RESOLVED, That the American Bar Association urges state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment when determining character and fitness for the purpose of bar admission. The questions should focus instead on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.

FURTHER RESOLVED, That this resolution replaces the 1994 policy, ABA Resolution No. 110, Aug. 1994 (94A110).
REPORT

Introduction

State and territorial bar examiners have a duty to the public to ensure that all licensed attorneys are fit to practice law. To fulfill this duty, state bars ask all applicants a series of moral character and fitness questions. Many of these questions focus on conduct or behavior, including deceit, fraud, financial irresponsibility, criminal arrests and convictions, academic, employment and professional discipline, and driving under the influence of alcohol or drugs.¹

In addition to conduct and behavior-related questions, many state bars inquire about applicants’ mental health diagnoses and treatment. Applicants who answer these questions affirmatively are subject to burdensome supplemental investigations that are not imposed on other applicants. Typically, they are required to authorize their treatment providers to release information relating to mental health diagnoses and treatment, including medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These applicants may also have to undergo examinations by independent psychiatrists or psychologists at their expense. Questions about mental health history, diagnoses, or treatment are not only unduly intrusive, but screen out or tend to screen out individuals with disabilities, are ineffective for the presumed purpose of identifying unfit applicants, and are likely to deter individuals from seeking mental health counseling and treatment.

Purpose

This Resolution urges state and territorial bar licensing entities, when determining character and fitness for the purpose of bar admission, to eliminate all questions that ask about mental health history, diagnoses, or treatment and instead focus on conduct or behavior that in a material way impairs an applicant’s ability to practice law competently, ethically, and professionally.

This Resolution replaces ABA Resolution No. 110 (Aug. 1994),² which stated:

BE IT RESOLVED, That the American Bar Association recommends that when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should

¹ See, e.g., NATIONAL CONFERENCE OF BAR EXAMINERS, REQUEST FOR PREPARATION OF A CHARACTER REPORT, at 13, available at http://ncbex.org/character-and-fitness (e.g., “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?”).
² Available at http://www.americanbar.org/content/dam/aba/directories/policy/1994_am_110.authcheckdam.pdf.
consider the privacy concerns of bar admission applicants, tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.

Although the 1994 policy was a step forward in limiting unnecessary and intrusive questions regarding mental health and treatment, it stopped short of calling for their elimination. The drafters recognized it might well become necessary to revisit the issue in the future, and expressed their intent “to pursue further dialogue and interaction.” The 20 years that have elapsed since adoption of that policy have brought significant developments in the law and our understanding of mental disabilities that call into question the continued use of even narrowly-tailored questions regarding mental health and treatment. It has become clear that questions about mental health history, diagnoses, or treatment are inherently discriminatory, invade privacy, stigmatize and needlessly exclude applicants with disabilities, are ineffective in identifying applicants who are unfit, and discourage some applicants from seeking necessary treatment. By calling for the elimination of such questions, the proposed Resolution will help ensure that bar applicants with disabilities are assessed—like other applicants—solely on the basis of their fitness to practice law.

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3 This concern was acknowledged in a subsequent policy adopted by the House of Delegates in February 1998 regarding character and fitness determinations of state and territorial judicial candidates, nominees, or appointees. Available at http://www.americanbar.org/content/dam/aba/directories/policy/1998_my_114.authcheckdam.pdf. Brought before the House by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Resolution stated:

RESOLVED, That the American Bar Association recommends that when making character and fitness determinations of state and territorial judicial candidates, nominees, or appointees, any nominating or evaluating entity: 1) consider the privacy concerns of the candidates; 2) narrowly tailor questions concerning physical and mental disabilities or physical and mental health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and 3) take steps to ensure that the process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. (Emphasis added.)

FURTHER RESOLVED, That fitness determinations may include specific, targeted questions about a state and territorial judicial candidate's behavior, conduct, or current impairment as it affects the ability to serve as a judge.
Developments Since Adoption of 1994 Policy

In early 2014, the U.S. Department of Justice (DOJ) informed the states of Vermont⁴ and Louisiana⁵ that their questions about bar applicants’ mental health diagnoses and treatment violate Title II of the Americans with Disabilities Act (ADA). The decision with respect to Louisiana followed an extensive investigation in response to a complaint filed by Louisiana bar applicants, resulting in a formal finding in February 2014 that Louisiana’s character and fitness questions regarding applicants’ mental health diagnoses and treatment discriminate based on disability and thus violate Title II of the ADA. The questions at issue were:

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 26A is yes, are the limitations caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational

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⁴ Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Karen L. Richards, Executive Director, Vermont Human Rights Commission (Jan. 21, 2014) [Vermont Letter]. Richards had requested the Department of Justice’s (DOJ) position regarding the extent to which states may consider mental health in their screening process for bar applicants. DOJ stated its position—the questions are eligibility criteria that screen out or tend to screen out persons with disabilities and subject them to additional burdens; the questions are unnecessary because questions related to applicants’ conduct are sufficient and most effective to evaluate fitness; and the questions are unnecessary because they do not effectively identify unfit applicants—but did not make a formal finding because no complaint was lodged.

institution, employer, government agency, professional organization, or licensing authority.”

Applicants who responded affirmatively to these questions were required to provide a detailed description of their condition(s) and treatment, list all of their treatment providers, and authorize their providers to release all of their medical records to bar officials.

The DOJ found that, to comply with the ADA, “attorney licensing entities must base their admissions decisions on an applicant’s record of conduct, not the applicant’s mental health history.” Moreover, “[i]nquiring about bar applicants’ medical conditions substitutes inappropriate questions about an applicant’s status as a person with a disability for legitimate questions about an applicant’s conduct.” The DOJ concluded that the questions at issue: impermissibly screen out or tend to screen out persons with disabilities “based on stereotypes and assumptions about their disabilities”; are unnecessary to determine fitness and ineffective in identifying unfit applicants; and are likely to deter individuals from seeking mental health counseling and treatment and, therefore, are counterproductive to the goal of ensuring fitness to practice.

As to Question 26A, the DOJ found that asking whether a condition or impairment “if untreated could affect” an applicant’s ability to practice law “reduces the question to one about an applicant’s diagnosis, not the effect of that diagnosis on his or her fitness to practice law.” Because the question “considers an applicant’s disability in a hypothetical future untreated form,” it fails to “inform an assessment of how the disability affects an applicant’s current fitness to practice law.” It assumes “a worst case scenario that may never come to pass” and “appears rooted in unfounded stereotypes about individuals with these diagnoses.”

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6 Id. at 5.
7 Id. at 8.
8 Id. at 19.
10 Findings Letter, supra note 4, at 19, 22. See also Banta, supra note 8, at 182-83.
11 Findings Letter, supra note 4, at 22. Id. at 23. See also Jennifer McPherson Hughes, Suffering in Silence: Questions Regarding an Applicant’s Mental Health on Bar Applications and Their Effect on Law Students Needing Treatment, 28 J. Legal Prof. 187 (2003-04); Banta, supra note 8, at 183-84.
12 Findings Letter, supra note 4, at 22. See also Sutton v. United Air Lines, Inc., 527 U.S. 471, 472 (1999) (finding that a “disability” under the Americans with Disability Act “exists only where the impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.”)
13 Findings Letter, supra note 4, at 22.
14 Id.
In August 2014, the DOJ entered into a settlement agreement with the Louisiana Supreme Court to ensure the right of qualified bar applicants with mental health conditions to have equal access to the legal profession.\textsuperscript{15} The settlement requires the court to revise its character and fitness questions so that they focus on an applicant’s conduct or behavior. Under the terms of the settlement, inquiries into mental health diagnoses or treatment are prohibited unless an applicant voluntarily discloses this information (1) to explain conduct or behavior that may otherwise warrant denial of admission or (2) in response to Question 26A on the National Conference of Bar Examiners’ Character and Fitness application, “Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?”

Although the settlement did not require Louisiana to eliminate Question 26A, at least one other state has done so. The Tennessee Board of Law Examiners decided to remove Questions 26A and B\textsuperscript{16} from the National Conference of Bar Examiners’ application accessed by applicants for licensure in Tennessee.\textsuperscript{17}

**The Law and Its Application**

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”\textsuperscript{18} DOJ is the federal agency charged with enforcing Title II. Its regulations bar public entities from “administer[ing] a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of a disability.”\textsuperscript{19} In addition, public 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.\textsuperscript{20} Also prohibited are policies that “unnecessarily impose


\textsuperscript{16} 26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? □ Yes □ No

B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?


\textsuperscript{18} 42 U.S.C. § 12132.

\textsuperscript{19} 28 C.F.R. § 35.130(b)(6).

\textsuperscript{20} Id. § 35.130(b)(8).
requirements or burdens on individuals with disabilities that are not placed on others.”

State bars are public entities and thus fall within the scope of coverage under Title II.

As the DOJ concluded in its Findings Letter, inquiries about bar applicants’ mental health diagnoses and treatment constitute eligibility criteria that screen out or tend to screen out individuals based on speculation, stereotypes, and assumptions about their disabilities. Bar examiners appropriately ask a wide range of questions that focus on conduct relevant to applicants’ fitness. Such conduct-based questions are not only sufficient to evaluate fitness, but also the most effective means for doing so. A history of mental health diagnosis or treatment is not a useful predictor of future attorney misconduct or malpractice.

Furthermore, as the DOJ observed, questions concerning mental health diagnoses and treatment are counterproductive to the goal of ensuring the fitness of licensed attorneys by deterring applicants from seeking counseling and treatment for mental health concerns. Applicants fear that such disclosures may preclude them from becoming


22 Findings Letter, supra note 4, at 19.

23 Id. at 22-23. See also Allison Wielobob, Bar Application Mental Health Inquiries: Unwise and Unlawful, 24:1 HUMAN RIGHTS 12, 14 (Winter 1997) (“But questions about behavior, not mental health treatment, would more accurately discover potentially problematic practitioners.”); Banta, supra note 8, at 186-87 (“Permissible inquiries into conduct and behavior to determine fitness are sufficient to serve bar examiners’ purpose of protecting the public.”); Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution, 20 J. LEGIS. 147, 149 (1994) (“Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse.”).

24 See, e.g., 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) (“there is simply no empirical evidence that applicants’ mental health histories are significantly predictive of future misconduct or malpractice as an attorney”); Banta, supra note 8, at 182-83 (Psychological records are not a reliable predictor of behavior, since the range and severity of individuals’ problems vary.”); In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (“Research 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.”); Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 446 (E.D. Va. 1995) (licensing questions related to mental health status or treatment were unnecessary where “the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction”; “past behavior is the best predictor of present and future mental fitness.”); Application of Underwood, 1993 WL 649283, at *2 (Me. Dec. 7, 1993) (“Although it is certainly permissible for the Board of Bar Examiners to fashion questions more directly related to behavior that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA.”) (emphasis in original).


26 Id.
lawyers. In addition, such questions may prevent applicants who seek treatment from being totally candid about their conditions, thereby limiting the health care provider’s ability to accurately diagnose and treat them.27

Finally, unnecessary burdens are placed on applicants who respond affirmatively to mental health questions.28 Typically, they are subjected to further investigations such as interviews and independent psychiatric or psychological examinations at their own expense, and are required to submit detailed medical information related to their condition and treatment, including copies of medical and hospitalization records. These records contain highly sensitive, personal information such as details about childhood, parents, siblings, and sexual history that is not relevant to one’s ability to practice law. These practices impose significant expense, delays, and invasions of privacy on applicants with disabilities.

Conclusion

Nearly 25 years after the passage of the ADA, in the wake of intervening court and federal agency decisions, the time has come for the ABA to update its position on this issue of great significance to our profession and our members. The ABA has long sought to “promote the full and equal participation in the association, our profession, and the justice system by all persons.”29 In 2000, the House adopted policy urging courts to ensure equal access to justice by making courthouses and court proceedings accessible. The accompanying report cited the congressional finding that people with disabilities frequently face restrictions and limitations “resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”30

Petition of Frickey, 515 N.W.2d 741 (Minn. 1994) (“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”).

27 Findings Letter, supra note 4, at 24 (citing Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 438 (E.D. Va. 1995); U.S. Dep’t of Health & Human Services, Mental Health: A Report of the Surgeon General 441 (1999) (“evidence also indicates that people may become less willing to make disclosures during treatment if they know that information will be disseminated beyond the treatment relationship”).

28 Vermont Letter, supra note 3, at 8-9 (citing Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. at 442-43 (E.D. Va. 1995) (finding applicants with disabilities cannot be subjected to additional unnecessary burdens); Ellen S. v. Fla. Bd. of Bar Exam’rs, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994); Med. Soc’y of N.J. v. Jacobs, 1993 WL 413016, at *8 (D.N.J. Oct. 5, 1993) (holding that licensing board may not place burden of additional investigations on applicants who respond affirmatively to questions about disability status); Brewer v. Wis. Bd. of Bar Exam’rs, 2006 WL 346958, at *10 (E.D. Wis. Nov. 28, 2006) (concluding licensing entities may not require additional investigation solely because of applicants’ disabilities)). See also Coleman & Shellow, supra note 23, at 148 (stating that applicants who disclose a history of illness or treatment are injured because their admission is delayed, they are compelled to reveal private details of mental health, and face the stigma associated with mental conditions).


The signatories to the 1994 Resolution wrote in the conclusion to their report, “What has been accomplished to date represents both progress and the promise of greater progress.” We believe this new Resolution represents that “greater progress” and we commend it to the House of Delegates for its favorable consideration.

Respectfully submitted,
Mark D. Agrast
Chair
Commission on Disability Rights

Mark I. Schickman
Chair
Section of Individual Rights and Responsibilities

August 2015
1. **Summary of Resolution(s).** This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. **Approval by Submitting Entity.** The Commission on Disability Rights approved the resolution at its fall meeting in Washington, DC, on November 17, 2014. The Section of Individual Rights and Responsibilities approved the resolution at its council meeting on April 24, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No. However, this proposed resolution would replace existing policy as noted under Question 4.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   In August 1994, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights), the Section of Legal Education and Admissions to the Bar, and the Association of American Law Schools—recommending that state and territorial bar examiners, when making character and fitness determinations for the purpose of bar admission, should tailor questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so. The proposed resolution would replace this 1994 policy by urging state and territorial bar licensing entities and the National Conference of Bar Examiners to no longer ask any questions concerning mental health and treatment.

   In February 1998, the House passed policy—submitted by the Commission on Mental and Physical Disability Law (now the Commission on Disability Rights) and the Section of Individual Rights and Responsibilities—urging any nominating or evaluating entity making character and fitness determinations of state judicial
candidates, nominees, and appointees to: consider the privacy interests of the candidates; narrowly tailor questions concerning physical and mental disabilities and health treatment in order to elicit information about current fitness to serve as a judge, with such reasonable modifications as may be required; and take steps to ensure that the evaluation process does not have the effect of discouraging those who would seek judicial office from pursuing professional assistance when needed. This policy would not be affected by the proposed resolution, which does not address judicial character and fitness determinations.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Adoption of this policy will enable the Association to urge state and territorial bar licensing entities to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead ask questions that focus on conduct or behavior that in a material way impairs a bar applicant’s ability to practice law in a competent, ethical, and professional manner.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.

   Criminal Justice Section
   Section of Family Law
   Section of Legal Education and Admissions to the Bar
   Section of Real Property, Trust and Estate Law
   Judicial Division
   Law Student Division
   Senior Lawyers Division
   Young Lawyers Division
   Association of American Law Schools
   National Conference of Bar Examiners
   Standing Committee on Client Protection
   Standing Committee on Ethics and Professional Responsibility
   Standing Committee on Legal Assistance for Military Personnel
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
Commission on Disability Rights
Amy L. Allbright
1050 Connecticut Avenue, NW Suite 400
Washington, DC 20036
(202) 662-1575
amy.allbright@americanbar.org

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Commission on Disability Rights:
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Section of Individual Rights and Responsibilities:
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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges state and territorial bar licensing entities, in their character and fitness determinations for the purpose of bar admission, to eliminate any questions that ask about mental health history, diagnoses, or treatment and instead focus questions on conduct or behavior that in a material way impairs an applicant’s ability to practice law in a competent, ethical, and professional manner. This resolution replaces the 1994 policy (ABA Resolution No. 110 (Aug. 1994)).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the extent to which questions about mental health history, diagnoses, or treatment are necessary or appropriate in determining an applicant’s character and fitness. It provides that such questions are unnecessary and ineffective in identifying applicants who are unfit and are likely to deter individuals from seeking mental health counseling and treatment. These kinds of questions are counterproductive to the goal of ensuring fitness to practice; unnecessarily invade applicants’ privacy; and impermissibly tend to screen out persons with disabilities based on stereotypes and assumptions about their disabilities, rather than focusing on their conduct or behavior that impairs their ability to practice law in a competent, ethical, and professional manner.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed resolution urges state and territorial bar licensing entities to eliminate any questions that ask bar applicants about mental health history, diagnoses, or treatment.

4. Summary of Minority Views

At this time, we are unaware of any opposition. However, to the extent that some licensing entities currently ask questions about mental health history, diagnoses, or treatment, it is possible that there will be some opposition to the resolution.