IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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| JULIE ANN CLARK | : | |
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| Plaintiff, | : | |
| | : | C.A. # 94-211-A |
| v. | : | |
| | : | |
| VIRGINIA BOARD OF BAR EXAMINERS | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

**MEMORANDUM OF LAW OF THE UNITED STATES AS AMICUS CURIAE**

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## I. INTRODUCTION

The United States submits this memorandum as amicus curiae to address the issues expected to arise in the trial of this case, which is scheduled to begin on November 22, 1994.

Although she has successfully passed the Virginia Bar examination and has satisfied all of the other requirements of the character and fitness review of the Virginia Board of Bar Examiners ("Board"), plaintiff Julie Ann Clark has refused to answer question 20(b) of the Board's application, which asks,

> Have you within the past five (5) years been treated or counseled for any mental, emotional, or nervous disorder?

Ms. Clark asserts that the Board violates title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. II 1990) by asking question 20(b) because it is an unnecessary and burdensome inquiry into mental disabilities.

The United States recognizes the great responsibility placed on the Board to ensure that attorneys licensed to practice in the Commonwealth are mentally fit and professionally competent. However, Congress enacted title II of the ADA to prohibit policies or procedures that assess an individual's ability on generalizations or stereotypes based on disability. The United States believes that Ms. Clark should prevail in this case because question 20(b) discriminates against persons with disabilities. It targets persons with disabilities for additional burdens and disclosure requirements, and this broad inquiry into an applicant's mental health history is not

necessary to determining fitness to practice law. Requiring applicants to answer question 20(b) is an unnecessary eligibility criteria that violates title II of the ADA regardless of whether individuals who answer question 20(b) affirmatively are ultimately granted a license to practice law.

## II. ARGUMENT

### A. TITLE II PROHIBITS CLASSIFICATIONS BASED ON DISABILITY THAT DO NOT ACCURATELY PREDICT INDIVIDUAL ABILITIES

The ADA is a civil rights law intended to protect individuals with disabilities against the stereotypes or generalizations that are commonly associated with those disabilities. As stated in the ADA itself, Congress found these stereotypes "are not truly indicative of the individual ability of [persons with disabilities] to participate in, and contribute to, society." 42 U.S.C. §12101(a)(7)(emphasis added).[1] By inquiring into the existence of mental disabilities, licensing organizations act on the basis of this impermissible stereotype.

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[1] See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 30, 33, 40, 41 (1990) [hereinafter cited as Education and Labor Report]; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. III at 25 (1990) [hereinafter cited as Judiciary Report]; S. Rep. No. 116, 101st Cong., 1st Sess. at 7, 9, and 15 (1989) [hereinafter cited as Senate Report]; see, e.g., U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual 12 (1992 & Supp. 1993)[hereinafter, "Title II Technical Assistance Manual"]("A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However the public entity must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities") (emphasis added).

These inquiries start from a presumption that a person's ability to practice law is likely to be adversely affected by having had treatment for any of a broad range of mental disabilities in the past, even though they may have never affected that person's judgment, integrity, responsibility, or abilities as a professional.[2]

The Supreme Court has cautioned against relying upon negative attitudes or stereotypes of the potential dangers posed by disabilities. School Board of Nassau County v. Arline, 480 U.S. 273, 285 (1986)(person with disabilities are often "vulnerable to discrimination on the basis of mythology");[3] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985)("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwelling, and the like.").

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[2] Bar examiners are not usually professionals trained in the fields of psychiatry or psychology.

> [w]hile mental stability is obviously relevant to practice, current certification standards license untrained examiners to draw inferences that the mental health community would find highly dubious...Even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases.

Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 581-82 (1985).

[3] The legislative history of the ADA includes numerous approving references to Arline's interpretation of the law. See Senate Report at 21-24; Education and Labor Report at 50-53.

Even where generalizations about an individual's class are statistically true, civil rights law require focus on individuals rather than classes. In City of Los Angeles v. Manhart, 435 U.S. 702 (1978), the Court considered whether a pension plan that required female employees to make larger contributions than male employees violated Title VII of the Civil Rights Act of 1964. Although both parties conceded that statistical and actuarial data confirmed that women, as a class, live longer than men, the Court held that the plan violated Title VII. The Court concluded that Congress had intended unnecessary classifications based on gender to be unlawful, despite statistical or actuarial analysis. Id. at 707-709. Noting that there was "no assurance that any individual woman ... will actually fit the generalization" upon which the plan was based, the Court held that Title VII required an analysis of the individual instead of the class:

> Even if statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve assumptions about groups rather than thoughtful scrutiny of individuals.

Id., at 708, 709.[4]

[4] See also Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983)(holding that pension plans that pay lower monthly benefits to female contributors violate title VII); Connecticut v. Teal, 457 U.S. 440 (1982)(holding that an individual may sustain a "disparate impact" claim under Title VII, even if an employer ultimately favors plaintiff's racial group).

Like Title VII of the 1964 Civil Rights Act,[5] the ADA was intended to combat generalizations based on a person's class---in this case, a person's status based on disability. This congressional intent is reflected in the findings supporting the ADA, where Congress found that,

> individuals with disabilities are a discrete and insular minority who have been ... subjected to a history of purposeful unequal treatment... resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7). The legislative history also reveals that Congress recognized the need to combat the "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies"[6] surrounding disability and the need for a more enlightened view towards persons with disabilities:

> Gradually public policy affecting persons with disabilities recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices towards people with disabilities. These discriminatory policies and practices affect people with disabilities in every aspect of their lives, from securing employment, to

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[5] Unlike title II, section 703(a)(1) of the Civil Rights Act of 1964, which was at the heart of the Manhart decision, does not explicitly include an exception for necessary eligibility criteria. In Manhart, several amici suggested that a gender based distinction was justified by business necessity. The Court held, however, that these distinctions were not shown to be "reasonably necessary to the normal operation of the Department's retirement plan." 435 U.S. at 716 n. 30.

[6] Senate Report, at 7; Education and Labor Report, at 30.

> participating fully in community life,... to enjoying all the rights that Americans take for granted.

Judiciary Report, at 25. As in Manhart, unnecessary classifications based on disability are not permitted because of the ADA's requirement that public entities focus on the abilities of individuals rather than class generalizations.

Even if it could be shown that, as a class, persons with certain mental disabilities are more likely to become impaired in their ability to practice law in the future,[7] the ADA prohibits unnecessary inquiries into disabilities.[8] All of the courts that have considered challenges to mental health questions in professional licensing have concluded that a broad-based inquiry, such as the Board's question 20(b), violates title II of the ADA. Ellen S. v. Florida Board of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994)(a licensing board violates title II by asking applicants about any counseling or diagnosis for any nervous, mental, or emotional condition); Medical Society of New Jersey v. Jacobs, 1993 WL 413016 (D.N.J. 1993)(a licensing board's inquiry of "have you ever suffered or been treated for any mental illness or psychiatric problem" violates title II); In re Applications of

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[7] The United States does not concede and the record does not support the position that persons answering question 20(b) are more likely to become impaired in the ability to practice law in the future than other applicants.

[8] Of course, if a disability could perfectly predict future behavior of all persons with that disability, then it rises above being a mere generalization. However, even the defendant does not assert and the record clearly does not show that any past treatment for mental disability is perfectly predictive of current or future fitness to practice law.

Anne Underwood and Judith Ann Plano, No. BAR 93-21, 1993 WL 649283 at *2 (Me. Dec. 7, 1993) ("The Board's requirement that applicants answer questions 29 and 30 [regarding diagnosis of and treatment for emotional, nervous or mental disorders], and that they sign a broad medical authorization violates the ADA because it discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities."); cf. In re Petition of Frickey, et al., 515 N.W.2d 741 (Minn. April 28, 1994), (while not decided on the basis of the ADA, finding that similar inquiries regarding mental health history on Minnesota's bar admissions application were unnecessary and deterred students from obtaining necessary counseling); see also Applicants v. Texas State Board of Law Examiners, 93 CA 740 SS (W.D. Tex. Oct. 10, 1994)(broad-based inquiries into an applicant's mental health history violate title II of the ADA).[9]

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[9] The United States believes that, to the extent that it permitted even limited inquiries into "severe" mental disabilities, the court's opinion in Texas State Board of Law Examiners, 93 CA 740 SS (Oct. 10, 1994), was incorrectly decided because these inquiries are unnecessary classifications that violate title II and the principles of Manhart.

In Texas State Board of Law Examiners, the court based its decision on the premise that a licensing board can inquire into an applicant's mental health in order to determine if he or she has the mental and emotional fitness to fulfill a lawyer's legal, ethical, and moral responsibilities. Singling out persons solely on the basis of their histories of treatment or counselling for certain mental disabilities, however, does not further that end. The court in Texas State Board of Law Examiners stated,

(continued...)

B. TITLE II PROHIBITS DISCRIMINATION AGAINST QUALIFIED INDIVIDUALS WITH DISABILITIES

Title II prohibits a public entity from discriminating against a "qualified individual with a disability," which is defined in title II of the ADA and section 35.104 of the title II regulation to mean,

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices ... meets the essential eligibility requirements for the receipt of services or the participation in the programs or activities provided by a public entity.

42 U.S.C. § 12131(2); 28 C.F.R. § 35.104 (emphasis added). A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or

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[9](...continued)

> Bipolar disorder, schizophrenia, paranoia, and psychotic disorders are serious mental illnesses that may affect a person's ability to practice law. People suffering from these illnesses may suffer debilitating symptoms that inhibit their ability to function normally. The fact that a person may have experienced an episode of one of these mental illnesses in the past but is not currently experiencing symptoms does not mean that the person will not experience another episode in the future or that the person is currently fit to practice law.

Id., at 7-8 (emphasis added). This analysis is fundamentally flawed. For those individuals who demonstrate symptoms that would inhibit their ability to practice law, an inquiry into an applicant's behavior would identify those candidates unfit to practice law. On the other hand, if an applicant is not demonstrating symptoms that would inhibit their ability to practice law, then he or she would be currently fit to practice law and cannot lawfully be denied a license to practice on the basis of disability.

certification. 28 C.F.R. pt. 35, app. A at 453 (July 1, 1993).[10] Where public safety may be affected, a determination of whether a candidate meets the "essential eligibility requirements" may include consideration of whether the individual with a disability poses a direct threat to the health and safety of others.[11] So long as the candidate does not pose a direct threat and meets the

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[10] The section-by-section analysis also indicates that determining what constitutes "essential eligibility requirements" has been shaped by cases decided under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. 28 C.F.R. pt. 35, app. A at 451. These cases have demanded a careful analysis behind the qualifications used to determine the actual criteria that a position requires. School Bd. v. Arline, 480 U.S. 273, 287-288 (1986)(requiring an individualized analysis based on facts, instead of generalizations based on unfounded stereotype); Pandazides v. Virginia Bd. of Educ., 946 F.2d 345, 349-50 (4th Cir. 1991)(noting that "defendants cannot merely mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications."); Doe v. Syracuse School Dist., 508 F. Supp. 333, 337 (N.D.N.Y. 1981) (requiring analysis behind "perceived limitations"). See also Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (finding State's characterization of essential nature of program to license bus drivers overbroad, and requiring a "factual basis reasonably demonstrating" that accommodating the individual would modify the essential nature of the program).

[11] As noted in the Department's title II analysis accompanying section 35.104,

> A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.... Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

28 C.F.R. pt. 35, app. A at 448 (1993).

essential eligibility criteria, he or she is protected against discrimination on the basis of disability.

This case does not involve a final decision to deny a license based on disability. However, title II and its implementing regulations proscribe more than total exclusion on the basis of disability.[12] Title II contains a sweeping prohibition of practices by public entities that discriminate against persons with disabilities. Section 202 of the Act, 42 U.S.C. § 12132, provides,

> Subject to the provisions of this subchapter, 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.

As a public entity[13] responsible for licensing, the Board must comply with section 35.130(b)(6), which prohibits administering a licensing program "in a manner that subjects qualified persons with disabilities to discrimination." Similarly, section 35.130(b)(3)(i) prohibits use of "methods of administration" that have a discriminatory effect. Finally, section 35.130(b)(8) prohibits the Board from imposing unnecessary eligibility

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[12] See e.g., Ellen S. v. Florida Board of Bar Examiners, 859 F. Supp. 1489, 1493-94 (S.D. Fla. 1994); Medical Society of New Jersey v. Jacobs, 1993 WL 413016 (D.N.J.), at *7.

[13] A "public entity" is defined in title II to include "any department, agency ... or other instrumentality of a State ... or local government." 42 U.S.C. § 12131(1)(B). The Board falls within this definition as it is the State governmental agency responsible for licensing attorneys in the Commonwealth of Virginia.

criteria that screen out, or tend to screen out, persons with disabilities.

Two conclusions follow from analyzing title II and the regulation. First, section 35.130(b)(8) prohibits any policy that unnecessarily imposes requirements or burdens on individuals with disabilities that are greater than those placed on others. 28 C.F.R. pt. 35, app. A at 453-54 (1993); see Ellen S. at 1494; Medical Society at *7. Second, unnecessary inquiries into disabilities are prohibited.

1. LICENSING BOARD INQUIRIES INTO TREATMENT OR COUNSELING FOR MENTAL DISABILITIES IMPOSE UNNECESSARY BURDENS ON PERSONS WITH DISABILITIES

Title II prohibits a licensing board from imposing unnecessary burdens on persons with disabilities at all stages of the licensing process, regardless of whether a license is eventually granted. Ellen S., at 1494; Medical Society, at *6-8. The Board's inquiries and reporting requirements concerning diagnosis and treatment for mental illness impose requirements on persons with histories of disabilities that are greater than those imposed on other applicants. Applicants are required to state whether, within the past five years, they have been treated or counseled for any mental, emotional, or nervous disorder. Only those applicants who answer affirmatively are then required to identify and provide the complete address of each individual consulted for the condition and record the beginning and ending dates of consultation. By signing their applications, candidates also waive their rights of confidentiality to and authorize

release of their treatment or consultation records. This process is invasive because it requires only those persons who answer affirmatively to provide information about mental health treatment -- treatment that is often bound up with intensely personal issues such as family relationships and bereavement.

The inquiries are also burdensome because of the stigma that attaches to treatment for mental or emotional illness. As the Supreme Court has recognized, there is a substantial liberty interest under the Due Process Clause of the Constitution in avoiding the social stigma of being known to have been treated for a mental illness. Parham v. J.R., 442 U.S. 584, 600 (1979); Addington v. Texas, 441 U.S. 418, 426 (1979).[14] See also Smith v. Schlesinger, 513 F.2d 462, 477 (D.C. Cir. 1975) ("[m]ental illness is unfortunately seen as a stigma. The enlightened view is that mental illness is a disease...but we cannot blind ourselves to the fact that at present, despite lip service to the contrary, this enlightened view is not always observed in practice") (ordering Department of Defense to present

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[14] In Parham, the Court found that a person's liberty is "substantially affected" by the stigma attached to treatment in a mental hospital: "The fact that such a stigma may be unjustified does not mean it does not exist. Nor does the fact that public reaction to past commitment may be less than the public reaction to aberrant behavior detract from this assessment. The aberrant behavior may disappear, while the fact of past institutionalization lasts forever." Parham v. J.R., 442 U.S. 584, 622, n.3 (1979) (Stewart, J., concurring in judgment).

investigative file on plaintiff, whose security clearance had been revoked.)[15]

The ADA's definition of disability also recognizes the potential stigma attaching to treatment for mental illness. Persons who have been diagnosed or received treatment for a mental condition may be covered by the third prong of the "disability" definition, regardless of whether they have ever suffered from an actual substantial impairment of a major life activity, 42 U.S.C. § 12102(2)(C).[16] Unfortunately, persons who have sought treatment for mental health problems in the past are often seen as emotionally disabled even if their past or current capability or stability may not be affected. See discussion infra.[17] As the Supreme Court observed in School Board of Nassau

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[15] See also In Re John Ballay, 482 F.2d 648, 668-69 (D.C. Cir. 1973) ("[d]ischarged patients must not only cope with stigma of having once been hospitalized, but must often continue to cope with the 'mental illness' label itself....Even the most enlightened persons may unwittingly harbor views associated with this stigma.").

[16] The title II regulation defines this prong to include persons who have "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment . . . ." 28 C.F.R. § 35.104 (1992).

[17] Of course, persons with histories of treatment or counselling for a mental condition may also be covered by the second prong of the "disability" definition, which protects persons with a "record" of a disability, regardless of whether they are not currently impaired in a major life activity. 42 U.S.C. § 12102(2)(B). The title II regulation defines this prong to include persons who have "a history of, or [have] been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 28 C.F.R. § 35.104 (1992).

County v. Arline, 480 U.S. 273 (1987), Congress, in enacting the "regarded as" provision, "acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." Id., at 284.[18]

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[18] The Board's inquiries into an individual's history of disabilities also has a more insidious discriminatory effect. Concern over the Board's inquiries about diagnosis and treatment for mental illness deters law students and other applicants from seeking counseling for mental or emotional problems. See Stephen T. Maher & Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Ind. L. Rev. 821, 830-33 (1990) (detailed discussion of how such inquiries have deterrent effect). Indeed, this deterrence factor was part of the basis for the State of Minnesota Supreme Court's order in In re Petition of Frickey, et al., 515 N.W.2d 741 (Minn. Apr. 28, 1994) (deleting questions regarding mental health history from bar admissions application on grounds that the questions deterred law students from seeking needed counseling).

This conclusion is supported by studies suggesting that law students may decide against seeking treatment because they are afraid that it might disqualify them from admission to the bar. In a recent survey of over 13,000 law students, 41 percent responded that they would seek assistance for a substance abuse problem if they were assured that bar officials would not have access to the information. As to whether they would refer a friend who had a substance abuse problem, 47 percent responded that they would if bar officials would not have access to the information. Association of American Law Schools, Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 Journal of Legal Education 35, 55 (1994) It can be reasonably assumed that a study asking the same questions about mental health problems would show similar findings.

Furthermore, even when treatment is sought, its effectiveness may be compromised, because knowledge of the Board's potential investigation of issues surrounding treatment is likely to undermine the trust and frank disclosure on which successful counseling depends. See Maher & Blum, supra, at 824, 833-46.

2. QUESTION 20(B) IS UNNECESSARY TO DETERMINING FITNESS TO PRACTICE LAW

The burdens created by question 20(b) are unnecessary because question 20(b) is an unnecessary eligibility criteria. Section 35.130(b)(8) provides,

> A public entity shall not 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.

28 C.F.R. § 35.130(b)(8)(emphasis added). This section is identical in substance to a statutory provision in title III, 42 U.S.C. § 12182(b)(2)(A)(i), and the title III regulation, 28 C.F.R. 36.301(a).[19] The legislative history of the analogous title III provision makes clear that Congress intended to prohibit unnecessary inquiries into disability.

> It also would be a violation for [a public accommodation] to invade such people's privacy by trying to identify unnecessarily the existence of a disability, as, for example, if the credit application of a department store were to inquire whether an individual has epilepsy, has ever ... been hospitalized for mental illness, or has other disability.[20]

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[19] Section 204 of the ADA provides that the title II regulation shall incorporate this concept insofar as it requires the title II regulation to be consistent with the ADA generally. 42 U.S.C. § 12134(b); Judiciary Report at 51; Education and Labor Report at 84; 28 C.F.R. pt. 35, app. A at 440.

[20] Senate Report at 62; see also Education and Labor Report at 105; Judiciary Report at 58. The analysis accompanying the title III regulations also reflects this Congressional intent. 28 C.F.R. pt. 36, app. B at 590.

The title II Technical Assistance Manual, published by the Attorney General pursuant to statutory mandate,[21] states that title II similarly prohibits unnecessary inquiries into disability.[22] This same conclusion was also reached in Ellen S., where the court held that merely asking for the type of information called for by question 20(b) would violate title II of the ADA. The court noted that, "as the Title II regulations make clear, question 29 and the subsequent inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability." Id., at 1493-94. The court was careful to note that asking the question itself independently violates title II, without regard to whether an ensuing investigation is conducted. Id., at 10, n. 7.

Inquiries like the Board's question 20(b) are unnecessary because diagnosis or treatment for any mental, emotional, or nervous disorder provides an uncertain basis for predicting future behavior[23] and because the Board may ask questions focusing directly on conduct and behavior, including those that may be associated with mental illness. The Title II Technical

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[21] 42 U.S.C. §§ 12206(c)(3) & (d) (Supp. II 1990).

[22] Title II Technical Assistance Manual § II-3.5300.

[23] See generally Jay Ziskin, Coping with Psychiatric and Psychological Testimony 1-63 (3d ed. 1981); Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974) (both articles citing extensive authority establishing the inability of mental health professionals to make reliable predictions of future behavior).

Assistance Manual states that,

> [p]ublic entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."

Title II Technical Assistance Manual, at II-3.7200 (emphasis added). Such a permissible "factor related to the disability" is any inappropriate behavior associated with that disability that legitimately reflects on fitness to practice. Such conduct or behavior, whether it results from mental illness, substance dependency, or other factors (such as irresponsibility or bad moral character), provides a basis to determine fitness to practice law without relying on an applicant's diagnosis or treatment history.[24] Thus, if the Board wants to assess accurately the likelihood of improper behavior, the Board can and should inquire about credit history, financial or legal problems, criminal records, leaves of absence, disciplinary actions,

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[24] Indeed, inquiring into mental health treatment history may be ineffective. Diagnoses of some mental disabilities such as bipolar disorder or manic-depression often do not arise until the late-twenties or significantly later -- well after many bar applicants are asked to answer question 20(b). American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 213-228 (3d ed. 1987), (DSM III-R); Frederick K. Goodwin & Kay R. Jamison, Manic-Depressive Illness 127-156 (1990). Interestingly, the age when symptoms or behaviors associated with these disabilities first appear is generally younger than the age when treatment is first sought. Frederick K. Goodwin & Kay R. Jamison, Manic-Depressive Illness 128 (1990). The likelihood of episodes of aberrant behavior is not significantly related to the age of onset of symptoms associated with these disorders. Gabrielle A. Carlson, Yolande B. Davenport & Kay R. Jamison, A Comparison of Outcome in Adolescent- and Late-Onset Bipolar Manic-Depressive Illness, 134 Am. J. of Psychiatry 919 (1977). Therefore, making direct inquiries about behavior will better serve the Board's purposes.

suspensions, or terminations from school or jobs in the past, but may not focus the inquiry only on such events or problems occasioned by physical or psychiatric illnesses or conditions. Similarly, the Board may also inquire about personal behavior, including whether the applicant uses illegal drugs and the frequency of use.[25] The Board may also ask applicants, references, colleagues, and business associates whether there is anything that would currently impair their ability to carry out the duties and responsibilities of an attorney in a manner consistent with the standards of conduct for an attorney admitted to practice in the Commonwealth of Virginia.[26] Indeed, addressing the area of physician licensure, the American Psychiatric Association guidelines state,

> The salient concern is always the individual's current capacity and/or current impairment. Only information about current impairing disorder affecting the capacity to function as a physician, and which is

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[25] Under the ADA, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12110(a).

[26] For instance, in Doe v. Syracuse School District, 508 F. Supp. 333 (N.D.N.Y. 1981), the court held that a question on a job application form asking whether the applicant had ever experienced a nervous breakdown or undergone psychiatric treatment was illegal under the Rehabilitation Act and its implementing regulations. The district court noted that, "if defendant sincerely wanted to employ persons that were capable of performing their jobs, all it had to ask was whether the applicant was capable of dealing with various emotionally demanding situations." Id. at 337.

> relevant to present practice, should be disclosed.[27]

Other questions already on the bar application elicit a wealth of information to illuminate an individual's past behavior. These inquiries -- which require full disclosure of employment history, educational background, financial history, military service, and criminal record -- provide a sound and comprehensive basis for drawing inferences about an individual's fitness for the practice of law without resort to the mental health history. See Medical Society of New Jersey v. Jacobs, 1993 WL 413016, at *7 (questions regarding applicants' diagnosis of and treatment for psychiatric illness or condition are unnecessary, where the medical examiners could "formulate a set of effective questions that screen out applicants based only on their behavior and capabilities"); In re Petition of Frickey, et al., 515 N.W.2d 741 (Minn. April 28, 1994), (order removing similar questions from Minnesota bar admissions application, finding that "questions relating to conduct can, for the most part, elicit the information necessary for the Board of Law Examiners to enable the Court to protect the public from unfit practitioners").[28] Indeed, a recent

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[27] American Psychiatric Association, Recommended Guidelines Concerning Disclosure and Confidentiality, Work Group on Disclosure (Dec. 12, 1992) at 1.

[28] Related to the fact that question 20(b) is unnecessary, question 20(b) also suffers from being overbroad. While the United States does not endorse its opinion, see supra, the court in Texas Board of Law Examiners found that even an inquiry into mental disabilities that was much narrower than question 20(b) would violate the ADA. The court rejected a question which asked,

(continued...)

District of Columbia study determined that information obtained pursuant to inquiries about treatment for mental health problems has "rarely, if ever, brought to light a serious fitness question that was not highlighted by other information (concerning litigation, employment, encounters with legal authorities, academic or bar discipline, etc.)". Reishel, The Constitution, the Disability Act, and Questions about Alcoholism, Addiction, and Mental Health, 61 The Bar Examiner 10, 20 (1992).[29]

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[28](...continued)

> a) Have you, within the last ten (10) years, been treated for any mental illness?
>
> b) Have you, within the last ten (10) years, been admitted to any hospital or other facility for the treatment of any mental illness?
>
> Section 571.033, Texas Health and Safety Code, defines mental illness, as follows: "Mental illness" means an illness, disease, or condition other an epilepsy, senility, alcoholism, or mental deficiency, that:
> (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
> (B) grossly impairs behavior as demonstrated by recent disturbed behavior.

The court observed that, "such a broad-based inquiry violates the ADA." Id. at 20 (emphasis added). The boundless definition of "disorder" in defendant's question 20(b), which is much broader than the question rejected in Texas State Board of Law Examiners, would violate the ADA under the same reasoning.

[29] The article states,

> The vast bulk of such responses [to the mental health treatment inquiry] have concerned counseling, most frequently marriage counseling, with no relevance to fitness to practice. Almost always more serious mental health problems have been signalled by responses to

(continued...)

In enacting title II of the ADA, Congress sought to abolish unnecessary classifications based on disability. Nowhere was this need greater than in protecting the rights of persons with mental disabilities. The ADA outlaws these classifications and seeks to abolish attendant stereotypes. It is possible that the Virginia Board of Bar Examiners may find its task of identifying applicants unfit to practice law more time-consuming and labor-intensive if required to look at an applicant's individual ability and individual record of behavior, rather than using disability as a "red flag" to separate out applicants for further investigation. The ADA, however, requires no less.

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[29](...continued)

> other questions (about arrests, crimes, debt, litigation, discipline, etc.). Indeed, since mental health information is only relevant to a fitness inquiry because it might show a risk to job performance, arguably the only evidence that is material is that the applicant's mental condition has interfered with the applicant's job, school, or analogous activities. Any such significant interference should be, and almost invariably has been, reflected in the other information the committee seeks.

Responses of about 20,000 applicants to mental health inquiries over a period of seven years never resulted in a applicant's noncertification for admission to the District of Columbia bar. Reishel, The Constitution, the Disability Act, and Questions about Alcoholism, Addiction, and Mental Health, 61 The Bar Examiner 10, 20 (1992).

## III. CONCLUSION

For the foregone reasons, the Court should find in favor of plaintiff.

Respectfully submitted,

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November 21, 1994
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CERTIFICATE OF SERVICE

I, the undersigned, attorney for the United States of America, do hereby certify that I have this date served upon the persons listed below, by overnight delivery and electronic fascimile, true and correct copies of the foregoing Memorandum of the United States as Amicus Curiae.

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