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Mental Health, Law School, and Bar Admissions: Eliminating Stigma and Fostering a Healthier Profession

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MENTAL HEALTH, LAW SCHOOL, AND BAR ADMISSIONS: ELIMINATING STIGMA AND FOSTERING A HEALTHIER PROFESSION

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I. INTRODUCTION

In October 2018, Gabe MacConaill, a junior partner at Sidley Austin, died by suicide in the firm's parking garage.[1] Gabe and his wife, Joanna, had been planning a ten-year anniversary trip for over a year, which was to take place just one month from that October day.[2] Colleagues described Gabe as a "natural born leader" who had the ability to "make you feel like you were the smartest person on earth," which is why he was "the obvious choice" to take over the firm's bankruptcy team when two senior partners, Gabe's mentors, left Sidley Austin in early 2018.[3]

However, this meant Gabe had very little guidance when he took on the massive Mattress Firm bankruptcy case in summer 2018.[4] The firm told him "in no uncertain terms" that they would not hire any lateral support, even when he had other significant responsibilities, including chairing the firm's summer associate

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1. Lilah Raptopoulos & James Fontanella-Khan, *The Trillion-dollar Taboo: Why It's Time to Stop Ignoring Mental Health at Work*, FIN. TIMES (July 10, 2019), [https://perma.cc/Z9UN-YA5G].

2. Joanna Litt, *'Big Law Killed My Husband': An Open Letter from a Sidley Partner's Widow*, AM. LAW. (Nov. 12, 2018, 09:00 AM), [https://perma.cc/VH6M-PE4R].

3. Raptopoulos & Fontanella-Khan, *supra* note 1.

4. *Id.*

program.[5] Gabe worried he would be sued for malpractice for lack of sufficient debtor experience but was afraid to show his bosses any weakness.[6] He proceeded to work himself to exhaustion: he no longer laughed, went to the gym, or slept regularly.[7] Joanna asked him to see a therapist, but Gabe could not even find enough time to finish his work.[8] When Gabe began showing cardiac symptoms, Joanna decided to take him to the emergency room, but Gabe responded, "if we go, this is the end of my career."[9] He took his own life a week later.[10]

Kyrie Cameron, wife of Ryan Keith Wallace, another big law attorney who died by suicide, and a lawyer herself, maintains that her husband's perfectionism and fear of failure led to a belief that he had no way out: "We think being a lawyer defines us. That success means being the highest-billing, highest-earning, most productive person there at the expense of taking care of ourselves."[11] Gabe's story is strikingly similar—his wife believed "he would rather die than live with the consequences of people thinking he was a failure."[12]

Though it is easy to blame big law and other high-pressure legal jobs, mental health issues often begin in law school—an environment that often fosters low self-esteem, distrust of peers, and disillusionment about the law.[13] Though students begin their legal education with psychological profiles similar to peers who are not in law school, by graduation, one in ten law students self-harms, one in six has clinical depression, one in three has clinical anxiety, and one in four has developed alcohol dependence.[14] Part II of this Comment explores the current state of mental health in the legal profession and the shortcomings of state bar associations, lawyer assistance programs ("LAPs"), and courts

5. Litt, *supra* note 2.
6. Raptopoulos & Fontanella-Khan, *supra* note 1.
7. *Id.*
8. *Id.*
9. Litt, *supra* note 2.
10. Raptopoulos & Fontanella-Khan, *supra* note 1.
11. *Id.*
12. Litt, *supra* note 2.
13. Kathryne M. Young, *Understanding the Social and Cognitive Processes of Law School That Create Unhealthy Lawyers*, 89 FORDHAM L. REV. 2575, 2582, 2587 (2021).
14. *Id.* at 2575-76.

applying the Americans with Disabilities Act ("ADA") in combating the profession's mental health problem. Part III then examines practical steps the profession can take at the law school level that will aid in eliminating the stigma associated with seeking mental health treatment in the legal profession, thus addressing the problem at its source.

II. THE CURRENT STATE OF MENTAL HEALTH IN THE LEGAL PROFESSION

A. Numbers Don't Lie (But Are Often Misconstrued)

Mental illnesses are health conditions that alter a person's thoughts, feelings, or behavior in a way that causes the individual distress and difficulty functioning.[15] Like any disease, mental illness can be mild or severe.[16] While many people still believe mental illness is rare, in fact, approximately 32.4% of the U.S. population meets criteria for a mental health diagnosis in a given year.[17] Further, "[f]our of the [ten] leading causes of disability—major depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder—are mental illnesses."[18] There is no single cause of mental illness; environmental factors such as a head injury or poor nutrition, social factors such as economic hardship or abuse, and genetic factors all combine to influence whether someone develops a mental illness.[19]

As for the legal profession, a wave of research in the late 1980s and early 1990s confirmed the problem that so many already knew existed: lawyers suffer from mental health and substance abuse issues at significantly higher rates than the general population.[20] However, even over thirty years ago, those in the legal profession knew that these issues were "a symptom,

15. Nat'l Inst. of Health, *Information About Mental Illness and the Brain*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (2007), [https://perma.cc/G52Q-M9JB].

16. *Id.*

17. BLAVATNIK INST. OF HEALTH CARE POL'Y, HARVARD MED. SCH., 12-MONTH PREVALENCE OF DSM-IV/WMH-CIDI DISORDERS BY SEX AND COHORT (2007), [https://perma.cc/Y7GM-5FFX].

18. Nat'l Inst. of Health, *supra* note 15.

19. *Id.*

20. Ann D. Foster, *TLAP: Past, Present, and Future*, 67 TEX. BAR J. 522, 522-23 (2004).

and not a principal cause, of the problems."[21] More recently, a 2016 study revealed that 28% of lawyers suffer from depression, 19% suffer from severe anxiety, and 11.4% experienced suicidal thoughts in the previous year.[22] Perhaps surprisingly, "[t]he younger the lawyer, the greater the rate of impairment."[23] The study recommended the profession try to change its "culture of secrecy," which has led to law students who are "terrified of somebody finding out that they have a problem, which will result in their not being admitted to the bar or not being able to get a job. It's really about the stigma that attaches to this issue."[24]

The study proposed five solutions to change the culture of the legal profession and generate discussion surrounding lawyer well-being:

> (1) Identify stakeholders and the role each of them can play in reducing the level of toxicity in the legal profession;
> (2) Eliminate the stigma associated with help-seeking behaviors;
> (3) Emphasize that well-being is an indispensable part of a lawyer's duty of competence;
> (4) Educate lawyers, judges and law students on lawyer well-being issues;
> (5) Take small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.[25]

While at first glance these seem like ideal goals, two of them conflict: how can the profession eliminate mental health stigma while at the same time send the message that lawyers who suffer from mental illness are incompetent? To define competence this way "focuses appraisals of lawyers' abilities not on their performance, but on their health."[26] This definition also conflicts with the legislative history of the ADA, which states that an

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21. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1409 (1988).

22. *New Study on Lawyer Well-Being Reveals Serious Concerns for Legal Profession*, AM. BAR ASS'N (Dec. 2017), [https://perma.cc/JB2V-QN9V].

23. *Id.*

24. *Id.*

25. *Id.*

26. Nicholas D. Lawson, *"To Be a Good Lawyer, One Has to Be a Healthy Lawyer": Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 93 (2021).

employee's "actual performance on the job is, of course, the best measure of ability to do the job."[27] The legal profession would certainly not consider it acceptable to evaluate attorney competency on the basis of a physical disability, even though, admittedly, like mental disabilities, "[m]any . . . physical conditions could render an attorney unfit to practice."[28] Yet, leaders in the legal profession impart the message that mental illness threatens the competency of law students from the day they first set foot on campus for orientation.[29]

Further, does mental illness actually affect a lawyer's competency? With so many law students and lawyers suffering from mental illness,[30] it seems unreasonable to claim that even a significant percentage of them are incompetent, and in fact, research from the mid-1990s resulted in "simply no empirical evidence that [bar] applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney."[31]

While the American Bar Association's Commission on Lawyer Assistance Programs ("CoLAP") and state LAP representatives have "repeatedly suggested that mental health disorders cause a substantial proportion of professional misconduct cases,"[32] information concerning the methodology or scope of the surveys CoLAP has conducted of attorney discipline cases has never been published.[33] Additionally, these surveys often employ ambiguous language, such as "[a]pproximately 40% to 70% of attorney disciplinary proceedings and malpractice actions are *linked to* alcohol abuse or a mental illness."[34] Statements like this confuse correlation with causation; the fact

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27. S. REP. NO. 101-116, at 39 (1989). For further discussion of the ADA, see *infra* Section II.C.

28. Alyssa Dragnich, *Have You Ever…? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 687 (2015).

29. *See* Madeline Holcombe, *Law Students Say They Don't Get Mental Health Treatment for Fear It Will Keep Them from Becoming Lawyers. Some States Are Trying to Change That*, CNN: HEALTH (Feb. 29, 2020, 11:18 PM), [https://perma.cc/FPZ7-G39Y].

30. *See supra* text accompanying notes 22-24.

31. Lawson, *supra* note 26, at 81.

32. *Id.* at 82. For further discussion of LAPs, see *infra* Section II.B.1.

33. Lawson, *supra* note 26, at 82.

34. *Id.*

that an attorney has a mental health diagnosis at the time of a disciplinary proceeding or malpractice action does not imply that mental illness *caused* the misconduct at issue.

To evaluate the effectiveness of the message that mental health and attorney competency are inextricably linked, look no further than the life and career of Gabe MacConaill. He graduated third in his law school class, made partner at a massive, global firm, and won honors for his work as an attorney.[35] Yet, he worried he would be sued for malpractice or fired.[36] Throughout his career, Gabe had surely received the message that mental health issues threaten a lawyer's competency.[37] Judging by his life's tragic ending, this message did nothing to encourage him to seek help, and likely actually contributed to his decision to forgo mental health treatment.[38]

B. The Profession's Response at the Law School Level

This Section explores the legal profession's response to these issues since learning of their existence and evaluates their effectiveness. At the law school level, the profession has primarily employed two methods of intervention for students with mental health issues: (1) lawyer assistance programs ("LAPs")[39] and (2) regulation of admission to practice law through mental health-related questions on state bar character-and-fitness applications and conditional-admission programs.[40]

1. Lawyer Assistance Programs ("LAPs")

LAPs are specialized programs that exist to provide lawyers, judges, and in most states, law students, with mental health and substance abuse treatment.[41] Some even provide services to

35. Litt, *supra* note 2.
36. *Id.*
37. *See id.*
38. *See id.*
39. *Commission on Lawyer Assistance Programs*, AM. BAR ASS'N, [https://perma.cc/8WX6-M4GL] (last visited Oct. 16, 2022).
40. *Mental Health Character & Fitness Questions for Bar Admission*, AM. BAR ASS'N (Aug. 11, 2022), [https://perma.cc/CSM8-8THE].
41. *Commission on Lawyer Assistance Programs*, *supra* note 39.

family members of affected lawyers.[42] Though LAPs across the country differ from one another in size and variety of services provided, LAPs generally offer consultations, assessments, confidential phone lines, mental health education, individual and group therapy, and referrals to treatment centers.[43]

Employee Assistance Programs ("EAPs"), the predecessor of LAPs, have existed since the 1940s, though these programs were directed strictly toward alcoholism.[44] EAPs identified employees whose job performance had deteriorated and referred them to a professional with the experience required to diagnose and treat alcoholism.[45] The companies that sponsored EAPs had written policies "outlining the company's attitude towards alcoholism as a recognizable and treatable disease."[46] These programs proved to be highly successful.[47] Modern EAPs, including LAPs, are much broader in scope but remain effective.[48] This success is partially due to "polic[ies] of strict confidentiality between the employee and the EAP" which are "considered essential . . . if the employees' trust is to be gained and maintained."[49]

The state of Washington developed one of the first LAPs in 1975.[50] It achieved immediate success and soon became a national model, with more than seventy lawyers participating in its first six months of existence.[51] From the program's beginning, the Supreme Court of Washington promulgated strict confidentiality rules, the importance of which "cannot be over-emphasized," as "[i]t is virtually assured that no referrals will occur if there is any possibility that information will be used

42. *See* ARK. JUDGES & LAWS. ASSISTANCE PROGRAM FOUND., 2020 REPORT 5 (2021), [https://perma.cc/MW92-YV8S].

43. *See* IDAHO LAW. ASSISTANCE PROGRAM, REFERENCE MANUAL 5 (2022), [https://perma.cc/Q794-MV58]; ILL. LAWS. ASSISTANCE PROGRAM, REACHING OUT TO ILLINOIS LAW STUDENTS ON THEIR PATH TO WELLNESS 2 (n.d.), [https://perma.cc/2WT5-XPLV].

44. Bloom & Wallinger, *supra* note 21, at 1423.

45. *Id.* at 1424.

46. *Id.*

47. *Id.*

48. *Id.*

49. Bloom & Wallinger, *supra* note 21, at 1424.

50. *Id.*

51. *Id.*

against the referred or referring lawyer at a later date."[52] Notably, unlike some LAPs today, Washington's program has been "completely unconnected to the disciplinary system" since its inception.[53]

Today, all fifty states, as well as Great Britain and Canada, have LAPs.[54] The American Bar Association promotes and collaborates with state LAPs through CoLAP.[55] As LAPs developed and began experiencing the same success as Washington's program, they began extending their services to law students.[56] Though a few programs still have not taken this step, law students now make up 12% of LAP clients nationally,[57] while in Arkansas, law students comprise a whopping 40% of JLAP's client load.[58] With so many law students receiving treatment from LAPs, confidentiality is a primary concern,[59] as many state bar admissions committees ask about mental health and substance abuse treatment on the character-and-fitness questionnaire, which must be submitted before a law school graduate can sit for the bar examination.[60]

LAPs tend to differ in their messaging. While some are lawyer-centered, stating that their foremost mission is "[t]o help

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52. *Id.* at 1425.

53. *Id.* While Washington's program does not accept mandatory referrals from the state disciplinary board, many other state LAPs do. *See, e.g.*, ARK. CODE ANN. RULES OF THE ARKANSAS JUDGES AND LAWYERS ASSISTANCE PROGRAM, R. 7 (2001) ("JLAP may accept referral of lawyers or judges under investigational, provisional, or probational status with the Arkansas Professional Conduct Committee, Arkansas Judicial Discipline and Disability Commission, or any disciplinary agency with disciplinary authority."). When Arkansas JLAP accepts a referral from the professional conduct committee, "reports of non-compliance" may be used against the lawyer in any subsequent proceeding relating to the referral. ARK. CODE ANN. RULES OF THE ARKANSAS JUDGES AND LAWYERS ASSISTANCE PROGRAM, R. 7 (2001).

54. Foster, *supra* note 20, at 523.

55. *Id.*

56. *See* Linda Albert, *Lawyer Assistance Programs: Advocating for a Systems Approach to Health and Wellness for Law Students and Legal Professionals*, BAR EXAM'R, Dec. 2015, at 31, 32.

57. Samantha Wilson, *The Rise of the Lawyer Counseling Movement; Confidentiality and Other Concerns Regarding State Lawyer Assistance Programs*, 27 GEO. J. LEGAL ETHICS 951, 955 (2014).

58. Sarah Cearley, *Lawyer Assistance Programs: Bridging the Gap*, 36 U. ARK. LITTLE ROCK L. REV. 453, 455 (2014).

59. *See infra* note 131 and accompanying text.

60. Holcombe, *supra* note 29.

lawyers, judges, and law students get assistance,"[61] others advertise their primary purpose as "[p]rotect[ing] the interests of clients from harm caused by impaired lawyers," with "assist[ing] lawyers and judges in securing treatment for addictive diseases and mental health issues" coming secondary.[62] North Dakota Supreme Court Rule 49, which established the state's LAP, does not even mention providing lawyers with mental health assistance in its purposes.[63] This difference likely reflects the legal profession's conflicting views on mental health: on the one hand, it is necessary to eliminate the stigma associated with mental health issues in the legal profession in order to encourage those affected to seek support; on the other hand, many in the profession, despite evidence to the contrary, still view lawyers suffering from mental illness as a liability.[64] In order for LAPs to effectively persuade affected lawyers, judges, and law students to seek treatment, it is probably best not to open with the allegation that mentally ill lawyers are actively harming their clients, when in reality, many likely just want help with mild to moderate anxiety and depression.[65] Instead, LAPs should simply aim to create a healthier legal profession by providing low-cost mental health treatment to judges, lawyers, and law students, which will in turn benefit clients and improve the public's overall perception of the legal profession.

2. Regulation of Bar Admissions

State bar associations have required bar applicants to submit character-and-fitness applications since the 1920s and 1930s.[66]

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61. *See* ILL. LAWS. ASSISTANCE PROGRAM, *supra* note 43.

62. *See* IDAHO LAW. ASSISTANCE PROGRAM, *supra* note 43.

63. N.D. CENT. CODE SUP. CT. ADMIN. R. 49 (2014) ("[T]his rule provides for the establishment of a mechanism to protect the public, assist lawyers in the performance of their duties and responsibilities in the representation of clients, and to maintain and improve the integrity of the legal profession.").

64. *See supra* text accompanying notes 27-28.

65. For example, in Arkansas, mental health concerns constitute 84% of JLAP client issues, while substance abuse is the initial concern for only 16% of clients. ARK. JUDGES & LAWS. ASSISTANCE PROGRAM FOUND., *supra* note 42.

66. 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, 103 (2001).

The purpose of these questionnaires is to assess if a bar applicant "is capable of performing the duties of a lawyer."[67] In many states, in order to qualify for admission to the practice of law, applicants must demonstrate "mental and emotional stability."[68] Though many jurisdictions do not define "mental and emotional stability" on character-and-fitness applications, it is typically "evaluated through an assessment of mental and emotional health as it affects the competence of a prospective lawyer."[69] This requirement is explicitly "intended to exclude from the practice of law persons having mental or emotional illnesses or conditions that likely would prevent them from carrying out their duties to clients, courts, or the profession."[70] This inquiry is logically different from whether an applicant possesses "good moral character," another requirement of character-and-fitness applications, because "[a]pplicants may be of good moral character, but may be unfit to properly discharge their duties as lawyers by reason of . . . [mental] illness or [emotional] condition."[71] However, some states, including Arkansas, disappointingly still conflate the two.[72]

Currently, forty-five states, as well as Washington, D.C., include at least one question referencing the applicant's mental health status in the character-and-fitness questionnaire.[73] These questions typically fall into one of four categories: (1) diagnosis or existence of a particular mental health condition; (2) treatment, inpatient or outpatient, of the aforementioned condition; (3) use

67. COMM'N ON DISABILITY RIGHTS, AM. BAR ASS'N, MENTAL HEALTH PROVISIONS IN STATE BAR EXAMS 3 (2022), [https://perma.cc/5NLM-ELU2].

68. *See, e.g.*, ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, R. 13 (2004); N.M. STAT. ANN. RULES GOVERNING ADMISSION TO THE BAR, R. 15-103 (2022).

69. TEX. BD. OF L. EXAM'RS, BOARD OF LAW EXAMINERS GUIDELINES FOR DETERMINING CHARACTER AND FITNESS AND OVERSEEING PROBATIONARY LICENSE HOLDERS 1 (n.d.).

70. *Id.* at 1-2.

71. *Id.* at 2.

72. *See, e.g.*, ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010) (listing factors that the Board considers in ascertaining "whether the applicant possesses good moral character and mental and emotional stability," which include "[u]nlawful conduct," "[a]cademic misconduct," "[a]cts involving dishonesty, fraud, deceit or misrepresentation," and "[n]eglect of financial responsibilities"); S.D. CODIFIED LAWS § 16-16-2.3 (1990) (stating that "[e]vidence of mental or emotional instability" is relevant to the determination of whether an applicant possesses good moral character).

73. COMM'N ON DISABILITY RIGHTS, AM. BAR ASS'N, *supra* note 67, at 3.

of the condition as an explanation or defense in legal or administrative proceedings; and (4) whether the applicant has ever been a party to a conservatorship or court-appointed guardianship.[74] Forty states ask about category one, thirty-two states ask about category two, thirty-two states ask about category three, and eighteen states ask about category four.[75]

Practically, these questions exist to elicit "facts and circumstances [that] may be considered as an indication of lack of present fitness."[76] Many jurisdictions contend that diagnosis or treatment alone "does not ordinarily constitute evidence of a lack of present fitness,"[77] and some even go so far as to state that "successful[] complet[ion] [of a LAP] program by the time of graduation . . . shall be considered favorably by the Board when evaluating the applicant's character and fitness."[78] However, these words are meaningless to a law student contemplating entering treatment when "[e]vidence of treatment, advice to seek treatment or any order directing the Applicant to seek mental health treatment" are still "circumstances [that] may be considered as an indication of lack of present fitness,"[79] and an "applicant's failure to complete a treatment program may be considered adversely by the Board."[80] As previously discussed, mental illnesses are complex and often result from multiple environmental and social factors which in many cases have been present in a person's life since childhood.[81] Additionally, most mental illnesses are not curable in the way many bodily diseases are.[82] It seems unreasonable to expect that an applicant be "cured" in the short amount of time from entering treatment during law school to submitting a bar application and to penalize him or her for unexpected life events that may interfere with treatment or for simply wanting to see a different therapist or try a different treatment modality.

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74. *Id.*
75. *Id.*
76. TEX. BD. OF L. EXAM'RS, *supra* note 69, at 2.
77. *Id.*
78. ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010).
79. TEX. BD. OF L. EXAM'RS, *supra* note 69, at 2.
80. ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, REGUL. 8 (2010).
81. *See supra* text accompanying note 19.
82. Nat'l Inst. of Health, *supra* note 15.

If an applicant is deemed unfit to practice due to mental or emotional instability, what happens next varies by state. In some states, it is simply an outright denial of admission to the practice of law.[83] Other states employ conditional or deferred admission programs.[84] Though these programs appear to be a good compromise for applicants who are determined borderline unfit to practice law due to mental health issues, in reality, these applicants are put into the same category as applicants who were denied admission due to lack of candor in the admissions process, academic dishonesty, financial irresponsibility, or criminal history.[85]

It is worth noting that character-and-fitness questionnaires' inquiries into applicants' mental health are a relatively recent development, as these questions first emerged during the 1980s and 1990s.[86] These questions were originally extremely broad, requiring applicants to reveal if they had *ever* been treated for *any* "mental, emotional or nervous disorder or condition," as well as if they had ever been voluntarily or involuntarily admitted to an institution for treatment of such a condition.[87] Following the enactment of the ADA, bar applicants began challenging these questions in court, to varying levels of success.[88]

C. The ADA and Its Limits

Title II of the ADA applies to "public entities," which include "any department, agency . . . or other instrumentality of a State";[89] thus, state bar associations, as state licensing entities, are covered by Title II.[90] This provision outlaws discrimination against "qualified individual[s] with a disability" by "exclud[ing]

83. *Comprehensive Guide to Bar Admission Requirements Chart 2: Character and Fitness Determinations*, NAT'L CONF. OF BAR EXAM'RS, [https://perma.cc/HGT4-LLT3] (last visited Oct. 2, 2022).

84. *Id.*

85. *Id.*

86. Nancy Paine Sabol, *Stigmatized by the Bar: An Analysis of Recent Changes to the Mental Health Questions on the Character and Fitness Questionnaire*, 4 MENTAL HEALTH L. & POL'Y J. 1, 7 (2015).

87. *Id.*

88. *Id.* at 8; *see also infra* Section II.C.

89. 42 U.S.C. § 12131(1)(B).

90. Sabol, *supra* note 86, at 9.

from participation in" or "den[ying] the benefits" of a state entity's "services, programs, or activities."[91] Discrimination under the ADA may take the form of (1) "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of . . . disability"; (2) "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability"; or (3) "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability."[92] Put more simply, the ADA prohibits state bar associations from imposing unequal burdens on individuals with disabilities compared to those without them.[93]

A "qualified individual with a disability" falls into one of three categories: (1) those who have a physical or mental impairment that substantially limits one or more major life activities, (2) those who have a record of having such a disability, or (3) those who are regarded as having such a disability.[94] Major life activities include physical activities such as sitting, walking, eating, and caring for oneself, and mental activities such as sleeping, concentrating, thinking, and communicating.[95] Thus, the ADA covers individuals with an extremely broad range of impairments, including those mental health conditions typically considered "minor" that might not ordinarily be regarded as disabilities, such as generalized anxiety and clinical depression.[96] Because the primary purpose of mental health questions on character-and-fitness questionnaires is to "screen out or tend to screen out" applicants with certain mental health conditions, mental health questions conflict with ADA requirements unless state bar associations can prove they are "necessary for the provision of the service, program, or activity being offered."[97]

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91. 42 U.S.C. § 12132.

92. 42 U.S.C. § 12112(b)(1), (3), (6).

93. Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494 (S.D. Fla. 1994).

94. 42 U.S.C. § 12102(1)(A)-(C).

95. *See* 42 U.S.C. § 12102(2)(A).

96. Williams v. AT&T Mobility Servs., 186 F. Supp. 3d 816, 825-26 (W.D. Tenn. 2016).

97. *See* 28 C.F.R. § 35.130(b)(8) (2016); Sabol, *supra* note 86, at 11.

Predictably, after Congress enacted the ADA in 1990, a wave of lawsuits from bar applicants who had been subjected to mental health inquiries on character-and-fitness applications ensued.[98] In *Clark v. Virginia. Board of Bar Examiners*, the United States District Court for the Eastern District of Virginia struck down a question that required applicants to reveal whether they had "been treated or counseled for any mental, emotional or nervous disorder" within the past five years,[99] while in *In re Rhode Island Bar*, the Rhode Island Supreme Court concluded that a question that asked whether applicants had ever been diagnosed with, treated, or hospitalized for any "emotional disturbance, nervous or mental disorder" likewise violated the ADA.[100] The Supreme Judicial Court of Maine struck down two similar questions, even when accompanied by the disclaimer: "(THIS QUESTION DOES NOT INTEND TO APPLY TO OCCASIONAL CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS OR DEPRESSION, AND SUCH CONSULTATION SHOULD NOT BE REPORTED)."[101]

In contrast, courts have upheld questions that asked whether the applicant had been diagnosed, treated, or hospitalized for disorders such as schizophrenia or other psychotic disorders, bipolar disorder, antisocial personality disorder, and major depression in the past five to ten years as sufficiently narrow, because in those courts' opinions, these conditions, unlike less severe mental health issues, could potentially affect an applicant's fitness to practice law.[102] Thus, overly broad questions that ask the applicant to reveal a wide range of mental health diagnoses violate the ADA, while courts will generally uphold questions that limit the inquiry to specific diagnoses that admissions committees consider to be higher-risk.

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98. Sabol, *supra* note 86, at 8.

99. 880 F. Supp. 430, 431, 442-43 (E.D. Va. 1995).

100. *In re* Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1334, 1337 (R.I. 1996).

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

102. *See, e.g.*, ACLU of Ind. v. Individual Members of the Ind. State Bd. of L. Exam'rs, No. 1:09-cv-842, 2011 WL 4387470, at *8-9, *13 (S.D. Ind. Sept. 20, 2011); O'Brien v. Va. Bd. of Bar Exam'rs, No. 98-0009, 1998 WL 391019, at *4 (E.D. Va. Jan. 23, 1998); Applicants v. Tex. State Bd. of L. Exam'rs, No. A-93-CA-740, 1994 WL 923404, at *3, *10 (W.D. Tex. Oct. 11, 1994).

While these decisions are undoubtedly progress from the extremely broad mental health inquiries of the 1980s and 1990s, they still sanction admissions policies that violate the ADA, as "limiting, segregating, or classifying" applicants on the basis of a diagnosis alone is textbook ADA discrimination.[103] Additionally, while some initial concern about the symptoms of schizophrenia, which include delusions and hallucinations, and those of bipolar disorder, which include manic or hypomanic episodes, is reasonable, "major depressive disorder" is simply "the clinical term for certain depressive episodes," and "nearly three out of every ten lawyers suffer with depression."[104] It seems that both courts and bar admissions committees need to conduct more research on the symptoms of certain mental illnesses and their prevalence before requiring applicants to reveal sensitive health information just because the name of a particular disorder sounds serious or scary.

While states like Virginia, Rhode Island, and Maine amended their mental health questions in response to these decisions, some states' discriminatory questions and policies required federal intervention even over twenty years after the ADA's enactment.[105] For example, in 2014, Louisiana's deferred-admissions program had such discriminatory effects on mentally ill applicants that the United States Department of Justice ("DOJ"), pursuant to the ADA, stepped in.[106] The DOJ's three-year investigation found that Louisiana's program "subject[ed] bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment" and "implement[ed] burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals'

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103. 42 U.S.C. § 12112(b)(1).

104. Ana P. V. Paladino, Comment, *Mental Health and the Legal Profession: The Florida Board of Bar Examiners Continues to Violate the Americans with Disabilities Act*, 50 STETSON L. REV. 295, 323-24 (2021).

105. *See infra* text accompanying notes 106-14; *see also* Paladino, *supra* note 104, at 310 ("Well after Congress enacted the ADA and ADAAA, the Florida Bar Application mental health questions remained broad.").

106. Letter from Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Just., to Bernette J. Johnson, C.J., Louisiana Sup. Ct. (Feb. 5, 2014) [hereinafter DOJ Letter], [https://perma.cc/Z8HN-6MXW].

mental health diagnoses or treatment."[107] Specifically, after reporting a mental health diagnosis on the character-and-fitness questionnaire, Louisiana required these applicants to "provide detailed medical information related to their condition, to submit to an Independent Medical Examination . . . or to do both."[108] For one applicant, the admissions committee reviewed her psychiatrist's treatment notes, which "describe[d] each therapy session since she began treatment" and "include[d] details of intimate information . . . such as her upbringing, relationships with members of her family, sexual history, body image, and romantic relationships."[109]

The admissions committee often recommended conditional admission even where applicants' records revealed compliance with treatment and well-controlled symptoms.[110] Louisiana required applicants who were conditionally admitted due to mental health issues to, among other things, "[e]nter into, and comply with, probation agreements with the Office of Disciplinary Counsel ('ODC')," "[a]uthorize their treating health care providers to submit substantive reports to the ODC every three months," and "[g]rant ODC 'full and unfettered access to any and all information contained in files kept by any health care professional regarding [their] diagnosis, treatment, and recovery.'"[111] Applicants were also often assigned a probation monitor who had the ability to contact the applicant's employer and review the applicant's files and accounts.[112] Notably, the ODC did not have any mental health professionals on staff.[113] All in all, Louisiana treated and monitored these applicants as criminals instead of as capable individuals with an immutable condition that *might* at times, if unmanaged, affect their ability to perform their jobs. Though Louisiana changed many aspects of this program to comply with the DOJ's order, conditional-

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. DOJ Letter, *supra* note 106.
112. *Id.*
113. *Id.*

admission programs for mentally ill applicants still exist in many states.[114]

D. Recent Progress

There is currently a national movement spearheaded by law students to remove mental health-related questions from the character-and-fitness questionnaire.[115] In March 2020, the Michigan Supreme Court directed the Board of Law Examiners to (1) remove diagnosis- and treatment-based questions from the character-and-fitness questionnaire and (2) replace them with a conduct-based question: "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?"[116] One of the reasons cited for this change was that "the focus on counseling deterred law students from seeking mental health treatment."[117]

In March 2021, the Kentucky Supreme Court directed the Kentucky Office of Bar Admissions to review the state's bar application after the Kentucky Student Bar Association circulated a petition to remove a treatment-based mental health question from the character-and-fitness questionnaire.[118] Though the Office of Bar Admissions released a statement claiming "treatment, is not in itself a basis on which admission is denied,"[119] it is difficult to ascertain the purpose of the question other than to assess an applicant's mental and emotional stability based on the length and type of treatment received. Additionally, many of these questions require applicants to supply their providers' contact information, leading applicants to reasonably

114. *Comprehensive Guide to Bar Admission Requirements Chart 2: Character and Fitness Determinations*, *supra* note 83.

115. *See* Holcombe, *supra* note 29.

116. *Changes Coming to Mental Health Questions on Bar Exam Application*, STATE BAR OF MICH. (Mar. 18, 2020), [https://perma.cc/2T62-WFKR].

117. *Id.*

118. Monica Harkins, *UPDATE: Supreme Court Says It Will Evaluate Law Students' Exam Concerns*, WTVQ (Mar. 21, 2021), [https://perma.cc/JC4B-67NV].

119. *Id.*

believe their doctor or therapist will be contacted by the bar admissions committee.[120]

III. PRACTICAL STEPS THE PROFESSION CAN TAKE TO ELIMINATE STIGMA AND ENCOURAGE EARLY INTERVENTION

A. Bar Admissions Reform

1. Complete Removal of Mental Health Questions

One possible solution to the problem of mental health stigma in the legal profession is the removal of mental health questions from character-and-fitness applications altogether. It is notable that for most professions, there are no mental health qualifications or inquiries;[121] in fact, as previously discussed, pre-employment mental health-related questionnaires typically violate the ADA because these inquiries are "selection criteria that screen out or tend to screen out . . . individuals with disabilities."[122] Additionally, there is a genuine question of whether these inquiries even work—that is, whether applicants are honestly answering them. If an applicant simply answers "no" to mental health questions, there is typically no way of discerning whether he or she is lying, as "mental health providers are bound by professional ethical rules that require doctor-patient confidentiality."[123] The low rate of affirmative answers to mental health questions compared to the rate of mental illness among law students clearly illustrates that these inquiries incentivize dishonesty.[124] In light of the fact that there is no empirical evidence that law students' mental health histories predict future

120. *Id.*; Holcombe, *supra* note 29; Samantha Braver, *Mental Health Questions on the Bar Application Prevent People From Seeking Help*, TEEN VOGUE (Jan. 5, 2022), [https://perma.cc/8ELL-JNDB].

121. Allison Wielobob et al., *Bar Application Mental Health Inquiries: Unwise and Unlawful*, HUM. RTS., Winter 1997, at 12, 12.

122. 42 U.S.C. § 12112(b)(6).

123. Dragnich, *supra* note 28, at 686.

124. *Id.* at 685.

professional misconduct,[125] this "calls the utility—and fairness—of the whole enterprise into question."[126]

Still, admission to the practice of law is a privilege, not a right, as lawyers have a special fiduciary duty to their clients that often includes handling client funds and submitting crucial court documents on time.[127] Thus, some level of inquiry into applicants' emotional stability is necessary to the extent of identifying applicants who have a record of misconduct related to a mental health condition; however, it should not take the form of questions that require applicants to reveal sensitive health information, especially when the condition at issue is well-managed and has never contributed to wrongful conduct.

2. Conduct-Based Questions

Conduct-based questions present a good compromise between complete removal of mental health questions from character-and-fitness applications and intrusive diagnosis- and treatment-based questions. Specifically, questions from category three[128] that ask whether an applicant has used a mental health condition as an explanation or defense in legal or administrative proceedings eliminate the possibility that an applicant whose mental health condition has never contributed to wrongful conduct will be singled out for a supplemental investigation or conditional admission, but they still elicit responses from high-risk applicants who have a history of questionable behavior related to a mental illness. This approach also eliminates the problem of singling out applicants with diagnoses, such as bipolar disorder, that are more heavily stigmatized for more intrusive inquiries.

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125. *See supra* text accompanying note 31.

126. Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 674 (1997).

127. *See* ARK. CODE ANN. RULES GOVERNING ADMISSION TO THE BAR, RR. 12-13 (2022).

128. *See supra* text accompanying note 74.

3. Specialized Conditional Admission for Mental Health Issues

Even if all jurisdictions switch to a conduct-based approach to applicants' mental health issues, some applicants undoubtedly do have severe mental health issues related to past misconduct that may threaten their competency as attorneys. Conditional-admission programs are a good alternative to outright denial of admission for these applicants, but these programs should be better tailored to fulfill the needs of applicants with mental health issues. These programs should be focused on monitoring symptoms and treatment progress, not on discipline. To accomplish this, conditional-admission programs for mentally ill applicants should be separate from conditional-admission programs for applicants with character issues such as unlawful conduct or academic dishonesty and should be overseen by a mental health professional. Instead of being assigned a probation officer, applicants should attend progress monitoring sessions every month or so with a counselor or social worker. Admissions committees should not have unfettered access to records from these meetings or records from any of the applicant's treatment providers, but instead, these professionals should be required to report to the committee only pre-determined conduct of the applicant that would negatively affect the applicant's clients or ability to practice law.

B. LAP Confidentiality Policies

For many of the roughly one-quarter to one-third of law students who suffer from mental health or substance abuse issues,[129] the logical solution to the problem of invasive diagnosis- and treatment-based questions on the character-and-fitness application is to delay mental health treatment until after bar admission.[130] For example, a stressed and isolated law student

129. 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. LEGAL EDUC. 116, 116 (2016).

130. *See id.* at 142; Holcombe, *supra* note 29; Bauer, *supra* note 66, at 151 ("Many law school faculty members, administrators, and counselors have described encounters with law students who decided not to seek help for mental health or substance abuse problems out of fear of what would need to be reported to the bar examiners."). Courts have also

at the University of Kentucky decided, after hearing a judge tell his class the bar admissions committee would inquire about applicants' mental health diagnoses "to determine if they were qualified to become lawyers," that seeking mental health treatment "wasn't worth the risk to his dream."[131] While stress and loneliness are often temporary issues, the implications of deciding to delay treatment for those with conditions that tend to worsen with time, such as alcoholism, are much greater.[132]

According to a 2016 law student survey, 45% of respondents indicated that the potential threat to bar admission would discourage them from seeking mental health treatment, and 63% indicated that the potential threat to bar admission would discourage them from seeking substance abuse treatment.[133] Clearly, those most in need of help are also the most reluctant to seek it.[134] The stigma associated with moderate stress or anxiety, and thus the likelihood that the bar admissions committee would view it negatively, is much less than that associated with severe mental health issues and substance abuse disorders. While mental illnesses vary in severity, most are highly treatable;[135] however, if left untreated, these issues can and often do contribute to problems with clients and colleagues, malpractice suits, disciplinary sanctions, and disbarment.

Thus, by discouraging law students from seeking mental health treatment before entering practice, diagnosis- and treatment-based questions achieve the opposite of their intended purpose—instead of identifying applicants whose ability to practice law might be impaired, these questions cause many of these students, as well as others who are perfectly capable of entering practice, to simply avoid seeking treatment while their

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recognized this obvious consequence of invasive mental health questions. *See In re* Frickey, 515 N.W.2d 741, 741 (Minn. 1994) ("[T]he 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 . . . .").

131. Holcombe, *supra* note 29.

132. Catherine G. McLaughlin, *Delays in Treatment for Mental Disorders and Health Insurance Coverage*, 39 HEALTH SERVS. RSCH. 221, 221 (2004); Brian Cuban, *When Bar Examiners Become Mental Health Experts*, ABOVE THE L. (Jan. 10, 2018, 10:03 AM), [https://perma.cc/W8P6-4U2B].

133. Organ et al., *supra* note 129, at 141.

134. *Id.* at 142.

135. Nat'l Inst. of Health, *supra* note 15.

symptoms worsen.[136] While the obvious solution to this problem is to eliminate these questions from the character-and-fitness questionnaire, LAPs can also play an integral role in encouraging law students to seek treatment by discounting the practices of (1) reporting law student treatment to state bar admissions committees and (2) accepting referrals from state disciplinary boards.

IV. CONCLUSION

While, as discussed, LAPs have their shortcomings, when students and attorneys take the admirable step of entering mental health treatment, these programs really do work. For example, an Arkansas attorney with a bipolar disorder diagnosis and a history of "psychotic breaks, commitment to psychiatric hospitals, deep depression, [and] panic attacks" has found success in the legal profession as a Social Security disability attorney.[137] She is now a mental health advocate and Arkansas JLAP volunteer.[138] She attributes her success to medication, therapy, and accommodation from her employer, who allows her to practice part-time.[139] Perhaps if Gabe MacConaill's employer had been so accommodating, he would still be here today. This is what it takes to create a healthier profession: (1) attorneys who are educated about mental illness and its signs and willing to work with colleagues who are suffering; (2) state bar admissions policies that encourage students to seek treatment early rather than penalize them for it; and (3) for those with severe mental health issues that could truly affect their fitness to practice, specialized conditional-admission programs that provide support and monitoring with the goal of granting full admission after ensuring

136. *See* Bauer, *supra* note 66, at 152 ("An approach that rests on the overriding importance of protecting the public from unfit lawyers must seriously grapple with the question of whether the gains in public protection achieved by identifying some potentially unfit applicants are offset by the costs to lawyer fitness of discouraging preadmission treatment.").

137. Hilary Martin Chaney, *ARJLAP—Through the Open Door: A Bipolar Attorney Talks Mania, Recovery and Heaven on Earth*, ARK. LAW., Winter 2014, at 42, 42.

138. *Id.* at 42, 44.

139. *Id.* at 44.

these applicants are making progress within a treatment regimen that works for them.