, 480 U.S. at 288).

59. *Id.* at 650.

defense of direct threat *bears the burden of proving the person is a direct threat*.⁶⁰

Though the Eighth Circuit is clear who bears the burden of proving the direct threat defense, what behaviors constitute direct threat is less clear. Caselaw can help illuminate what proof courts look for when determining direct threat. In one case, an undergraduate student diagnosed with paranoid schizophrenia was unable to live in student housing unless he obtained treatment.⁶¹ Specifically, the college required the student, R.W., to release his medical records, attempted to remove R.W. from student housing as part of a mandated risk assessment, and placed continuing restrictions on R.W.'s housing and enrollment after he completed the mandated risk assessment.⁶² R.W. had discontinued medication approximately six months prior and was no longer seeing a doctor or in therapy.⁶³ The school defended their position using the direct threat defense.⁶⁴ In a prior assessment, which R.W. argued was inaccurate, his sister recounted that he had a "history of aggression, depression, anxiety, anger, language delays, poor social skills, temper tantrums, and sexual abuse."⁶⁵ The assessment also alleged R.W. hit a dog for no reason, which R.W. disputed.⁶⁶ The school used this past assessment to argue that R.W. posed a threat to the safety of other students residing in campus housing.⁶⁷ However, the school's medical expert determined that R.W. did not pose a threat in the classroom setting.⁶⁸ Their expert also could not articulate what R.W. was at risk of doing in the housing setting other than "general[] . . . disruption."⁶⁹ Because of the confusion surrounding what threat R.W. posed, the court found that there was an issue of material fact regarding the nature of the risk (the first *Arline* factor).⁷⁰ The court also found that there were material issues of fact

60. *Equal Emp't Opportunity Comm'n v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007) (holding that "the employer bears the burden of proof, as the direct threat defense is an affirmative defense").

61. *R.W. v. Bd. of Regents of the Univ. Sys. of Ga.*, 114 F. Supp. 3d 1260, 1269–71 (N.D. Ga. 2015).

62. *R.W. v. Bd. of Regents of Univ. Sys. of Ga.*, 2016 WL 8607395 at *1 (N.D. Ga. June 7, 2016).

63. *R.W.*, 114 F. Supp. 3d at 1269.

64. *Id.* at 1284.

65. *Id.* at 1286 (quoting the report).

66. *Id.* at 1269.

67. *Id.*

68. *Id.* at 1284.

69. *Id.* at 1270.

70. *Id.*

with regard to the duration of the risk posed, severity of the risk, and probability of the risk (the second, third, and fourth *Arline* factors).⁷¹ This case illustrates what a direct threat defense analysis might look like when a threat is caused by mental illness. Concededly, students and lawyers are vastly different. However, it is noteworthy that the school points to instances of physical or sexual violence to argue direct threat. It is also noteworthy that the court did not believe disruption rose to the level of direct threat. This outcome indicates that courts, when looking at direct threat as applied to lawyers, may look for a history of physical or sexual violence. This case also indicates that courts review each of the four factors set out in *Arline* when analyzing direct threat involving mental illness.

C) Whom to Sue? State Supreme Courts' Responsibility to Adhere to the ADA While Administering Licenses

So, what happens if a licensing entity (such as the MBLÉ) does violate the ADA? If an applicant with a disability who is seeking professional licensure wants to bring a claim for discrimination under the ADA, they must show they have standing to sue.⁷² Standing is established when there has been an “injury in fact” that is an invasion of a legally protected interest that is (1) concrete and particularized⁷³ and (2) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”⁷⁴ Standing also requires that there “be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”⁷⁵ Finally, standing requires

71. *Id.* at 1284. After a four-day trial, the jury found in R.W.’s favor with regard to the school’s continuing restrictions on R.W. but not with regard to R.W.’s actions as part of the mandated risk assessment itself. The jury awarded him \$75,000 in emotional distress damages and issued an injunction removing the college’s discriminatory restrictions. *R.W. v. Bd. of Regents of Univ. Sys. of Ga.*, 2016 WL 8607395 at *1, *4–5 (N.D. Ga. June 7, 2016).

72. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

73. *Lujan*, 504 U.S. at 560 (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth*, 422 U.S. at 508; *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972)).

74. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

75. *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)) (alterations in original).

that the harm be “likely” as opposed to “speculative,” and that the injury be “redressed by a favorable decision.”⁷⁶

The Supreme Court in each state is empowered to govern the practice of law.⁷⁷ While some states may argue that they are immune to ADA claims due to state sovereign immunity, the late Justice Antonin Scalia would disagree. In a 2006 Supreme Court opinion, Justice Scalia explained that, when there is an ADA claim for a Fourteenth Amendment violation, the individual has a personal right of action against the State.⁷⁸ For these specific claims, sovereign immunity is abrogated.⁷⁹ Basically, if an applicant’s rights are being violated due to a MBL character and fitness investigation, applicants can sue the Minnesota Supreme Court (or the corresponding state supreme court).

D) Character and Fitness Questions Nationally

There is no one place of reference in order to know what licensing application questions violate the ADA and what questions do not. However, by looking at how courts respond to allegations that questions are violative, readers can gain a better understanding of what language violates the ADA and why it is violative. The following discussion is a compilation of multiple character and fitness cases, grouping the cases by similar interpretations of character and fitness questions.

1. Questions on Serious Mental Illnesses⁸⁰

Some applicants with disabilities have chosen to sue their state’s Supreme Courts regarding four specific mental disorders.

76. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 38).

77. *See, e.g.*, MINN. CONST. art. VI, § 1 (“The judicial power of the state is vested in a supreme court”).

78. *United States v. Georgia*, 546 U.S. 151, 158–59 (2006).

79. *Id.* This case explains that Congress has the power to enforce the provisions of the Fourteenth Amendment by creating private remedies against the States for actual violations. *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) for the proposition that this enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the states). The case ultimately concludes that Title II validly abrogates state sovereign immunity because Title II created a private cause of action for damages against the states for conduct that actually violated the Fourteenth Amendment. *Id.*

80. Some cases refer to bi-polar disorders, schizophrenia, paranoia, and other psychotic disorders as *serious mental illnesses* that may affect the applicant’s ability to practice law. The cases do not cite to a psychological study referring to these disorders as *serious mental illnesses*. However, the National Institute on Mental Health defines serious mental illness as a “mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or

Texas courts were the first to consider whether the ADA allowed asking if an applicant was diagnosed with or treated for bi-polar disorder, schizophrenia, paranoia, or a psychotic disorder.⁸¹ During the application for character and fitness evaluation, an applicant had to sign a verified affidavit stating, among other things, that they had not been “diagnosed, treated, or hospitalized since the filing of the declaration for bipolar disorder, schizophrenia, or any psychotic disorder.”⁸² The district court in Texas, allowing the questions, reasoned that these disorders were “serious mental illnesses that may affect a person’s ability to practice law.”⁸³ The court noted that even if a person does not currently experience symptoms of the mental illness, the fact that they experienced it in the past means that they may experience another episode in the future that would impact their ability to practice law.⁸⁴ The district court in Indiana later allowed these questions⁸⁵ as well because they were serious mental illnesses that could recur.⁸⁶

2. Questions on Emotional, Nervous, or Mental Disorders

Individuals have also sued regarding the admissibility of more broad mental health questions. In 1993, Maine had a similar question to Minnesota’s current question. Minnesota’s question asks:

Do you have, or have you had within the last two years, any condition, including but not limited to the following:

- a) An alcohol, drug or chemical abuse or dependency condition
- b) A mental, emotional, or behavioral illness or condition
- c) A compulsive gambling condition

that impairs, or has within the last two years impaired, your ability to meet the Essential Eligibility Requirements for the practice of law set forth in Rule 5A of the Rules for Admission to the Bar?

limits one or more major life activities.” *Mental Illness*, NAT’L INST. MENTAL HEALTH (Feb. 2019), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/WU9N-5SY9>].

81. *Applicants v. Tex. State Bd. Of Law Exam’rs*, No. A 93 CA 740 SS, 1994 WL 923404, at *10 (W.D. Tex. Oct. 11, 1994).

82. *Id.* at *2.

83. *Id.* at *3.

84. *Id.*

85. Indiana’s question: “Have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?” *ACLU of Ind. v. Individual Members of the Ind. State Bd. Of Law Exam’rs*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *2 (S.D. Ind. Sept. 20, 2011).

86. *Id.* at *9.

If “Yes,” complete FORM 10.⁸⁷

Maine’s question asked whether the applicant had “ever received [a] diagnosis of an emotional, nervous or mental disorder” and further asked if the applicant had been treated for the disorder within the last ten years.⁸⁸ Minnesota limits this time frame to two years. The Maine court conceded that the Board could ask questions “more directly related to *behavior*” that could affect practicing law without violating the ADA; however, the questions as they stood violated the ADA because they discriminated “on the basis of disability and impose[d] eligibility criteria that unnecessarily screen[ed] out individuals with disabilities.”⁸⁹ The fact that Maine found that questions with nearly identical language as Minnesota’s questions violate the ADA is probative of determining whether Minnesota’s Board of Law Examiners is currently violating the ADA.

A plaintiff in Rhode Island made a similar challenge.⁹⁰ Rhode Island asked whether the applicant had been hospitalized, institutionalized, or admitted for treatment or evaluation for “any emotional disturbance, nervous or mental disorder” as well as asking about chemical addiction within the last five years.⁹¹ The court amended these questions to only ask about *current* addiction and mental health noting that “[r]esearch has failed to establish that a history of previous psychiatric treatment can be correlated with an individual’s capacity to function effectively in the workplace.”⁹²

Like the Rhode Island court’s allowance for current addiction and mental health questions, an Indiana court allowed this type of questioning regarding any condition or impairment that “currently affects, or if untreated could affect” one’s ability to practice law because the question focused on current ability.⁹³ Yet Indiana did not allow a question asking about being diagnosed or treated for “any mental, emotional or nervous disorder[]” since the age of sixteen because it addressed less serious mental and emotional

87. APPLICATION FOR ADMISSION, *supra* note 22, at 10 (emphasis added).

88. *In re Underwood*, 1993 WL 649283, at *2 n.1 (Me. Dec. 7, 1993).

89. *Id.* at *2.

90. *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d 1333, 1334 (R.I. 1996) (challenging the admissibility of mental health questions on Rhode Island’s bar application).

91. *Id.*

92. *Id.* at 1336.

93. *ACLU of Ind. v. Individual Members of the Ind. State Bd. of Law*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *2, *10 (S.D. Ind. Sept. 20, 2011).

health problems, yielded false positives in its answer, and had an arbitrary time frame.⁹⁴

A plaintiff in Virginia also brought a similar suit.⁹⁵ Virginia's questions asked about treatment within the last five years for the same, broad mental diagnoses: emotional, nervous, or mental disorders.⁹⁶ The district court was concerned that the question did not highlight all applicants suffering from mental disorders and was therefore ineffective.⁹⁷ The court also noted that, because the question was asked in conjunction with drug and alcohol addiction, the Board implied that applicants were "deficient or inferior . . ."⁹⁸ Ultimately, the court found that the "broadly worded" question discriminated because it set "additional eligibility criteria" to the application to the bar.⁹⁹ While "severe mental or emotional disorders may pose a direct threat to public safety," the court noted there was no individualized finding that emotional, mental, or nervous disorders posed such a threat.¹⁰⁰ The Virginia case is the closest states have come to evaluating whether character and fitness evaluation questions adhere to the ADA. This case asks whether the applicant will pose a *direct threat* to the health and safety of others, which is necessary in order for boards of law examiners to escape liability pursuant to 28 C.F.R. § 35.139(a).

3. U.S. Department of Justice Emphasizes the Importance of Questioning Conduct, Not Disability Status

Along with individuals suing over allegedly violative questions, the DOJ has also brought cases when it believes a board of law examiners is violating the ADA.¹⁰¹ Arguments coming out of

94. *Id.* at *9.

95. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995) (challenging the use of mental health related questions on Virginia's bar application).

96. *Id.* at 431.

97. *Id.* at 445.

98. *Id.*

99. *Id.* at 446.

100. *Id.*

101. Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Honorable Chief Justice Bernette J. Johnson, Chief Justice of La. Supreme Court, Elizabeth S. Schell, Exec. Dir., La. Supreme Court Comm. on Bar Admissions, and Charles B. Plattsmier, Chief Disciplinary Counsel, La. Attorney Disciplinary Bd. (Feb. 5, 2014) [hereinafter Letter from Jocelyn Samuels to Hon. Bernette Johnson et al.], <https://www.ada.gov/louisiana-bar-lof.pdf> [<https://perma.cc/F8PU-7PVV>]; Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Karen L. Richards, Executive Dir., Vt. Human Rights Comm'n (Jan. 21, 2014) [hereinafter Letter from Jocelyn Samuels to

these cases are particularly probative because of who is bringing the suit. Unlike an individual who believes they should obtain a license but were discriminated against, the DOJ can bring a lawsuit on behalf of all applicants with disabilities because it believes the questions violate the ADA by having a disproportionate effect on those with disabilities.¹⁰² The outcomes of these cases are also valuable because they shed light on how confident the board of law examiners is with respect to its interpretation of the ADA.¹⁰³ The following DOJ case provides the greatest detail of the type of information that should be obtained in a character and fitness investigation and why certain language should not be used in character and fitness questions because it places additional burdens on applicants or because it does not obtain relevant information.

The DOJ made extensive recommendations to fix Louisiana's application in 2014.¹⁰⁴ At the time the DOJ investigated the Louisiana application, Louisiana was asking a number of invasive questions. The Louisiana Board of Law Examiners had the National Conference of Bar Examiners (NCBE) investigate applicants.¹⁰⁵ Louisiana required applicants to answer the following questions from the NCBE:

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

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

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?¹⁰⁶

Karen Richards], <http://www.bazelon.org/wp-content/uploads/2017/03/2.5.14-DOJ-Letter-on-Bar-Admissions.pdf> [<https://perma.cc/8EN2-76YP>].

102. Letter from Jocelyn Samuels to Hon. Bernette Johnson et al., *supra* note 101, at 34 (“the Attorney General *may* initiate a lawsuit pursuant to the ADA”) (emphasis added).

103. *Id.* at 3, 34 (explaining that the current steps to address ADA violations are insufficient, and a lawsuit will commence if the board of law examiners fails to take additional steps).

104. *Id.* at 31–33.

105. *Id.* at 4–5.

106. *Id.* at 5–6 n.17.

If applicants answered affirmatively to questions 25 or 26, they also had to complete authorizations allowing the NCBE to gain information from each of their treatment providers including providing information “without limitation, relating to mental illness . . . , including copies of records, concerning advice, care, or treatment provided”¹⁰⁷ They also provided a form describing their condition and treatment or monitoring program.¹⁰⁸ This form required applicants to “[a]nswer every question; do not leave anything blank. Incomplete applications [would] not be accepted[,]” advising applicants to, “[c]omplete all forms required; you must provide all the requested information.”¹⁰⁹ The DOJ explained that, even though the NCBE drafted the questions, it was the state that violated the ADA because it is the state court that determines how the NCBE report is interpreted, what action is taken based on the report, and how the information collected applies to the applicant’s ability to practice law.¹¹⁰ The DOJ had previously informed the Vermont Human Rights Commission that these questions were unnecessary and did not comply with the ADA yet Louisiana still used them.¹¹¹

The DOJ explained that question 25, asking whether applicants had been diagnosed with or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder and requiring them to provide additional information, uses an “eligibility criterion that tends to screen out individuals with disabilities and subjects them to additional burdens.”¹¹² Inquiry about an applicant’s medical conditions “substitutes inappropriate questions about an applicant’s status as a person with a disability for legitimate questions about an applicant’s conduct.”¹¹³ Because the existence of a diagnosis—in these questions—is presumed to be an appropriate basis for further investigation, Louisiana’s inquiry, and actions flowing “from inappropriate disability status-based inquiries, are therefore based on ‘mere speculation, stereotypes, or generalizations about individuals with disabilities.’”¹¹⁴ Louisiana’s questions were not necessary because there were other methods of

107. *Id.* at 6 (internal quotation omitted).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citing Letter from Jocelyn Samuels to Karen L. Richards, *supra* note 101).

112. *Id.* at 19.

113. *Id.*

114. *Id.* (quoting 28 C.F.R. § 35.130(h) (2018); 42 U.S.C. § 12101(a)(7) (2018)).

identifying unfit applicants, the questions did not effectively identify unfit applicants, and they had “a deterrent effect that [was] counterproductive to the Court’s objective of ensuring that licensed attorneys are fit to practice.”¹¹⁵ Instead, questions could simply ask about prior conduct since this “would serve the legitimate purposes of identifying those who are unfit to practice law or are unworthy of public trust, and would do so in a non-discriminatory manner.”¹¹⁶ The DOJ noted that “past behavior is the best predictor of present and future mental fitness.”¹¹⁷

Questions 26A and 26B also violated the ADA because they focused on an applicant’s diagnosis, not the effect of that diagnosis on the individual’s fitness to practice law.¹¹⁸ Question 26A asked how a diagnosis, even in hypothetical form, might affect the applicant’s practice of law.¹¹⁹ Question 26B, paired with Question 26A, indicates that the intention of the questions are to single out individuals with mental health conditions or substance abuse problems because question 26B assumes an affirmative response to Question 26A is related to the mental health or substance abuse.¹²⁰ The DOJ explained that if the words “if untreated could affect” were removed, the question would no longer violate the ADA since the question would then “be based on the applicant’s current fitness to practice law, not on future, hypothetical scenarios.”¹²¹

Additionally, the questions were unnecessary in determining an applicant’s ability to fulfill their professional responsibilities since research does not support the theory behind asking these questions.¹²² The DOJ provided research in the health field and clinical experience demonstrating that “neither diagnosis nor the fact of having undergone treatment support any inferences about a person’s ability to carry out professional responsibilities or to act with integrity, competence, or honor.”¹²³ The DOJ explained that

115. *Id.*

116. *Id.* at 20.

117. *Id.* at 22 (citing *Clark v. Virginia Bd. of Bar Exam’rs*, 880 F. Supp. 430, 446 (E.D. Va. 1995)) (drawing on expert testimony to show that past behavior is the best predictor of present and future mental fitness for the purposes of identifying fitness to practice law).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (internal quotations omitted).

122. *Id.* at 23.

123. *Id.* (citing Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 141 (2001)).

questions that cannot accurately predict which applicants are unfit to practice law are unnecessary.¹²⁴

Finally, and possibly of most concern, the questions dissuaded applicants from seeking mental health treatment and thus failed to serve the Court's interests.¹²⁵ Instead of improving quality, dependability, and trustworthiness of the legal profession, Louisiana's questions had the perverse effect of deterring applicants from seeking treatment, though they may have benefited from treatment, and merely penalized those better able to practice law because they obtained treatment.¹²⁶ For these reasons, the DOJ found that the questions violated the ADA.¹²⁷

On August 15, 2014, the DOJ announced that it had entered into a settlement agreement with the Louisiana Supreme Court.¹²⁸ The Court agreed, among other things, to:

- Revise its character and fitness screening questions so that they focus on applicants' conduct or behavior, and ask about an applicant's condition or impairment only when it currently affects the applicant's ability to practice law in a competent, ethical and professional manner or is disclosed to explain conduct that may otherwise warrant denial of admission;
- Refrain from imposing unnecessary burdens on applicants with mental health disabilities by placing onerous disability-based conditions on their admission, invading their privacy, or violating their confidentiality[.]¹²⁹

After the DOJ's settlement with Louisiana, Louisiana continues to use NCBE questions to evaluate character and fitness.¹³⁰ However, the questions *now* ask, "29. Within the past five years, have you *exhibited any conduct or behavior* that could call into question your ability to practice law in a competent, ethical, and professional manner?" and "30. Do you *currently have any condition or impairment* (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that

124. *Id.*

125. *Id.*

126. *Id.* at 24–25.

127. *Id.* at 25.

128. Press Release Number: 14-860, *Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities*, DEP'T OF JUSTICE: OFFICE OF PUB. AFFAIRS (August 15, 2014), <https://www.justice.gov/opa/pr/department-justice-reaches-agreement-louisiana-supreme-court-protect-bar-candidates> [<https://perma.cc/F2UT-7CCK>].

129. *Id.*

130. *Louisiana, Character and Fitness Investigations*, NAT'L CONF. OF BAR EXAM'RS, <http://www.ncbex.org/character-and-fitness/jurisdiction/la> [<https://perma.cc/NTX5-7SNG>].

in any way affects your ability to practice law in a competent, ethical, and professional manner?” explaining that “currently” means “recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.”¹³¹ If an applicant answers affirmatively to question 30, the applicant must disclose whether they have had treatment or participated in a monitoring or support program, the name of the attending physician or counselor if applicable, and the name of hospital or institution if applicable.¹³²

The DOJ’s lawsuit helps clarify whether questions asking about past mental health and treatment, without more, violate the ADA. These questions act as screening devices that place additional burdens on applicants. The fact that the Louisiana Board of Law Examiners settled with the DOJ, and changed their questions and practices, provides helpful evidence of what questions violate the ADA and, just as importantly, provides reasoning for why such questions violate the ADA.

II: To Be (in Therapy) or Not To Be: That is the Question for Lawyers and Law Students

As important as protective laws are, and as important as it is to establish questions and procedures to investigate an applicant’s direct threat, it is equally important to look at the trends multiple psychologists have observed in lawyers and law students’ mental health, and why they do (and often do not) seek mental health treatment. This analysis starts with what is considered as competent lawyering.

A) *Definitions of Competence in Lawyers*

The MBLE is responsible for ensuring that applicants are competent and have the character to practice law.¹³³ The reasoning behind the DOJ’s regulations allowing entities to refuse licensure¹³⁴ is an acknowledgement that there are some disabilities that, in the context of a profession requiring a license, could put the public at risk. What defines lawyers as competent or incompetent is therefore pertinent to the analysis of whether someone poses a direct threat to the public. Can a lawyer have a mental disability that affects

131. NAT’L CONF. OF BAR EXAM’RS, *Standard Application*, at 19–20, <http://www.ncbex.org/dmsdocument/134> [<https://perma.cc/D7NJ-8G3E>] (emphasis added).

132. *Id.*

133. 2018 ANNUAL REPORT, *supra* note 6, at 1.

134. See sources cited *supra* note 41, and accompanying text.

their life but does not make them a direct threat? Because lawyers bear so much responsibility—representing other people when those people’s lives and livelihoods are at stake—lawyers with mental illnesses have the potential to pose a greater risk to the public than, for example, a server at a restaurant with that same mental illness.

A lawyer is required to have certain skills to competently and diligently represent clients, as well as modulate his or her workload to act competently. The Model Rules of Professional Conduct define competence as “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹³⁵ The Model Rules of Professional Conduct further explain how “analysis of precedent, the evaluation of evidence and legal drafting” are required skills all lawyers must possess, unlike other aspects of the legal position where lawyers can build competence.¹³⁶ A comment to the Model Rules of Professional Conduct explains how the “lawyer’s work load must be controlled so that each matter can be handled competently.”¹³⁷ As Joan Bibelhausen, Executive Director of Minnesota’s Lawyers Concerned for Lawyers put it, the rules call for self-care.¹³⁸

Although the Model Rules of Professional Conduct require competence, they do not preclude law students with even “serious mental illnesses,”¹³⁹ such as bipolar disorder and schizophrenia, from becoming successful lawyers and practicing attorneys. To the contrary, attorneys with these “serious mental illnesses”¹⁴⁰ can, and do, practice, teach law, and advocate mental health rights.¹⁴¹

135. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2018).

136. *Id.* r. 1.1 cmt. 2 (explaining that a substantive area of law is an example of something that is learnable).

137. *Id.* r. 1.3 cmt. 2.

138. Joan Bibelhausen, Exec. Dir., Lawyers Concerned for Lawyers, Lecture at the University of Minnesota Law School Professional Responsibility Class (Oct. 31, 2018) (on file with author).

139. The National Institute of Mental Health defines serious mental illness as a “mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities.” *Mental Illness*, NAT’L INST. OF MENTAL HEALTH (Nov. 2017), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/QM9T-76N9>].

140. *Id.*

141. See *Elyn Saks*, USCGOULD (Jan. 29, 2019), <https://gould.usc.edu/faculty/?id=300> [<https://perma.cc/2REV-E75M>] (noting that Ms. Saks is an Orrin B. Evans Distinguished Professor of Law, Professor of Psychology, Psychiatry and the Behavioral Sciences, Director of the Saks Institute for Mental Health Law, Policy, and Ethics, among other roles, and has published five books and more than fifty articles and book chapters in the areas of law and mental health); Elyn R. Saks, *Successful and Schizophrenic*, N.Y. TIMES (Jan. 25, 2013), <https://www.nytimes.com>.

Knowing how mental health plays a role in making or preventing a lawyer from being competent (and thus a direct threat) is important to understand given the legal community's stigmatic view of mental illness¹⁴² and laudation of unhealthy behaviors.¹⁴³ As Robin Wolpert said, “[w]e’ve almost glorified being unwell,” explaining how it is necessary to take care of yourself as an attorney otherwise “your competence and diligence [will be] compromised.”¹⁴⁴ Mental health questions in character and fitness questionnaires can disincentivize people from seeking treatment.¹⁴⁵ This disjunction between the Model Rules’ call for self-care and the legal community’s stigma surrounding mental illness exposes a flaw in the legal licensing program: one aspect of the legal community requires self-care, while another encourages hiding mental illness.¹⁴⁶

B) Mental Health in the Legal Profession

In the largest study of its kind, the Hazelden Betty Ford Foundation partnered with the ABA Commission on Lawyers Assistance Programs to publish a study on the prevalence of substance use¹⁴⁷ and other mental health concerns among American

[com/2013/01/27/opinion/sunday/schizophrenic-not-stupid.html](https://perma.cc/PW9J-D936) [<https://perma.cc/PW9J-D936>] (discussing her life with Schizophrenia and owing her success to “excellent psychoanalytic treatment and medication”); Jennifer Goforth Gregory, *A Lawyer’s Case for Disclosure*, BPHOPE (Jan. 4, 2018), <https://www.bphope.com/a-lawyers-case-for-disclosure/> [<https://perma.cc/K3UW-LMUY>] (reporting on Reid Murtaugh’s life with bipolar II disorder and his successful practice as a lawyer in Indiana).

142. Traci Cipriano, *Addressing Mental Health and Stigma in the Legal Profession*, LAW.COM (Aug. 19, 2019, 12:45 PM), <https://www.law.com/ctlawtribune/2019/08/19/addressing-mental-health-and-stigma-in-the-legal-profession/> [<https://perma.cc/89WD-F64X>] (explaining that the “legal profession is particularly prone to being affected by the shunning and shaming effects of stigma” and that “law students are taught that experiencing strong emotions reflects weakness, and such emotions must be avoided or suppressed in order to ‘think like a lawyer’”).

143. Lizzy McLellan, *Is the Legal Industry Ready for a Culture Shift on Mental Health?*, LAW.COM (May 30, 2019, 12:50 PM), <https://www.law.com/2019/05/30/is-the-legal-industry-ready-for-a-culture-shift-on-mental-health/> [<https://perma.cc/SET6-5RUB>] (noting that law schools and big law firms haze law students and new legal professionals into dangerous mindsets and destructive behaviors like neglecting one’s own personal needs and equating self-care with weakness).

144. Stephen Montemayor, *Minnesota Supreme Court Taking Aim at Mental Health ‘Crisis’ in Legal Profession*, STAR TRIB. (Mar. 2, 2019), <http://www.startribune.com/minnesota-supreme-court-taking-aim-at-mental-health-crisis-in-legal-profession/506606552/> [<https://perma.cc/D3W6-V88T>] (internal quotations omitted).

145. *See infra* section II.C.

146. *See supra* note 135, at r. 1.3 cmt. 2.

147. *Study on Lawyer Impairment*, AM. BAR ASS’N (Jan. 18, 2019), https://www.americanbar.org/groups/lawyer_assistance/research/colap_hazelden_la

lawyers. Approximately 13,000 lawyers¹⁴⁸ “completed surveys assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.”¹⁴⁹ Of the 11,516 participants who completed mental health surveys, 61.1% experienced anxiety, 45.7% experienced depression, 16.1% experienced social anxiety, 12.5% experienced attention deficit hyperactivity disorder, 8% experienced panic disorder, and 2.4% experienced bipolar disorder at some point during their legal career.¹⁵⁰ Finally, “11.5% of the participants reported suicidal thoughts at some point during their career, 2.9% reported self-injurious behaviors, and 0.7% reported at least [one] prior suicide attempt.”¹⁵¹

Another study, published in 2014, on Yale law students, found that most respondents struggled with mental health challenges.¹⁵² Most respondents also feared exclusion from state bar associations and other professional opportunities if they disclosed their mental health challenges.¹⁵³ Women were more likely to seek treatment than men.¹⁵⁴ This statistic indicates that female law students are at a higher risk of being discriminated against based on mental illness disabilities than are male students.

The Hazelden and Yale studies were not the first to note the prevalence of mental illness in lawyers and the stigma that inhibits lawyers and law students from seeking treatment. The international legal community has already acknowledged that stigma plays a big part in lawyers not seeking treatment.¹⁵⁵

[wyer study/ \[https://perma.cc/59EP-HNGE\]](https://perma.cc/59EP-HNGE). While some of the studies discussed in this Article also incorporate alcohol and drug use by law students and lawyers, discussion of the direct threat defense implications and potential ADA violations is beyond the scope of this Article. It is easier to see how chemical use may negatively impact a person’s ability to do what they need to do since this form of substance use usually involves an addiction. However, mental illness in general does not necessarily make a person less likely to possess the skills necessary for an attorney.

148. Sample size of licensed, employed attorneys was 12,825, but 11,516 attorneys completed the survey. Krill et al., *supra* note 8, at 46.

149. *Id.* This Article focuses only on stigma surrounding mental illness. While there is a link between substance use and mental illness, that discussion is beyond the scope of this Article. So too is whether lawyers and law students with substance use issues pose a direct threat to the health and safety of others. Any discussion of substance use in this Article is used only to highlight the prevalence, and implicit acceptance, of unhealthy behaviors in the legal community.

150. *Id.* at 49–50.

151. *Id.* at 50.

152. AGATSTEIN ET AL., *supra* note 12.

153. *Id.* at 36–37.

154. *Id.* at 16.

155. ANGUS LYON, A LAWYER’S GUIDE TO WELLBEING AND MANAGING STRESS 10 (Laura Slater ed., 2015) (explaining the common mental health issues and substance

Lawyers fear “losing face, reduction in status, being seen as weak[,]” and being overlooked for promotions.¹⁵⁶ One lawyer commented that “[i]t would be easier at work for me to come out as gay, than to ask for two weeks off for stress.”¹⁵⁷

Put into the context of the character and fitness questions, students face a real disincentive to seek treatment if it means establishing a record of mental health problems. In 1994, the Minnesota Supreme Court changed its character and fitness questions specifically because the Court found that “the prospect of having to answer the mental health questions in order to obtain a license to practice causes many law students not to seek necessary counseling [and that this] weigh[ed] against asking the questions”¹⁵⁸ Yet, stigma surrounding mental health persists.¹⁵⁹

After publication of the ABA/Hazelden study, members of the legal community associated with the study and the ABA tried to promote the study’s findings and impact on the legal community and law schools. Lawyers published videos on Facebook and YouTube trying to raise awareness about the study and the ABA provided a webpage compiling more information on the study and its impacts in the legal community.¹⁶⁰ The Minnesota Character and Fitness Questionnaire even states “[t]he Board views mental health and chemical dependency treatment as a positive factor in evaluating an application.”¹⁶¹ However, given the recent study and the deep-seated stigma surrounding mental illness as a weakness,

abuse problems facing lawyers in the U.K.).

156. *Id.*

157. *Id.*

158. *In re Frickey*, 515 N.W.2d 741, 741 (Minn. 1994).

159. *Speaking Out To End Stigma*, AM. BAR ASS’N (2019), https://www.americanbar.org/groups/lawyer_assistance/profession_wide_anti_stigma_campaign/ [<https://perma.cc/4WFY-GFUE>] (explaining that obstacles like stigma, shame, and fear faced by lawyers, judges, and law students play a major role in an individual’s decision not to seek help when suffering from mental health and substance use disorders).

160. Am. Bar Ass’n, *Patrick Krill Discusses his Study on the High Rates of Problematic Drinking, Depression, and Anxiety in the Legal Profession*, FACEBOOK (Feb. 6, 2016, 4:47 PM), <https://www.facebook.com/AmericanBarAssociation/videos/10153956502654669/> [<https://perma.cc/946X-Q464>]; *Study on Lawyer Impairment*, AM. BAR ASS’N (Jan. 18, 2019), https://www.americanbar.org/groups/lawyer_assistance/research/colap_hazelden_lawyer_study/ [<https://perma.cc/H2VA-R644>]; State Bar of Wis., *Lawyers at Risk: Be Intentional About Your Mental Health*, YOUTUBE (Feb. 1, 2016), <https://www.youtube.com/watch?v=5OdvaHMnE6I> [<https://perma.cc/H9PX-Q37J>].

161. APPLICATION FOR ADMISSION, *supra* note 22, at 9.

these actions are not sufficient to encourage students to seek treatment.

C) Violative Questions Deter Law Students from Seeking Treatment

As stated before, the longer law students are in law school, the less likely they are to seek help, or help others seek assistance, for their mental illnesses.¹⁶² They also actively hide their mental health issues in case they will not be admitted to the bar.¹⁶³ Law students are afraid of the stigma associated with having a mental illness and are afraid they will not be admitted to the bar if the Board of Law Examiners finds out about their mental illness.¹⁶⁴ The Minnesota Board of Law Examiners only perpetuates this atmosphere of secrecy. Instead of using *Arline's* four-factor test to evaluate an applicant's tendency to be a direct threat to the health or safety of others, the "MBLE tends to define the risk using their [*sic*] own criteria."¹⁶⁵ The MBLE does seem to want to encourage students to seek treatment when they are having difficulty and may view treatment as a good thing in applications.¹⁶⁶ While it certainly is not the MBLE, or any other State Board of Law Examiners' intention,

162. Organ et al., *supra* note 12, at 141, 143 (noting that third-year law students were more concerned that seeking treatment would threaten their job or academic status or threaten bar admission, and were less likely to encourage other students to seek help from campus counseling than first-year law students).

163. *Id.* at 142 (reporting that 43% of responding students indicated "[i]f I had a mental health problem, my chances of getting admitted to the bar are better if the problem is hidden.").

164. *See id.* at 141 (reporting that the top four reasons for not seeking help for mental health issues are (1) "[p]otential threat to job or academic status"; (2) "[s]ocial stigma"; (3) "[f]inancial reasons"; and (4) "[p]otential threat to bar admission"); *see also* Krill et al., *supra* note 8, at 50 (reporting that the two largest barriers existing to seeking treatment, among those who did and did not seek treatment were "not wanting others to find out they needed help" and "concerns regarding privacy or confidentiality").

165. Interview with Eric Cooperstein, Esq., Law Office of Eric T. Cooperstein, PLLC, in Minneapolis, Minn. (Jan. 23, 2019). E-mail from Eric Cooperstein, Esq., to Michelina Lucia, author (Jan. 2, 2020, 11:04 AM) (on filed with author).

166. APPLICATION FOR ADMISSION, *supra* note 22, at 9 (giving notice that "[t]he Board views mental health and chemical dependency treatment as a positive factor in evaluating an application"); Interview with Eric Cooperstein, Esq., *supra* note 165 (observing that the current system has been a "good wakeup call" for applicants who are alcoholics or have some form of substance misuse and noting that there were a few cases where the process "saved [a] guy's life"); Interview with Ed Kautzer, President, Revelson & Kautzer, Ltd. (Jan. 22, 2019) (noting that Minnesota is a progressive jurisdiction in looking at rehabilitation and considering it as a good thing).

by creating a culture of secrecy surrounding the mental health portion of the application for admission, the MBLÉ creates a perverse incentive to hide mental illnesses. Attorneys practicing with untreated mental illnesses ignore their health and pose a higher threat to the public than the law students and lawyers who seek treatment for their mental illnesses before applying for licensure.¹⁶⁷ This is exactly the point DOJ made when explaining that Louisiana's questions violated the ADA. Just as Louisiana's questions did not effectively identify and deter unfit applicants from seeking treatment, the MBLÉ's questionnaire does not effectively identify unfit applicants and has "a deterrent effect that is counterproductive to the Court's objective of ensuring that licensed attorneys are fit to practice."¹⁶⁸ The MBLÉ's secretive application process actively, although unintentionally, helps create the dangerous attorneys it is trying to prevent.

III: "The Purest Treasure . . . is a Spotless Reputation":¹⁶⁹ A Study of Minnesota's Character and Fitness Questionnaire

Stigma surrounding mental illness is pervasive within the legal community.¹⁷⁰ Researchers are only just beginning to examine the harms caused by the stigma of mental illness.¹⁷¹ Yet, there is enough information to support changes within the MBLÉ's character and fitness evaluation and the legal community's handling of mental illness in the legal profession. The following analyzes the MBLÉ's character and fitness questionnaire and proposes changes to ensure it complies with the ADA and, in so doing, no longer contributes to the stigma of mental illness.

167. Letter from Jocelyn Samuels to Karen Richards, *supra* note 101, at 8 ("Questions that dissuade applicants from seeking needed mental health treatment fail to serve the states' interest in ensuring that licensed attorneys are fit to practice. Rather than improving the quality, dependability, and trustworthiness of attorneys, inquiries regarding mental health may have the perverse effect of deterring those who could benefit from treatment from obtaining it while penalizing those who will be better able to successfully practice law and pose less of a risk to clients because they have acted responsibly and taken steps to manage their condition.")

168. *Id.* (identifying Louisiana's questions as violating the ADA since there were other methods of identifying unfit applicants; the questions were not effective in identifying unfit applicants; and they had a deterrent effect that was counterproductive to the Court's objective of ensuring that licensed attorneys were fit to practice). *See supra* Part I.D.3.

169. WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1 (Jonathan Bate et al. eds., 2010).

170. *See supra* Parts II.B–C.

171. *See supra* Parts II.B–C.

A) *The Black Box: The MBLE's Application for Admission to the Bar*

The MBLE investigates bar applicants' character and fitness and administers the bar.¹⁷² The Board is comprised of a staff of "8.9 full time exempt (FTE) positions"¹⁷³ with its Director being Emily Eschweiler who started her position in April of 2017.¹⁷⁴ "The [MBLE] staff uses processing systems and written procedures to ensure that character and fitness investigations are conducted in a thorough, fair, efficient, and consistent manner."¹⁷⁵ These processing systems and written procedures are not described in greater detail. In 2017, 88.8% of the 116 applicants who passed the February 2017 bar examination, and 94.2% of the 448 applicants who passed the July 2017 bar examination, also passed the character and fitness portion.¹⁷⁶ In 2018, 80.7% of the 114 applicants passing the February bar and 92.5% of the 438 applicants passing the July bar also passed the character and fitness portion in time to participate in the admission ceremony.¹⁷⁷ The MBLE reports failure to pass the character and fitness portion before the ceremony as being due to a failure to respond to requests from the MBLE for information "in a timely manner[,]" not submitting a qualifying MPRE score, or because applicants had "serious issues" in the application.¹⁷⁸

1. Minnesota's Questions and Procedures on Mental Health Are Overly Broad

Minnesota's character and fitness questionnaire is an exhaustive questionnaire covering an applicant's background.¹⁷⁹ Questions 4.34–4.44 address an applicant's mental health and chemical dependency.¹⁸⁰ Questions 4.37 and 4.41 ask specifically

172. MINN. STATE BD. OF LAW EXAM'RS, 2017 ANNUAL REPORT 1 (June 13, 2018) [hereinafter 2017 ANNUAL REPORT], <https://www.ble.mn.gov/wp-content/uploads/2018/06/2017-BLE-Annual-Report.pdf> [<https://perma.cc/NK4V-F2LY>].

173. *Id.* (reporting that some of these positions are Director, Managing Attorney, Staff Attorney, Director's Assistant, Office Manager, Office Administrator, Attorney for Character and Fitness, two Paralegals, and four Office Assistants). The number 8.9 is not a typo.

174. *Id.*

175. *Id.* at 10 (what constitutes "processing systems and written procedures" is not explained).

176. *Id.*

177. 2018 ANNUAL REPORT, *supra* note 6, at 1, 9.

178. *Id.*

179. APPLICATION FOR ADMISSION, *supra* note 22.

180. *Id.* at 9–10.

about the applicant's mental health and treatment.¹⁸¹ Question 4.37 asks:

Do you have, or have you had within the last two years, any condition, including but not limited to the following:

- a) An alcohol, drug or chemical abuse or dependency condition
- b) A mental, emotional, or behavioral illness or condition
- c) A compulsive gambling condition

that impairs, or has within the last two years impaired, your ability to meet the Essential Eligibility Requirements for the practice of law set forth in Rule 5A of the Rules for Admission to the Bar?

If "Yes," complete FORM 10.¹⁸²

Form 10 is a *General Narrative* form that allows the applicant space to explain their answer in greater detail.¹⁸³

Revelation by the applicant or discovery by an MBE staff member, that the applicant's "[c]onduct . . . evidences current mental or emotional instability that may impair the ability to practice law . . ." triggers further inquiry into the applicant's fitness.¹⁸⁴ This requirement is problematic because the MBE merely states it may investigate but does not explain what types of conduct require further investigation and how far they will go to investigate said information. The MBE may argue that it cannot

181. *Id.* at 10.

182. *Id.* Rule 5A, Essential Eligibility Requirements, states:

Applicants must be able to demonstrate the following essential eligibility requirements for the practice of law: (1) The ability to be honest and candid with clients, lawyers, courts, the Board, and others; (2) The ability to reason, recall complex factual information, and integrate that information with complex legal theories; (3) The ability to communicate with clients, lawyers, courts, and others with a high degree of organization and clarity; (4) The ability to use good judgment on behalf of clients and in conducting one's professional business; (5) The ability to conduct oneself with respect for and in accordance with the law; (6) The ability to avoid acts which exhibit disregard for the rights or welfare of others; (7) The ability to comply with the requirements of the Rules of Professional Conduct, applicable state, local, and federal laws, regulations, statutes, and any applicable order of a court or tribunal; (8) The ability to act diligently and reliably in fulfilling one's obligations to clients, lawyers, courts, and others; (9) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; and (10) The ability to comply with deadlines and time constraints.

RULES FOR ADMISSION, *supra* note 18, r. 5A.

183. MINN. STATE BD. OF LAW EXAM'RS, FORM 10: GENERAL NARRATIVE (Sept. 23, 2018), <https://www.ble.mn.gov/wp-content/uploads/2018/01/Form-10-Narrative-Response-2018-Fill-In.pdf> [<https://perma.cc/8AST-6K9N>].

184. RULES FOR ADMISSION, *supra* note 18, r. 5B(3)(j).

provide a complete list of what it looks for because everyone's application is individual. However, assuming that an exhaustive list of the MBLE's guidelines and procedures that trigger further inquiry is not possible, this absence does not mean the MBLE cannot provide clear guidance on how they evaluate applications. The MBLE can and should publicize the fact that the MBLE adheres to the *Arline* factors when evaluating whether an applicant's "current mental or emotional instability" warrants further investigation.¹⁸⁵ The MBLE can also quote, and cite to, the language of the code of federal regulations on determining a direct threat defense:

[Licensing entities must make] an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.¹⁸⁶

In this way, applicants know, at the very least, the laws that will apply to them and know that the MBLE intends to apply those laws. As the questions currently read, it is unclear which rights applicants possess and which procedures, if any, are implemented. This ambiguity can cause undue fear and anxiety.¹⁸⁷

Because the MBLE does not explain its guidelines and criteria for assessing the type of conduct evidencing "mental or emotional instability," the MBLE can choose, case by case, what evidences instability.¹⁸⁸ Further, because these guidelines and policies are secret, there is no way for anyone—public disability advocates, concerned lawyers, or law students—to evaluate whether the MBLE is consistently evaluating applications.¹⁸⁹ This large amount

185. *Id.*

186. 28 C.F.R. § 35.139(b) (2018).

187. Brian Cuban, *When Bar Examiners Become Mental Health Experts*, ABOVE THE LAW (Jan. 10, 2018, 10:03 AM), <https://abovethelaw.com/2018/01/when-bar-examiners-become-mental-health-experts/> [<https://perma.cc/AAT5-NUA6>] (explaining, with real examples, how bar application mental health questions after an applicant is flagged can negatively affect law students).

188. *Id.* (noting there "should be a 'Miranda Mental Health' warning on state bar fitness applications," notifying that mental health disclosures could be used against applicants).

189. Lisa T. McElroy, *The Worst Part of the Bar Exam: It's Time to Drop Mental Health Questions*, SLATE (Aug. 07, 2014, 8:08 AM), <https://slate.com/technology/2014/08/bar-examiners-ask-lawyer-applicants-about-mental-health-the-question-policy-is-discriminatory-dangerous-and-invasive.html> [<https://perma.cc/QW6F-Z92C>]

of discretion leaves the applicant with no way to confirm that the ADA is being followed or to investigate whether their application is being screened out based on their mental disability. There is no way to know whether this is happening due to the nebulous and secretive processing systems and written procedures in place.

Further, there is only one psychology professional on the MBLE.¹⁹⁰ Because of this staffing practice, discussions about an individual application may only involve the opinions of one mental health expert. There is no way to know whether the Board consults with outside experts unless the Board informs the applicant it is seeking an independent psychological evaluation.¹⁹¹ One psychologist should not be expected to know all potential mental illnesses. Research shows that the psychological community debates the ontological status of mental illnesses.¹⁹² Even if an applicant submitted documentation from their therapist or psychologist, the Board has no published language dictating how to weigh that expert's opinion, unlike the clear procedures set out by the direct defense threat.¹⁹³ It is unclear whether the MBLE is using that defense in their character and fitness analysis at all. The combination of only one psychological expert and lack of transparency about the types of mental illnesses or severity of mental illnesses that will trigger further investigation provide insufficient assurances that protections are in place against discrimination based on disability.

In addition to the issues of transparency, question 4.37(b) also sets an arbitrary time limit on the history of mental illness that does not fairly assess current competence. Like Indiana's licensure board, the MBLE sets an arbitrary timeframe of two years on

(explaining the wide diversity in the way agencies across the country ask about and evaluate a wide range of medical history).

190. 2018 ANNUAL REPORT, *supra* note 6, at 1, 11 (listing Mark S. Kuppe, PsyD, Psychologist Emeritus as a member of the Board of Law Examiners of Minnesota).

191. *Character and Fitness FAQ: 15. If an Applicant Receives Alcohol or Drug Treatment During Law School, Will This Lead to a Delay in Admission?*, MINN. STATE BD. OF LAW EXAM'RS (Apr. 2017), <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>] ("If an applicant has conduct issues in the file that suggest that an applicant has a current chemical dependency issue, the Board may request a chemical dependency evaluation at the Board's expense. The Board will factor the recommendations of the evaluator in making a determination on the file. This may delay the Board's determination.")

192. Woo-kyoung Ahn et al., *Mental Health Clinicians' Beliefs About the Biological, Psychological, and Environmental Bases of Mental Disorders*, 33 COGNITIVE SCI. 147, 148 (2009).

193. See discussion *infra* Section III.D.

question 4.37(b).¹⁹⁴ The type of questions asked in 4.37 are allowed by other states when the Board of Law Examiners can show a sound basis for the time frame.¹⁹⁵ Yet, Minnesota does not explain why it must know the applicant's "mental, emotional, or behavioral" illnesses or conditions for the last two years.¹⁹⁶ The MBLE is not assessing current ability to meet the essential eligibility requirements for practicing law as set forth in rule 5A of the Rules for Admission to the Bar.¹⁹⁷ Instead, it looks at past ability without establishing whether prior history of any and every possible mental illness is predictive of future threat to the health or safety of others. The DOJ has actually provided proof that science does not support the idea that past mental illness is predictive of future misconduct.¹⁹⁸

The MBLE may argue that it sets a two-year time frame because it wants to set up a bright-line rule for analyzing character and fitness. However, without explaining to applicants why it considers the last two years of mental illnesses, the MBLE leaves the applicant to wonder at the MBLE's motives. An applicant with persistent depressive disorder may not need to answer this question affirmatively because they have not had a depressive episode affecting their ability to meet the essential eligibility requirements for the practice of law for two and a half years. However, an applicant with depression may need to answer this question affirmatively because they suffer from depression on an ongoing basis although it is maintained through therapy and/or medication. It is possible that the MBLE decided that, in balancing privacy to medical information with the need to investigate mental health, two years provides the MBLE with a large enough timeframe (one including time spent while students are in law school's stressful

194. APPLICATION FOR ADMISSION, *supra* note 22, at 10.

195. See *ACLU of Ind. v. Individual Members of the Ind. State Bd. of Law*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *8, *9 (S.D. Ind. Sept. 20, 2011) (finding that a question asking whether an applicant was ever diagnosed or treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder were admissible and not overly broad in scope because they were "serious mental illnesses" with "undisputed evidence th[e] mental illnesses tend to recur" throughout an applicant's life).

196. APPLICATION FOR ADMISSION, *supra* note 22, at 10.

197. Cf. *Character and Fitness FAQ: 3. What Is Meant by Meeting the Good Character and Fitness Standards?*, MINN. STATE BD. OF LAW EXAM'RS (April 2017), <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>] (stressing that it is the burden of the "applicant to prove a *current ability* to meet the essential eligibility requirements to practice law in Minnesota") (emphasis added).

198. See *supra* Part I.D.3.

environment) to assess how applicants act under pressure. The problem with this decision is that by providing a seemingly arbitrary time frame, the MBE provides applicants with an incentive *to stop going to therapy*.¹⁹⁹ If applicants stop going to therapy in their first year, or before law school starts, and keep their mental health problems to themselves, the MBE will never know that an applicant has a mental illness unless the mental illness becomes too much to handle and bleeds into their professional life. This situation could happen, for example, through an encounter with the police or by necessity of an academic investigation. This outcome, of course, is extremely problematic because law students are then not getting the mental health assistance they need.

The MBE should ask if an applicant has a current or past history of schizophrenia, bipolar disorder, or any other psychotic disorder. This question provides the MBE with enough information to determine if it must conduct additional investigation into potential direct threats. Asking about the applicant's current mental illness status will be a question directed at current fitness to practice law, not at past fitness to practice law. This would also comport with the DOJ's advice that questions that ask about current fitness do not violate the ADA.²⁰⁰ Asking about schizophrenia, bipolar disorder, or any other psychotic disorder is permissible because these mental disorders are "serious mental disorders" that have a likelihood to recur in a patient's lifetime and because these disorders have a severe impact on all aspects of life.²⁰¹

199. Susan DeSantis, *Momentum Builds for Allowing NY Bar Applicants to Keep Mental Health History Secret*, LAW.COM (June 10, 2019, 5:00 AM), <https://www.law.com/newyorklawjournal/2019/06/10/momentum-builds-for-allowing-ny-bar-applicants-to-keep-mental-health-history-secret/> [<https://perma.cc/AP7W-L25C>] (quoting Henry M. Greenberg, President of the New York State Bar Association, "Time in law school is marked by extreme stress, anxiety, overwhelming expectations and financial uncertainty Many students admit they are not seeking help because they are concerned that doing so will negatively impact their bar admission.").

200. Letter from Jocelyn Samuels to Hon. Bernette J. Johnson et al., *supra* note 101, at 22; *see also supra* Part I.D.3.

201. *ACLU of Ind. v. Individual Members of the Ind. State Bd. of Law*, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *8, *9 (S.D. Ind. Sept. 20, 2011) (finding that a question asking whether an applicant was ever diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder were admissible and not overly broad in scope because they were "serious mental illnesses" with "undisputed evidence th[e] mental illnesses tend to recur" throughout an applicant's life); National Institute on Mental Health defines serious mental illness as a "mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life

Additionally, question 4.37(b) asks about applicants' mental health in law school; a period which is statistically shown to cause mental illness in many students.²⁰² The MBLE may argue that this question targets a good window of time to predict an applicant's ability to seek treatment when stressed. However, studies show that applicants are less likely to seek treatment because they fear not being licensed.²⁰³ As well-meaning as this question may be, rather than assessing whether an applicant has a mental illness that could adversely affect their ability to practice law, the MBLE is creating an incentive for applicants to not seek treatment.²⁰⁴

A further issue with question 4.37(b) is that the language is ambiguous. The MBLE does not define the word "impaired" when describing whether a mental, emotional, or behavioral illness or condition impaired an applicant's ability to meet the qualifications in 5A.²⁰⁵ Without a definition, applicants lack clarity about the difference between difficulty and impairment as used in the question. A student may become so stressed during a law school exam that they cannot concentrate and consequently cannot "reason, recall complex factual information, and integrate that information with complex legal theories"²⁰⁶ as required by Rule 5A and must get up and walk around or sit back and eat something before focusing on the problem again. The word "emotional" is defined by Merriam-Webster as "markedly aroused or agitated in feeling or sensibilities."²⁰⁷ "Behavioral" is defined by Merriam-Webster as "pertaining to reactions made in response to social stimuli[.]"²⁰⁸ In the situation above, the law student's experiences would fall within the literal definition "emotional" or "behavioral . . . condition" as set out in the application.²⁰⁹ An applicant could feasibly define this as impaired because they were not able to continue to work on a problem. If an applicant is unsure what constitutes "impaired," they must weigh exposing their private medical information against the MBLE's statement that

activities." *Mental Illness*, *supra* note 80.

202. *See* discussion *supra* Section II.B.

203. *See* Organ et al., *supra* note 12, at 142.

204. *Id.*

205. RULES FOR ADMISSION, *supra* note 18, r. 5A.

206. *Id.* r. 5A(2).

207. *Emotional*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/emotional> [<https://perma.cc/Y9QH-QKUD>].

208. *Behavioral*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/behavioral> [<https://perma.cc/D99Y-XM3P>].

209. APPLICATION FOR ADMISSION, *supra* note 22, at 10.

“failure to disclose an act or event can be more significant, and may lead to more serious consequences, than the act or event itself . . . [and] may result in denial of admission to practice law.”²¹⁰ The questionnaire is ambiguous.

If an applicant looks to the MBLE’s “Frequently Asked Questions” page online, they do not find clarity. In response to the question, “What can an applicant do if the applicant believes his or her record may cause further inquiry?”, the MBLE emphasizes cooperating with its investigation and “providing prompt and complete responses to all requests for additional records or explanation.”²¹¹ This response only serves to further pressure applicants with mental illnesses to disclose more information about themselves than necessary.

Possibly to counter this worry, the MBLE assures applicants the information they disclose will be confidential pursuant Rule 14(F) of the Rules for Admission to the Bar.²¹² However, an exception in that rule allows disclosure of applicant information to “[p]ersons or other entities in furtherance of the character and fitness investigation.”²¹³ This exception appears to mean that, at its discretion, the MBLE could release any of an applicant’s file to any entity without the applicant’s knowledge so long as the MBLE can define it as “in furtherance of the character and fitness investigation.”²¹⁴

If the materials published online do not answer the applicant’s questions, the MBLE has a further option for applicants. If an applicant has questions about what to provide, they are instructed to call the MBLE to explain their unique situation and ask what proofs the MBLE is seeking.²¹⁵ Applicants do not have to disclose their name, but this option is still problematic. Applicants cannot obtain concrete answers about how to fill out their application

210. *Id.* at 5.

211. *Character and Fitness FAQ: 12. What Can an Applicant Do if the Applicant Believes His or Her Record May Cause Further Inquiry?*, MINN. STATE BD. OF LAW EXAM’RS, <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>].

212. APPLICATION FOR ADMISSION, *supra* note 22, at 5; RULES FOR ADMISSION, *supra* note 18, r. 14(F) (“Subject to the exceptions in this Rule, all other information contained in the files of the office of the Board is confidential and shall not be released to anyone other than the Court except upon order of the Court.”).

213. RULES FOR ADMISSION, *supra* note 18, r. 14(D)(3).

214. *Id.* r. 14(D)(3).

215. *Character and Fitness FAQ: 36. What Should I Do if I Have Questions About My Past Conduct and How to Disclose It on My Application?*, MINN. STATE BD. OF LAW EXAM’RS, <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>].

without calling the MBLE and disclosing their disability. Even if the applicant is not stating their name, there is a risk that an application with a lesser-known disability becomes identifiable as soon as they submit their application. Because it is unclear how the MBLE operates, no one can be sure that these telephone conversations will actually be anonymous.

Another problem with answering individual questions over the telephone is that there is no record for the applicant that the MBLE will in fact review the evaluation as described over the phone. The MBLE member answering the phone may not be the one evaluating that application or may forget the conversation and forget what they told the applicant. Hopefully, the MBLE is providing consistent guidance from one applicant to another as to what is required to analyze an application, but there is no way to verify the MBLE is being consistent. The telephone option is not an adequate way of providing applicants transparency because it only provides to one applicant the *potential* evaluative criteria for an application.

Making initial over-disclosure of mental illness more critical, applicants are threatened by refusal of licensure if they do not provide follow-up information. The *Character and Fitness for Admission to the Bar* brochure explains that the applicant is “obligated to cooperate fully with the Board’s character and fitness investigation by providing prompt and complete responses to all requests for additional records or explanation.”²¹⁶ In the context of mental or emotional conditions, the brochure explains that “[r]ecent or severe conditions may result in additional inquiry” without defining “recent” or “severe.”²¹⁷ The MBLE warns applicants to “cooperate fully with the Board[]” and to provide “prompt and **complete** responses,”²¹⁸ yet fails to explain how that information is going to be used.

The ability to subjectively evaluate what “recent” or “severe” means on an individual basis makes these procedures suspect. Rather than rely on the psychological community’s opinion about the severity of disorders, the MBLE could subjectively decide a type of disorder is always severe, and there would be no way for the public to know. Further, when combined with the warning that an

216. *Supra* note 211.

217. *Character and Fitness FAQ: 16. Why Are Mental Or Emotional Conditions Relevant to a Bar Application?*, MINN. STATE BD. OF LAW EXAM’RS, <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>].

218. *Supra* note 211.

applicant bears the burden of showing they can practice law,²¹⁹ applicants understandably would be concerned about the MBLÉ's extremely invasive investigations into mental health and rejection from the practice of law. This requirement is an additional burden on applicants with mental disabilities that applicants without mental disabilities do not face.

Applicants wishing to provide the information that the MBLÉ requires appear to be left with terrible choices. First, they can provide what they *think* is enough information for the MBLÉ to make a decision, and face the consequences if the MBLÉ disagrees. By providing what they think is minimally enough information, the applicants run the risk that the MBLÉ will believe they are lying. Second, they may provide a detailed description of their mental condition and provide documentation of their medical history so the MBLÉ has all the information. Not only is an applicant in the second scenario exposing their most personal therapeutic information to an unknown person who has the discretion to provide it to others without informing the applicant.²²⁰ The applicant also risks providing information that, given the subjective level of review,²²¹ may make a staff member decide to investigate more because they are concerned about one type of disability specifically.

B) How to Make Question 4.37(b) Effective and Not Violate the ADA

Because we now know that applicants are less likely to seek treatment because they fear not being licensed,²²² the MBLÉ should clearly explain on its website and published materials why it asks about mental and emotional health for the prior two years so applicants understand why seeking treatment is actually beneficial to their application investigation. The MBLÉ should cite to ethical rules to explain that part of practicing as a competent attorney

219. See APPLICATION FOR ADMISSION, *supra* note 22, at 9.

220. RULES FOR ADMISSION, *supra* note 18, r. 14(D) (allowing the MBLÉ to release information to: "(1) Any authorized lawyer disciplinary agency; (2) Any bar admissions authority; or (3) *Persons or other entities in furtherance of the character and fitness investigation*" without giving any guidance or limitation as to who may be included in category three) (emphasis added).

221. While the MBLÉ argues it has "processing systems and written procedures to ensure that character and fitness investigations are conducted in a thorough, fair, efficient, and consistent manner," these "systems" and "procedures" are not explained. 2017 ANNUAL REPORT, *supra* note 172, at 10.

222. See Organ et al., *supra* note 12, at 142.

involves self-care.²²³ The MBLE should explain that this self-care takes the form of therapy, medication, or other mental health treatment when a law student or attorney is experiencing psychological stress or trauma.²²⁴ The MBLE should explain that it looks at the two previous years to ensure that when students are first exposed to the rigors and stresses of legal work in law school and have mental health issues, they actively seek assistance.²²⁵ The additional step to more explicitly link therapy with good lawyering is one way the MBLE can break the stigma surrounding mental illness and the glorification of unhealthy behaviors in the legal community. The MBLE, as one of the contributors to this stigma, is in the unique position to help break down the stigma by publicizing the importance of therapy for good lawyering.

Because of the harms caused by a supremely secretive investigative process, the MBLE should also publish its evaluative criteria on mental health questions while maintaining the opportunity to call and ask follow-up questions. Further, the answers to these follow-up questions should be published online so long as publishing the answers will not reveal a particular applicant's information. This practice will make the system fairer because it creates an expectation of consistency. Consistency benefits everyone. Applicants will know what they need to provide the MBLE to show they have the qualifications to be licensed. Finally, individuals with mental illnesses will be better able to predict whether they will be licensed in the future and make a decision about law school before paying for law school only to find out they will not be licensed. Individuals with mental illnesses will also know they must show they are taking care of themselves

223. See MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 2 (AM. BAR ASS'N 2018) ("A lawyer's work load must be controlled so that each matter can be handled competently."); see also, e.g., Montemayor, *supra* note 144 ("We have to create a cultural change where you are taking care of yourself because if you don't, your competence and diligence are going to be compromised.") (internal quotations omitted).

224. See Rachel Casper, *Practicing Self-Care: Tips for Lawyers + Law Students to Avoid Burnout*, LAWYERS CONCERNED FOR LAWYERS MASS. (Sept. 3, 2019), <https://www.lclma.org/2019/09/03/practicing-self-care-tips-for-lawyers-law-students/> [<https://perma.cc/TE4A-XVLH>] (recommending the utilization of social supports, including accessing mental health care); see also Jeena Cho, *Why Lawyers Fear Seeing Therapists, and Why We Should Do It Anyway*, ABOVE THE LAW (May 22, 2017 7:33 PM), <https://abovethelaw.com/2017/05/why-lawyers-fear-seeing-therapists-and-why-we-should-do-it-anyway/> [<https://perma.cc/KSH8-YCE6>].

225. See, e.g., APPLICATION FOR ADMISSION, *supra* note 22, at 9 ("The Board views mental health and chemical dependency treatment as a positive factor in evaluating an application.").

throughout law school in order to be licensed. Providing an incentive for self-care by valuing it in licensing criteria will make the profession a safer one because applicants will be more likely to pursue therapy and medication.

The MBLE may argue that providing its evaluative criteria, rather than providing an incentive for self-care, will only help applicants game the system more easily. If an applicant knows what areas of their life the MBLE examines, the applicant will do everything to make sure those areas do not look problematic. One problem with this argument is that applicants are working around the system already.²²⁶ Instead of making one area of their life not look problematic, they are trying to hide every part of their mental health as a blanket protection so the MBLE does not even have a reason to investigate their mental health.²²⁷ The current system highlights the individuals honestly disclosing their mental illness and has the perverse outcome of creating bad lawyers who hide their mental illnesses out of fear of not being licensed.

Further, the MBLE misses an opportunity to accept individuals with mental disabilities in the legal community. Individual attorneys and law students may accept other lawyers and law students who have mental illnesses, but until there is systemic acceptance of mental illness in the professional legal community, stigma surrounding mental illnesses will continue.²²⁸ The MBLE has the opportunity to send the message that mental illness is acceptable within the legal profession and attorneys with a mental illness can be competent to practice so long as they take care of themselves.

Another counterargument the MBLE could raise is that if it publicizes the reasons why it looks at medical records, applicants will be less likely to seek medical assistance, or if they do, will seek medical assistance through private doctors rather than doctors associated with medical services provided by the law school. This concern is a reasonable and could create an economic inequality issue because law students who have the money to go to private doctors are less likely to be discovered by the MBLE. Meanwhile, low-income law students must go to mental health assistance programs provided by the law school, which can be easily discovered by the MBLE. We know applicants hide their mental illnesses,²²⁹ and part of this obfuscation could involve going to private doctors

226. See Organ et al., *supra* note 12, at 142.

227. *Id.*

228. *Id.* at 156.

229. Organ et al., *supra* note 12, at 142.

and not reporting their treatment. Since it is now clear that the current system of licensure already creates a perverse incentive to hide mental illness, the MBLE must update its evaluative procedures to better reflect the recent psychological studies. If the MBLE refuses, the system of stigma surrounding mental illness will only continue.

Unlike question 4.37 asking about past diagnoses, question 4.41 focuses on past treatment to determine potential direct threat. Question 4.41 asks, “Within the past two years, have you discontinued treatment or medication for a condition that at any time impaired your ability to meet the Essential Eligibility Requirements for the practice of law set forth in Rule 5A? If ‘Yes,’ complete FORM 10.”²³⁰

Question 4.41 of the Application for Admission is overly broad and ineffective because it collects unnecessary, private information to the question of current fitness. This question does not take into account that applicants may have stopped treatment for reasons unrelated to merely choosing to stop treatment. They may no longer need the medication, switched to a more effective medication, or completed their treatment. This question is along the lines of a fishing expedition that allows the MBLE to learn of medications that were discontinued for good reasons. Even if the MBLE argues that it would not investigate when an applicant explains that they discontinued treatment because it was no longer necessary, applicants still must provide information about their treatment. This spills beyond investigation of pertinent information on an applicant’s ability to practice law and into an applicant’s history of mental illness or status as a person with a disability.

The MBLE asks about mental health history, not applicant decision-making. For example, prescription drugs taken two years ago have no clear bearing on an applicant’s current fitness to practice law unless the applicant chose to discontinue treatment *when they should have continued taking medication*.²³¹ This knowledge may be the information that the MBLE was trying to discover. However, it is less invasive to obtain this information by asking about conduct rather than diagnosis, as the DOJ suggested

230. APPLICATION FOR ADMISSION, *supra* note 22, at 10.

231. *Cf.* Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2018) (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . .”).

in its investigation of Louisiana's questions in 2014.²³² The MBLE actually uses some of these less invasive questions, like in question 4.42: "Within the past two years, have you failed in any way to comply with the recommendations of a professional that treatment or medication was necessary to avoid negatively affecting your ability to meet the Essential Eligibility Requirements for the practice of law set forth in Rule 5A?"²³³ Question 4.41 is further ineffective because it creates the counter-productive incentive for applicants to hide their mental illness by stopping therapy before the two-year timeframe. Just as Louisiana's questions violated the ADA by deterring applicants from seeking treatment, Minnesota's question 4.41 likely also violates the ADA as it deters applicants from seeking treatment.²³⁴

C) The MBLE Should Investigate Poor Health Choices in Question 4.41, Not Past Medical Records

Question 4.41 is unnecessary, improper, and should be removed from the application. In light of question 4.37 asking of a condition in the last two years impairing ability to practice law and question 4.42 asking about an applicant's health care choices, question 4.41 is unnecessary. It only serves to glean information about all the medications and treatment the applicant has had in the last two years. This information is unnecessary given the surrounding questions. Question 4.41 is, like Louisiana's questions, unnecessary, ineffective, and places an additional burden on applicants who currently have, or in the past had, a mental illness. The MBLE already gleans the necessary information about an applicant's fitness to practice based on conduct.

D) Burden of Proving Direct Threat in Minnesota

In addition to Minnesota's questions violating the ADA, the MBLE sets out a burden of proof scheme where the applicant must show they are not a direct threat. The Minnesota Application states it is the applicant's burden to show they "possess the qualifications necessary to practice law."²³⁵ However, the application,²³⁶ Rules for

232. See Letter from Jocelyn Samuels to Hon. Bernette Johnson et al., *supra* note 101, at 1.

233. APPLICATION FOR ADMISSION, *supra* note 22, at 10.

234. Letter from Jocelyn Samuels to Hon. Bernette Johnson et al., *supra* note 101, at 24–25.

235. APPLICATION FOR ADMISSION, *supra* note 22, at 9.

236. *Id.*

Admission to the Bar,²³⁷ and the MBL's "Frequently Asked Questions" regarding Character and Fitness for Admission to the Bar²³⁸ do not explain what this burden of proof is. Instead, the MBL should adopt and publicize that it adheres to the Eighth Circuit's ruling that it bears the burden to investigate and establish that a person is a direct threat to the health or safety of others,²³⁹ and assure applicants that, if they disagree with the MBL's assessment that the applicant is a direct threat, *the burden then shifts* to the applicant to show they are not a direct threat.²⁴⁰ This adherence would clarify that applicants, while needing to establish they possess the necessary qualifications, do not go into the character and fitness investigation with their mental illness as a black mark they bear the burden of mitigating. The MBL's disclosure of these burden of proof standards would limit the stigma of mental illness as something that must be downplayed or explained away.

The MBL may argue that because applicants must show they possess the qualifications necessary to practice law, they only have to prove they have the skills necessary to be a lawyer and therefore do not bear the burden established by the Eighth Circuit. They must merely show they are qualified to do the job. However, while there is no explicit instruction that applicants must show they are *not* a "direct threat," they must nevertheless include information as to why their "condition will not affect [their] ability to practice law in a competent and professional manner."²⁴¹ Despite their disability, applicants must show they are competent.

While on their face these instructions seemingly emphasize being qualified to do the job, the MBL's examples place the burden on applicants to show the lack of direct threat.²⁴² Instructions explaining what proof is useful state that applicants may base their arguments on their own opinion *or their treatment provider's opinion*.²⁴³ Specifically, the MBL states in instructions leading up

237. RULES FOR ADMISSION, *supra* note 18.

238. *Character and Fitness FAQ*, MINN. STATE BD. OF LAW EXAM'RS, <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>].

239. *Equal Emp't Opportunity Comm'n v. Wal-Mart Stores, Inc.*, 447 F.3d 561, 571 (8th Cir. 2007).

240. *Id.* at 569 (citing *Benson v. N.W. Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)).

241. APPLICATION FOR ADMISSION, *supra* note 22, at 9.

242. *Id.*

243. *Id.*

to the mental health questions: “Your response to a question may include information as to why, in your opinion or that of your treatment provider, your condition will not affect your ability to practice law in a competent and professional manner.”²⁴⁴ By basing their arguments on a professional’s opinion, the MBLE instructs an applicant to provide an assessment “based on medical or other objective evidence” that the applicant will not present a direct threat.²⁴⁵ Although the MBLE does not use “direct threat” in its instructions regarding the applicant’s burden, this type of evidence is that typically used to show lack of direct threat. The MBLE also instructs that applicants do not need to report on situational counseling such as “stress, victim, or grief counseling.”²⁴⁶ This instruction further sounds like the MBLE wants applicants to make a direct threat analysis that looks at significant risks instead of whether there is any risk at all.²⁴⁷ These instructions violate the Eighth Circuit’s holding that the MBLE bears the burden of showing an applicant is a direct threat.²⁴⁸

E) Shifting the Burden of Proof Back to the MBLE

Instead of placing the burden of proof on applicants, the MBLE should remove any language of burdens of proof until the hearing stage, after the MBLE has made a determination that the applicant poses a direct threat to the health and safety of others. The questionnaire should be a form requesting information that the MBLE uses to investigate the applicant’s ability to meet the essential eligibility requirements, not one requiring applicants to show they can practice law regardless of any mental health issues.

The MBLE may argue that it does not have enough information to establish that an applicant is a direct threat and needs applicants to explain why they do not think their mental health issues make them unable to practice law. However, this argument has no merit because the Eighth Circuit has already ruled that the MBLE bears the burden of proof.²⁴⁹ Further, the MBLE already has the applicant’s test scores, proof of graduation

244. *Id.*

245. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (citing *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 (1987)).

246. APPLICATION FOR ADMISSION, *supra* note 22, at 9.

247. *Bragdon*, 524 U.S. at 649.

248. *Equal Emp’t Opportunity Comm’n v. Wal-Mart Stores, Inc.*, 447 F.3d 561, 572 (8th Cir. 2007).

249. *Id.*

with a J.D., ten years of employment history, criminal background, five character references and two notarized affidavits of good character to assess whether an applicant is a direct threat or not.²⁵⁰ This scrutiny should be enough, along with the proposed modified questions, to determine whether someone poses a direct threat to the health or safety of others. Instead, by placing the burden on the applicant to show they are not a direct threat despite their mental illness, the MBLE places an additional burden on applicants with disabilities that applicants without disabilities do not face and furthers the stigma surrounding mental illness as people who are dangerous.

F) Authorizations: Giving Up All Privacy Rights to the MBLE

Applicants sign away any and all privacy rights to their medical records to the MBLE. Applicants are instructed to fill out the Application and sign the *Authorization and Release of Information and Records* that authorizes the release of, *inter alia*, their medical records to the MBLE.²⁵¹ In addition to its wide breadth, the authorization does not set a time limit.²⁵² The MBLE can contact “all persons, institutions, and entities having knowledge or records pertaining to [the applicant]” and obtain “any information, opinions, records or consumer credit reports,” according to the authorization.²⁵³ Such an authorization is dangerously broad.

Another issue with the authorization is the lack of date nullifying the validity of the authorization. Because the authorization has no time limit, the MBLE has effective authorizations for every applicant who applies for the Minnesota bar regardless of whether they are admitted to practice. These authorizations sitting in applicants’ files pose a potential serious

250. APPLICATION FOR ADMISSION, *supra* note 22, at 3, 5–8, 16, 18 (requiring that the five character references have known the applicant for at least three years and are not 1) a current or former employer or supervisor, 2) relative (by marriage or blood), 3) law school professors, 4) anyone writing an affidavit for the applicant, 5) individuals attending law school during the time the applicant was enrolled, and 6) anyone listed as an attorney reference from another jurisdiction).

251. *How to Apply, Step 2: Fill Out Application*, MINN. STATE BD. OF LAW EXAM’RS, <https://www.ble.mn.gov/how-to-apply/step-2-fill-out-application/> [<https://perma.cc/M764-2MB3>].

252. APPLICATION FOR ADMISSION, *supra* note 22, at 19.

253. *Id.*

security breach—there is even the potential for disclosure of the applicants' social security numbers.²⁵⁴

G) Ensuring MBLÉ's Authorization is Safe

The MBLÉ should, at the very least, publicize how, or even that it does, ensure this sensitive information remains confidential and protected rather than merely expecting applicants to trust that their sensitive information is protected. Further, the state should only release medical information after the MBLÉ notifies the applicant, who the MBLÉ is requesting information on, and the authorization should reflect that practice. This procedure does not prevent the MBLÉ from obtaining the information it needs and providing the applicant with notice that their medical records are being accessed. Further, if the applicant refuses said access, the MBLÉ can choose not to license the applicant due to failure to cooperate with the investigation. Finally, the authorizations should set a one-year timeframe within which the authorizations are effective. This would give the MBLÉ time to investigate the applicant's character and fitness. If the investigation into an applicant's character and fitness lasts longer than a year, the MBLÉ can obtain a second authorization.

H) Minnesota's Evaluation in Practice: A Trial by Surprise

Studying the application and published materials raises serious questions as to ADA compliance. As seen below, interviews with practicing attorneys in Minnesota only further highlight ADA concerns and show that the current investigative process perpetuates the stigma surrounding mental illness.

1. The MBLÉ's Processes and Procedures to Evaluate Character and Fitness

In the process of conducting research, the author interviewed the Director of the Minnesota State Board of Law Examiners, Ms. Emily Eschweiler.²⁵⁵ Due to conflicting interpretations of the recording of the telephone conversation, the Director, after speaking to the MBLÉ, officially withdrew consent to use the

²⁵⁴ *Cf. id.*

²⁵⁵ Interview with Emily Eschweiler, Dir., Minn. State Bd. of Law Exam'rs (Feb. 1, 2019). The interview was conducted on February 1, 2019 via telephone and was recorded by the author.

interview in this Article.²⁵⁶ According to Ms. Eschweiler's letter, "[t]he Board's website contains information about the process. Citing to the Board's website will provide individuals with the ability to review directly information from the Board."²⁵⁷ Accordingly, this Article does not use any information gleaned from the interview with Ms. Eschweiler. Instead, the author relies solely on information the MBLÉ has written on its website and published materials. According to the MBLÉ, if applicants or potential applicants have questions about past conduct, how to disclose it in applications, and "how past conduct might impact their application for admission," they should "feel free to call the Board office for a confidential consultation."²⁵⁸

According to their annual report, the MBLÉ "conducts an investigation of the background of each applicant to the bar."²⁵⁹ The investigation's focus "is to determine whether an applicant demonstrates the ability to meet the essential eligibility requirements to practice law."²⁶⁰ The MBLÉ looks for an applicant's ability to "be honest and candid, use good judgment, act in accordance with the law, avoid acts which exhibit a disregard for the rights and welfare of others, act diligently and reliably in fulfilling one's obligations, use good judgment in financial dealings, and comply with deadlines and time constraints."²⁶¹ In fact, the MBLÉ notes that honesty "is the single most important characteristic[.]" emphasizing that "[f]ull and complete disclosure is important."²⁶² The MBLÉ stresses that "[t]he burden is on the applicant to prove a current ability to meet the essential eligibility requirements to practice law in Minnesota."²⁶³ This explanation seems to indicate that applicants do not have a right to privacy of their medical information due to the requirement that they provide "[f]ull and complete disclosure . . ."²⁶⁴ If applicants do have a right to the privacy of some of their medical information, the MBLÉ does

256. Letter from Emily Eschweiler, Dir., Minn. State Bd. of Law Exam'rs, Michelina Lucia, author (July 1, 2019) (on file with author).

257. *Id.*

258. *Character and Fitness FAQ: 36. What Should I Do if I Have Questions About My Past Conduct and How to Disclose It on My Application?*, *supra* note 215.

259. 2017 ANNUAL REPORT, *supra* note 172, at 10.

260. *Id.*

261. *Id.*

262. *Character and Fitness FAQ: 3. What Is Meant by Meeting the Good Character and Fitness Standards?*, *supra* note 197.

263. *Id.*

264. *Id.*

not explain the extent of this right or how applicants may protect it.

According to the MBL's 2018 Annual Report, "[t]he Board staff uses processing systems and written procedures to ensure that character and fitness investigations are conducted in a thorough, fair, efficient, and consistent manner."²⁶⁵ However, it is not clear what "processing systems and written procedures" the MBL have in place. It is important that these systems and procedures are public so applicants and concerned individuals know applications are being assessed consistently. Without publicized procedures, it is impossible to know whether applications from year to year, and applicant to applicant, are evaluated consistently. The MBL does not state how these applications are interpreted or at what point application answers are too vague and require additional information. However, the MBL does state that "[a]pplications that raise serious character and fitness concerns are brought to the Board for review," and the MBL notes that "[t]he more serious the misconduct in the applicant's past, the more evidence of rehabilitation the applicant will be required to provide."²⁶⁶ Among the other grounds for further investigation, the MBL states that the following is grounds for inquiry in character and fitness investigations: "conduct evidencing current mental or emotional instability that may impair the ability to practice law . . ."²⁶⁷ Yet, the MBL does not state what conduct qualifies as that triggering conduct.

Approximately how long a character and fitness examination will take is also unclear from the posted material. The MBL notes "[f]or most applicants taking the bar examination, the Board completes investigations by the time the bar examination results are published."²⁶⁸ Still, the MBL explains, "[t]here are some applicants each examination cycle who wait until the results are

265. 2018 ANNUAL REPORT, *supra* note 6, at 9; *accord* 2017 ANNUAL REPORT, *supra* note 172, at 10; MINN. STATE BD. OF LAW EXAM'RS, 2016 ANNUAL REPORT 9 (2017), <https://www.ble.mn.gov/wp-content/uploads/2018/06/2016-BLE-Annual-Report.pdf> [<https://perma.cc/NVN3-454G>]; MINN. STATE BD. OF LAW EXAM'RS, 2015 ANNUAL REPORT 9 (2016), <https://www.ble.mn.gov/wp-content/uploads/2016/10/2015-BLE-Annual-Report.pdf> [<https://perma.cc/FZ4U-SGLY>].

266. 2017 ANNUAL REPORT, *supra* note 172, at 10.

267. *Character and Fitness FAQ: 9. What Kinds of Conduct Might Show that an Applicant Is Deficient in the Necessary Qualities of Honesty, Trustworthiness, Diligence, or Reliability?*, MINN. STATE BD. OF LAW EXAM'RS, <https://www.ble.mn.gov/frequently-asked-questions/character-and-fitness/> [<https://perma.cc/MJ7S-P6YU>].

268. 2017 ANNUAL REPORT, *supra* note 172, at 10.

released before providing responses to inquiries that the Board staff previously posted.”²⁶⁹ According to the report, 88.8% of the 116 applicants who passed the February 2017 bar examination “were cleared as to character and fitness in time to participate in the May 2017 admission ceremony.”²⁷⁰ “Of the 448 applicants passing the July 2017 bar examination, 94.2% were cleared as to character and fitness in time to participate in the October admission ceremony.”²⁷¹ When noting why applicants were not cleared, the MBLE states that applicants “either failed to respond to Board requests in a timely manner or had serious issues.”²⁷² The MBLE does not define “serious issues,” so it is unclear what application answers qualify for additional investigation.

Part of these investigative inquiries include those into “mental health and chemical dependency issues . . .”²⁷³ Nowhere in the online published materials does the MBLE assure applicants that it adheres to the *Arline* factors established by the Supreme Court when evaluating mental health questions. The MBLE states these inquiries “are narrowly focused to meet the Board’s responsibility to protect the public and to determine whether an applicant meets the essential eligibility requirements.”²⁷⁴ In conjunction with this explanation, the MBLE also notes in its annual report that it “recognizes the stresses that law school and other factors may place on applicants and encourages applicants to seek psychological counseling or treatment whenever the applicant believes it beneficial to do so.”²⁷⁵ The MBLE further stresses that it “views the decision to seek treatment as a positive factor in evaluating applications and regularly recommends admission of applicants who have addressed their issues and who have the current ability to meet the essential eligibility requirements to practice law.”²⁷⁶ Similarly, the MBLE notes how “written policies and procedures as well as information processing systems are not intended to discourage mental health treatment.”²⁷⁷ Instead,

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* The MBLE also noted that some of these applicants “did not qualify to attend the ceremony because they had not yet submitted a qualifying MPRE score.”
Id.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 11.

[w]hen an applicant discloses, or the Board's investigation identifies conduct that suggests a mental or neurological condition that appears likely to prevent the applicant from fulfilling the essential eligibility requirements of the practice of law as set forth in Rule 5A of the Rules, the Board may refer the applicant for a comprehensive psychological evaluation.²⁷⁸

While the MBLE assures readers that “referrals are rare and when requested, are conducted at the Board’s expense[.]”²⁷⁹ it is unclear exactly what triggers such a referral. So, the applicant is encouraged to seek treatment but at the same time, if there is a question about the applicant’s “mental or neurological condition that appears likely to prevent the applicant from fulfilling the essential eligibility requirements of the practice of law,” that applicant may be referred for a “comprehensive psychological evaluation.”²⁸⁰ Applicants who seek therapy also establish a record showing they definitely have had, at least in the past, mental health issues. Applicants who go to therapy have no way of knowing if disclosure of that therapy will trigger a referral for a “comprehensive psychological evaluation.”²⁸¹ This lack of clarity also leaves applicants unsure how many people will read and analyze their evaluation. While rule 14(F) of the MBLE’s Rules for Admission to the Bar ensures privacy of application information,²⁸² as stated before, there are ambiguities with this rule as well.

If applicants are not cleared for admission to the practice of law due to a determination that their character and fitness are not sufficient, they may be provided another option. For those “whose past conduct raises concerns under Rule 5, but whose current record of conduct evidences a commitment to rehabilitation and an ability to meet the essential eligibility requirements of the practice of law” the MBLE may conditionally admit the applicant.²⁸³ The MBLE notes that applicants “may be placed on conditional admission for issues such as substance abuse, chemical dependency, mental health-related misconduct, criminal probation, or financial irresponsibility.”²⁸⁴ These conditional admissions are by consent of the applicant and allow the applicant to practice law while

278. 2018 ANNUAL REPORT, *supra* note 6, at 10.

279. *Id.*

280. *Id.* at 11.

281. *Id.*

282. APPLICATION FOR ADMISSION, *supra* note 22, at 5; RULES FOR ADMISSION, *supra* note 18, r. 14(F).

283. 2017 ANNUAL REPORT, *supra* note 172, at 11.

284. *Id.*

continuing their program of rehabilitation.²⁸⁵ These conditional admissions can last anywhere between six and sixty months.²⁸⁶ Between 2004 and 2018, 120 lawyers were conditionally admitted and 94 lawyers had successfully completed their conditional admission as of the 2018 Annual Report with 24 lawyers on conditional admission at the end of 2018.²⁸⁷ Presumably, the remaining 2 lawyers did not successfully complete conditional admission but this is not clear from the report.

The most negative outcome for applicants is, of course, an adverse determination. The MBLE notes that when “past conduct warrants denial, the Board issues an adverse determination providing the grounds for the preliminary denial.”²⁸⁸ In these situations, applicants may appeal the determination and “request a hearing before the full Board.”²⁸⁹ According to the MBLE’s annual report, the MBLE issued thirty adverse determinations for character and fitness between 2010 and 2017.²⁹⁰ Of this number, seven applicants were denied after a full hearing.²⁹¹ Applicants have the right to appeal the MBLE’s adverse determination to the Minnesota Supreme Court.²⁹² The problem with this process is less that there is a risk of being denied membership into the Minnesota bar; the problem is that the anxiety and fear of being denied membership causes applicants to not seek treatment—thus creating the dangerous attorneys the MBLE is trying to prevent.

2. Trial by Surprise: Character and Fitness Hearings as Explained by Practicing Attorneys

Applicants can, of course, hire attorneys to represent them during character and fitness evaluations. It is unclear how many applicants are currently represented in character and fitness

285. *Id.*

286. *Id.*; RULES FOR ADMISSION, *supra* note 18, r. 16(E) (noting that conditional licensure cannot exceed sixty months unless “a complaint for a violation of the consent agreement or a complaint of unprofessional conduct has been filed with the [Office of Lawyers Professional Responsibility]. The filing of any complaint with the OLPR shall extend the conditional admission until disposition of the complaint by the OLPR.”).

287. 2018 ANNUAL REPORT, *supra* note 6, at 10.

288. 2017 ANNUAL REPORT, *supra* note 172, at 11.

289. *Id.*

290. *Id.* at 12.

291. *Id.*

292. RULES FOR ADMISSION, *supra* note 18, r. 17.

appeals. The following is a summary of the interviews of three attorneys who represent such applicants.

William Wernz, Retired Partner and, at the time of the interview, Of Counsel at Dorsey & Whitney, LLP in Minnesota has close to forty years of experience working in ethics, professional responsibility, and character and fitness issues. He explained how he argued for applicants' character and fitness in hearings before the Minnesota Supreme Court.²⁹³ He explained how the Minnesota Supreme Court stopped publishing the character and fitness appeals it hears,²⁹⁴ so there is no current precedent from character and fitness appeals cases that lawyers can use to show that a certain amount of proof is sufficient to meet the clear and convincing burden required by Rule 15(D) of the Rules of Admission to the Bar when the MBLE makes an adverse determination.²⁹⁵ He has successfully argued that law school applicants need to provide less documentation of rehabilitation in their character and fitness hearings because the Minnesota Supreme Court previously stated that disbarred lawyers or suspended lawyers had to provide a higher level of proof of rehabilitation than those initially applying for licenses.²⁹⁶ When representing his clients in hearings, Wernz tries to show the MBLE how the applicant is fit to practice by providing testimonials (especially from prior employers) and medical reports from well-respected practitioners when necessary.²⁹⁷ In Wernz's experience, the MBLE used the provisional license in many borderline cases.²⁹⁸ The MBLE had all the

293. Interview with William Wernz, Of Counsel, Dorsey & Whitney LLP, in Minneapolis, Minn., Dorsey & Whitney Office (Nov. 6, 2018) [hereinafter Wernz interview].

294. Whether the Supreme Court chooses to publish character and fitness appeals is relevant to the discussion of how much proof law students must show to meet the clear and convincing standard. However, whether the Supreme Court should begin publishing decisions again and whether to abbreviate applicants' names to protect their privacy is beyond the scope of this Article.

295. Wernz interview, *supra* note 293. It is notable that Mr. Wernz stated lawyers (including himself) had successfully used reinstatement of attorney licenses as precedent. Mr. Wernz explained that the argument would be that if an applicant had a similar or lesser problem than the person bringing a reinstatement case, the current applicant should *a fortiori* be admitted to practice law. Mr. Wernz also noted that applicants could refer to the Board of Law Examiners' Rule 5(D) and (E) to show rehabilitation. E-mail from William Wernz, Retired Partner, Dorsey & Whitney LLP, to Michelina Lucia, author (June 4, 2019, 01:02 CST) (on file with author); *see also* RULES FOR ADMISSION, *supra* note 18, r. 15(D).

296. Wernz interview, *supra* note 293.

297. *Id.*

298. *Id.*; E-mail from William Wernz, Retired Partner, Dorsey & Whitney LLP, to Michelina Lucia, author, *supra* note 295 (observing that for most of the period of time

bargaining power, while the applicant bore the burden of proving by clear and convincing evidence they were fit to practice law; the applicant's license to practice law was pushed back the longer they argued for full licensure, and they had a hearing to prepare for and the expense of the hearing.²⁹⁹

Eric Cooperstein, attorney at Eric T. Cooperstein, PLLC, former Senior Assistant Director of the Office of Lawyers Professional Responsibility, and former member of the Fourth District Ethics Committee in Minnesota,³⁰⁰ is even less optimistic about the MBL's procedures.³⁰¹ Mr. Cooperstein has represented approximately thirty law students in their character and fitness evaluations within the last twelve years.³⁰² According to Mr. Cooperstein, the MBL "do[es]n't want to let people know whether they're likely to get in or not."³⁰³ While Mr. Cooperstein believes that the MBL is not trying to cause unnecessary hardship on applicants, he is frustrated that he cannot get copies of his client's files or even see the documents that would be presented at a hearing unless he specifically requests such documents.³⁰⁴ Mr. Cooperstein does not agree with the MBL's practice of withholding documents until the hearing in order to gauge the applicant's reaction in realtime.³⁰⁵

In Mr. Cooperstein's experience, the MBL usually only investigates applicants experiencing mental illnesses that also have another issue of concern for the MBL (such as driving under the influence or a misdemeanor).³⁰⁶ However, Mr. Cooperstein has had at least one client with only a mental illness and subsequent therapy due to a traumatic incident in their past who experienced a delay in obtaining a license because the MBL wanted to see the

Mr. Wernz represented Board of Law Examiner applicants, there was no conditional license). Mr. Wernz also emphasized he had a good experience recently as a mentor for an applicant who agreed to a conditional license observing that the applicant likely would have been otherwise denied except that the MBL gave greater weight to the years of the applicant's good conduct after the applicant's alleged misconduct. *Id.*

299. Wernz interview, *supra* note 293.

300. *About Eric Cooperstein*, THE LAW OFFICE OF ERIC T. COOPERSTEIN, <http://ethicsmaven.com/background/> [<https://perma.cc/2L7T-9SY6>].

301. Interview with Eric Cooperstein, Esq., *supra* note 165.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

applicant's mental health records.³⁰⁷ Again, the concern is less that many applicants are being denied licensure. The problem is that this process causes fear and anxiety that applicants will be denied or further investigated, which creates perverse incentives not to seek treatment and hide mental illness.

Mr. Cooperstein explained his conceptual understanding of the overall process at the MBLÉ for evaluating potentially problematic applications for admission to the Minnesota bar.³⁰⁸ The Board would separate potential applications into three groups: those who were likely to meet character and fitness, those who would receive a denial of licensure, and those who posed a question as to character and fitness.³⁰⁹ For the third group, the entire Board would meet to review each application and determine whether to deny or approve admission to the bar.³¹⁰ The Board only meets ten times a year.³¹¹ Applicants with a questionable application who have their files come up for review in January, but are not reviewed during the meeting, must wait two months until the Board meets again in March to find out whether they will be denied or approved.³¹² Meanwhile, the applicant is left unlicensed and without assurance of a job.³¹³ Mr. Cooperstein believes that there must be a better way to evaluate the questionable applications so that applicants are not left at the mercy of the Board members' schedules.³¹⁴ When asked about *Arline's* four-factor test, Mr. Cooperstein had never heard of it, responding that the "MBLE tends to define the risk using their [*sic*] own criteria."³¹⁵

This information highlights serious problems about the MBLÉ's investigative process into mental health. First, it implements a trial by surprise approach to hearings whereby applicants with mental illnesses do not know what the MBLÉ will ask or what information will be collected on the applicant. The MBLÉ wants to gauge the reaction of applicants to the information, yet this reaction may be understandably impacted by the applicant's mental illness. An applicant with anxiety may be

307. *Id.*

308. *Id.* E-mail from Eric Cooperstein, Esq., to Michelina Lucia, author, *supra* note 165.

309. Interview with Eric Cooperstein, Esq., *supra* note 165.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* E-mail from Eric Cooperstein, Esq., to Michelina Lucia, author, *supra* note 165.

already on the brink of a panic attack during an interview so their reaction may not be representative of their honesty, ability to practice, or other types of information the MBLE is trying to read. Yet the MBLE assumes this is the only way to ensure the applicant's true motives are made clear. This assumption might work if an applicant did not disclose a criminal record; however, a trial by surprise seems ill suited in the context of mental illness. Second, only applicants who know, or whose attorneys know, to ask for the specific documents that will be provided at a hearing, will have the benefit of advance notice before interviews or hearings. It is no surprise that law students coming out of law school likely lack the financial resources for an attorney to represent them through the application for admission to the bar.³¹⁶ Third, the secretive process disadvantages anyone applying to the bar or even to law schools. Applicants to the bar and to law schools, reasonably, want some assurance that they will be able to obtain a license and get a job, yet the MBLE actively obfuscates the evaluative criteria, forcing applicants with mental illnesses to gamble that they will be licensed and get a job.

Conversely, Ed Kautzer, President and Partner at Ruvelson & Kautzer, Ltd., had a much more optimistic view of the MBLE.³¹⁷ Mr. Kautzer has been representing attorneys, judges, doctors, nurses, and other licensed professionals in their professional ethics matters since 1979.³¹⁸ He has represented about 30 students.³¹⁹ In Mr. Kautzer's experience, the MBLE balances its need to protect the public with an applicant's need to have additional treatment.³²⁰ He has not had a case where the MBLE denied licensure solely based on an applicant's prior treatment, noting that in most of the cases there was something else going on in the person's life such as a divorce, driving while intoxicated, or domestic abuse that

316. There is also a question of whether law students should expect they will need an attorney throughout their application for admission to the bar process. While an applicant may want representation if their application is denied and they request a hearing, the process seems to call for experienced individuals to give guidance as to *how* to answer the application.

317. Telephone Interview with Ed Kautzer, President, Revelson & Kautzer, Ltd. (Jan. 22, 2019).

318. *Attorneys*, RUVELSON & KAUTZER, LTD., <http://www.thesaintpaulloffices.com/attorneys/rkc/> [<http://web.archive.org/web/20180824033555/http://www.thesaintpaulloffices.com/attorneys/rkc/>].

319. Telephone Interview with Ed Kautzer, President, Revelson & Kautzer, Ltd. (Jan. 22, 2019).

320. *Id.*

contributed to their licensure denial.³²¹ If the MBE requires more information, it will explain why it needs the information and ask for additional records.³²² If the MBE requires a psychological evaluation, it will pay for it.³²³

Mr. Kautzer has not had difficulty getting information.³²⁴ He explained that he has known everyone at the MBE for the last 30 or more years and “it’s a two-way street. We need information from them, they need information from us.”³²⁵ Mr. Kautzer had never heard of the four-factor test from *Arline*.³²⁶ Mr. Kautzer’s interview further supports the need for experienced advice when filling out Minnesota’s Character and Fitness Questionnaire. Those who don’t know the system and don’t know what to request, and how to ask for it, will be at a disadvantage.

D) The Legal Community Should do More to Ensure That Students Seek Mental Health Treatment When They Need It

The boards of law examiners are not the only ones responsible for the culture of secrecy relating to mental health that permeates throughout law schools and the legal community. Every entity that helps create such a secret and stigmatic atmosphere surrounding mental illness must work to re-define what it means to be a qualified lawyer.³²⁷ Law schools should do more to ensure law students seek mental health treatment, encourage others to do the same, and promote healthy life choices.³²⁸ Law schools should integrate classes that incorporate mindfulness, time-management, and self-care beyond the minimum legal malpractice and ethics courses.³²⁹ Law schools should also provide easy access to mental health professionals and therapy animals on campus.³³⁰

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. See Organ, *supra* note 12, at 156 (arguing that incremental work by a few law schools will not solve the problem, rather such a solution requires “a coordinated and sustained effort by a variety of stakeholders.”).

328. *Id.* at 155.

329. AGATSTEIN ET AL., *supra* note 12, at 50 (finding that students were interested in taking courses and workshops on time management, mindfulness, and mental health law).

330. *Id.* at 51 (publishing how law students wanted more therapy dogs and a full-time counselor or mental health professional to help deal with the stressful

The legal community in general should promote self-care and publicize the confidential nature of lawyer-assistance programs to practicing lawyers to overcome the privacy concerns and fear surrounding mental illness and substance misuse.³³¹ On the week of February 25, 2019, Justice David Lillehaug, Justice of the Minnesota Supreme Court, in a seminar on mindfulness and health in the legal community, made public the Minnesota Supreme Court's stance on the psychological study conducted by the Hazelden Betty Ford Foundation and the American Bar Association.³³² The Supreme Court called the information coming from the study a "crisis of well-being among Minnesota lawyers[.]"³³³ saying that "the court feels an obligation to deal with" the stressful and toxic atmosphere in the practice of law.³³⁴ As Justice Lillehaug said, "[t]he real failure is the rest of us saying 'there but for the grace of God go I.'"³³⁵ The Supreme Court is dubbing this a "call to action" that will not be confined to the single, mindfulness event of February 2019.³³⁶

In the spirit of the Supreme Court's public stance to change the current trends of substance misuse and stigma surrounding mental illness, the Supreme Court should step in if the MBLE is unwilling to make the necessary changes to make the character and fitness application conform to the ADA and remove stigmatic language. If the MBLE will not correct itself on its own, the Minnesota Supreme Court should form a committee to review the MBLE's application procedures.³³⁷ This committee should be comprised of attorneys and members of the public who both understand the importance of professional responsibility in the legal field while also appreciating the social stigma surrounding mental illness. It should prioritize uniformity in evaluations, transparency in the mental health portion of the questionnaire, and adherence to the ADA and Eighth Circuit. The committee should

environment of law school).

331. Krill et al., *supra* note 8, at 52 (recommending that the "confidential nature of lawyer-assistance programs" be publicized to overcome privacy concerns causing barriers between struggling attorneys and help they need).

332. Montemayor, *supra* note 144.

333. *Id.*

334. *Id.* (quoting Justice David Lillehaug).

335. *Id.* (quoting Justice David Lillehaug).

336. *Id.*

337. Interview with Eric Cooperstein, Esq., *supra* note 165; E-mail from Eric Cooperstein, Esq., to Michelina Lucia, author, (Jan. 2, 2020, 12:08 PM) (recommending that the Minnesota Supreme Court form a committee to review the MBLE).

propose solutions that will ensure applicants with mental illnesses are not impermissibly discriminated against based upon their disability while also ensuring competence in the legal profession. The Minnesota Supreme Court should require the MBLE to evaluate applicants' mental illnesses under *Arline's* four-factor, direct threat analysis in order to adhere to 28 C.F.R. § 35.139(a) and the Americans with Disabilities Act.³³⁸ As Justice Lorie Skjerven Gildea said, the new psychological information is “a wake-up call casting a spotlight on a topic that sat in the shadows far too long.”³³⁹ The Supreme Court's “wake-up call”³⁴⁰ should spur it to take another look at the MBLE's policies and procedures assessing the mental health of applicants if the MBLE will not change on its own.

IV: “Our Remedies Oft in Ourselves Do Lie”:³⁴¹ Final Observations

The Americans with Disabilities Act seeks to protect individuals with disabilities from being discriminated against based on their disability status. Barriers cannot be placed on individuals with disabilities simply because they have a disability. The government further protects the public by allowing some investigation into a disabled individual's medical status when that status may pose a direct threat to the health or safety of others and the individual is applying for a professional license. Yet Minnesota does not follow the test set out to evaluate whether applicants for licenses to practice law pose a direct threat to the health or safety of others. It does not follow the Eighth Circuit's law relating to burden of proof either. Instead, the MBLE's procedures treat any mental, emotional, or behavioral condition or illness as a potential reason to investigate into any and all medical records of the applicant. The MBLE further does not provide a transparent evaluation process thus creating a culture of secrecy that creates a perverse incentive for applicants to be as secret as the Board in order to protect their privacy.

Due to the Character and Fitness Questionnaires violating the ADA, applicants with disabilities are subjected to additional burdens to prove their fitness to practice law that non-disabled applicants do not have to prove. In addition, the vagueness of the rules and procedures seen in Minnesota disincentivizes students

338. 28 C.F.R. § 35.139(a) (2018); 28 C.F.R. Pt. 35, App. B.

339. Montemayor, *supra* note 144.

340. *Id.*

341. WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL* act 1, sc. 1.

from seeking medical treatment. This disincentive only serves to lower the quality of lawyers in the legal profession.

We as a legal community, have the power to remedy every issue just described. By providing more transparency in the application process, applicants with disabilities will know what to expect from the board of law examiners. Applying *Arline's* four-factor, direct threat test and placing the burden of proving direct threat on the MBLE, applicants' exposure to investigations that violate the ADA will be diminished. This effort will also reduce additional burdens on applicants with disabilities, and disincentivize applicants from hiding their mental illness.