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Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans With Disabilities Act vs. State Professional Licensing Boards

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NOTES

IS THE MENTAL HEALTH HISTORY OF AN APPLICANT A LEGITIMATE CONCERN OF STATE PROFESSIONAL LICENSING BOARDS?

THE AMERICANS WITH DISABILITIES ACT VS. STATE PROFESSIONAL LICENSING BOARDS

I. INTRODUCTION

"A State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."1 The previous quotation is the subject of this Note: whether specific questioning by a state professional licensing board ("licensing board") is rationally connected to an applicant's fitness.2 The focus of this Note will be the impact of the Americans with Disabilities Act of 19903 ("ADA" or the "Act") on licensing boards that require disclosure of an applicant's mental health history and, consequently, deny a license to an applicant with a prior mental illness.

To illustrate the focus of this note, I will be discussing Anonymous v. Connecticut Bar Examining Committee,4 a case currently

1. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957) (citations omitted); see also Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972) (holding that state courts have traditionally had wide discretion in the establishment and application of standards of professional conduct and moral character for attorneys), cert. denied, 409 U.S. 889 (1972).
2. See, e.g., CONN. GEN. STAT. ANN. § 51-81 (West 1985).
4. CV 94 0534160 S (Conn. Super. Ct. Jud. Dist. Hartford/New Britain at Hartford filed Jan. 13, 1994). This case was originally brought in the United States District Court for the District of Connecticut, No. 93 CV 1227 (Covello, J.) and was dismissed as plaintiff's remedy was found to be an appeal to the state court system. See Federal Courts Digest, CONN. L. TRIB., Dec. 27, 1993, at L6. "Anonymous" appeal to the United States Court of Appeals for the Second Circuit was withdrawn by stipulation from active consideration without prejudice, see No. 94-716 (2d Cir. filed Dec. 21, 1994).
being litigated. The plaintiff in *Anonymous* graduated from law school, passed the Connecticut Bar Examination and was subsequently denied admission to the bar by the Connecticut Bar Examining Committee ("Examining Committee") based on his disclosed mental health history. Thereafter, "Anonymous" initiated a lawsuit under the ADA seeking to overturn the Examining Committee's conclusion that he was unfit to practice law.

As stated above, the main issues to be analyzed in this Note will center around the propriety of a licensing board compelling applicants to disclose whether they "have ever been diagnosed as having a mental illness or emotional disorder." This determination will begin in Part II of this Note by addressing the background of the ADA and its applicable sections. Part III will specifically discuss the regulation of applicants in the legal profession. In Part IV, the focus will be on the potential arguments and precedents to be employed by both denied applicants and licensing boards. Finally, Part V will offer a solution to the difficult problem posed.

**II. THE AMERICANS WITH DISABILITIES ACT**

The ADA was passed by Congress on July 13, 1990 and signed into law by President George Bush on July 26, 1990. The overall purpose of the ADA was to protect the civil rights of disabled Americans in areas such as employment and public services.

[Congress] provide[d] a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to

5. See infra Part IV(A).
6. See infra Part IV. Plaintiff sought the following relief: a) injunctive relief requiring the defendants to modify their rules to provide for conditional licensing; b) injunctive relief requiring the defendants to hold a new hearing on plaintiff's admission to the state bar; c) injunctive relief ordering defendants to admit plaintiff to the Connecticut Bar; and d) compensatory and punitive damages. Plaintiff's Complaint at 21, Anonymous v. Connecticut Bar Examining Comm., CV 94 0534160 S (Conn. Super. Ct. Jud. Dist. Hartford/New Britain at Hartford filed Jan. 13, 1994).
8. See infra text accompanying notes 12-63.
9. See infra text accompanying notes 64-73.
10. See infra text accompanying notes 74-165.
11. See infra text accompanying notes 166-85.
bring [persons with disabilities] into the economic and social mainstream of American life . . . [to] provide[] enforceable standards addressing discrimination against individuals with disabilities and [to] ensure[] that the federal government . . . play[s] a central role in enforcing these standards on behalf of individuals with disabilities.\textsuperscript{14}

However, the ADA was not the first piece of federal legislation with the goal of ending discrimination against those disabled. The Rehabilitation Act of 1973\textsuperscript{15} provided federally-protected rights to handicapped individuals. The Rehabilitation Act prohibited discrimination and promoted affirmative action in the employment of handicapped individuals by the federal government or employers who were receiving federal financial assistance.\textsuperscript{16} Although the Rehabilitation Act began to recognize the myriad of problems that disabled individuals faced in the American workplace, the fact that it protected only a minority of those disabled furthered the desire of the American public for stronger federal legislation to end such discrimination.

A. CONGRESSIONAL FINDINGS

Prior to the first draft of the ADA bill, Congress sought to study the plight of the millions of Americans affected by some form of disability.\textsuperscript{17} "Congress [found] that some forty-three million Americans have one or more physical or mental disabilities, and this number [was] increasing as the population as a whole [grew] older."\textsuperscript{18} These mentally or physically challenged individuals were found to be a "discrete and insular minority . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society."\textsuperscript{19} Historically, the inferior economic and social status of disabled individuals has been viewed as an inevitable consequence of the physical and mental limitations of their

\begin{footnotes}
\item[16] Id.
\item[17] H.R. REP. No. 485, supra note 14, pt. 3, at 25. "A . . . survey conducted by Louis Harris and Associates and used by the House of Representatives, found Americans with disabilities are notably underprivileged and disadvantaged. [P]ersons with disabilities are much poorer, have less education, have less social and community life, . . . and express less satisfaction with life." H.R. REP. No. 485, supra note 14, pt. 3, at 25.
\item[19] Id. § 12101(a)(7).
\end{footnotes}
However, these stereotypical assumptions were certainly not truly indicative of all disabled individuals.

In response to these congressional findings, the ADA was first introduced in 1988 to the 100th Congress. This bill was drafted by the National Council on Disability, "an independent federal agency charged with assessing the conditions of persons with disabilities and making legislative recommendations." Two years after the bill was first introduced, the ADA became law, "ensur[ing] that the . . . standards established in [this Act] . . . address . . . areas of discrimination faced day-to-day by people with disabilities."²³

B. RELEVANT SECTIONS OF THE ADA

Although this Note will deal specifically with Title II of the ADA, which prohibits discrimination by public entities, other titles of the Act protect other distinct areas of discrimination.¹⁴ One title covers the discrimination of individuals with disabilities in employment, another title covers the use and access of public accommodations and services operated by private entities, and another is a miscellaneous provision.²⁵

When applying the ADA to inquiries made upon professional license applicants, any potential protection should be afforded through Title II of the Act, which prohibits discrimination of individuals by public entities.²⁶ Subtitle A of Title II states, 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."²⁷ Therefore, to determine if Title II of the ADA will apply, one must first determine the intended definitions of "disability" and "qualified individual."

²⁰ Id.
²⁴ The ADA was the first comprehensive legislation to counter discrimination against those who are disabled. There have been several other laws that were passed which intended to end discrimination, but covered narrow areas. See, e.g., Rehabilitation Act of 1973, 29 U.S.C. § 701 (1988 & Supp. V 1993) (prohibiting discrimination in employment); Fair Housing Amendments Act, 42 U.S.C. § 3604 (Supp. V 1993) (prohibiting discrimination in the sale or rental of housing).
²⁶ Id. § 12132.
²⁷ Id. (emphasis added).
1. Disability

The ADA uses three different criteria to determine whether an individual is to be considered "disabled":28 (a) a physical or mental impairment that substantially limits one or more of the major life activities; (b) a record of such an impairment; or (c) the recognition of such an impairment.29

Under the first standard, the individual must be substantially limited in one or more major life activities by having a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting [certain] body systems"0 ... [or] any mental or psychological disorder."31 The use of the phrase "major life activity"32 implies that the disorder must be one of sufficient severity to pose substantial limitations on the ability to perform key functions such as "caring for one's self, performing manual tasks, walking, seeing, ... learning [or] working."33 As such, this standard would not protect individuals with minor or trivial impairments. Moreover, when determining if an individual should be considered disabled under this standard, "the [potential] impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."34

However, one or both of the remaining criteria should better suit a professional license applicant with a prior mental illness. The second standard in the ADA protects those individuals with a record of a physical or mental impairment.35 This protection will include indi-

28. See id. § 12102(2). The ADA specifically excludes from the definition of disability, and thus protection under the Act, the following conditions: homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from current illegal use of drugs, and current users of illegal drugs. H.R. REP. No. 485, supra note 14, pt. 3, at 31.
30. "The disorder must affect one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genital-urinary; hemic and lymphatic skin; and endocrine." H.R. REP. No. 485, supra note 14, pt. 3, at 28.
31. H.R. REP. No. 485, supra note 14, pt. 3, at 28. "Such disorders may include mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural or economic disadvantages." H.R. REP. No. 485, supra note 14, pt. 3, at 28.
individuals who were once mentally or physically impaired and are now recovered, or those who had been misclassified as being disabled. The third and final standard was "intended to cover persons who [were] treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity . . . whether or not a person has an impairment." This "regarded as" standard is the same as the one set forth in section 504 of the Rehabilitation Act.

Although the intent of the Rehabilitation Act also was to end discrimination of the disabled, it protected "individuals with handicaps." When the ADA was passed, the terminology was changed to protect individuals with disabilities. Undeniably, this reflected the preference of both the persons affected, as well as the lawmakers, to change this demeaning terminology. However, the use of new terminology was not intended to change the meaning of "individuals with handicaps" found in the Rehabilitation Act or the term "handicap" used in the Fair Housing Amendments Act of 1988. Since there was no guarantee of providing a comprehensive list containing all specific disabilities, Congress maintained the same definition.

The "regarded as" standard of the Rehabilitation Act was the subject of the Supreme Court decision in School Board of Nassau County v. Arline. In Arline, the respondent, Gene Arline, who suffered from tuberculosis, taught elementary school from 1966 until "[s]he was discharged in 1979 after suffering a third relapse of tuberculosis within two years." After failing to obtain relief in state ad-

39. Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.
46. Id. at 276.
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ministrative proceedings, Arline's federal lawsuit alleged that the school board's decision to discharge her violated Section 504 of the Rehabilitation Act.\(^{46}\) Arline asserted that the sole reason she was fired was the perception of her illness; that tuberculosis qualified her as a handicapped individual who was protected under the Rehabilitation Act; and that the school board's decision was discriminatory.\(^{47}\)

The district court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."\(^{48}\) The district court held that even if Arline was deemed handicapped, she was not qualified to teach elementary school due to her illness.\(^{49}\) The United States Court of Appeals for the Eleventh Circuit reversed the district court, holding that "persons with contagious diseases are within the coverage of section 504"\(^{50}\) of the Rehabilitation Act. Ultimately, the Supreme Court affirmed the appellate court's decision and noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling.\(^{51}\)

In the legislative history of the Rehabilitation Act "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."\(^{52}\) The Arline Court concurred and concluded further that few aspects of a handicap could give rise to such a level of public fear as contagiousness; the Court further found that a person regarded as having a contagious disease should be protected, so long as that individual is otherwise qualified.\(^{53}\)

Thus, unimpaired individuals who are discriminated against be-

\(^{46}\) Id.
\(^{47}\) Id. at 276-77. It was not disputed that the sole reason for Gene Arline's dismissal from her employment was because of her illness. The Superintendent of Schools for Nassau County testified that "the school board held a hearing, after which it discharged Arline, 'not because she had done anything wrong,' but because of the 'continued reoccurrence [sic] of tuberculosis.'" Id. at 276.
\(^{48}\) Id. at 277.
\(^{49}\) Id.
\(^{50}\) Id. (citing School Bd. of Nassau County v. Arline, 772 F.2d 759, 764 (11th Cir. 1985)).
\(^{51}\) Id. at 283.
\(^{52}\) Id. at 284 (citations omitted).
\(^{53}\) Id. at 284-85. "The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness." Id. at 284 n.12.
cause of the unsubstantiated myths, fears and stereotypes associated with a disability should seek protection under the "regarded as" section of the ADA.\textsuperscript{54} This section will apply regardless of whether or not the employer's perception was shared by others in the field, and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.\textsuperscript{55} "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."\textsuperscript{56}

2. Qualified Individual

Although individuals may be classified as disabled under the ADA, they will not be protected unless they are found "otherwise qualified."\textsuperscript{57} Title II of the ADA defines "otherwise qualified" as "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 programs or activities provided by a public entity."\textsuperscript{58} This same concept was first applied in the regulations implementing sections 501 and 504 of the Rehabilitation Act.\textsuperscript{59}

The Supreme Court interpreted the "qualified individual" clause in the Rehabilitation Act\textsuperscript{60} as one "who is able to meet all of a program's requirements in spite of his handicap"\textsuperscript{61} or if reasonable accommodations could be made that do not impose any undue financial or administrative burdens.\textsuperscript{62} Additionally, the Supreme Court has required lower federal courts to defer, when applicable, to the reasonable medical judgments of public health officials when making deter-

\textsuperscript{56} Arline, 480 U.S. at 283.
\textsuperscript{57} Id. at 285.
\textsuperscript{61} Arline, 480 U.S. at 287 n.17 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979)); compare Arline, 480 U.S. at 288-89 (holding that respondent suffering from tuberculosis would be "otherwise qualified" to teach elementary school if the severity of her disease and risk of contagion were found by finder of fact to be within acceptable limits) with Davis, 442 U.S. at 398 (holding that respondent suffering serious hearing difficulty was unqualified and, therefore, justly denied admission to a nursing program at a state university that received federal assistance).
\textsuperscript{62} See Davis, 442 U.S. at 412.
III. STATE REGULATION OF BAR ADMISSIONS

As stated earlier, the focus of this Note concerns the compelled disclosure of a professional license applicant's mental health history. This focus will be illustrated through a lawsuit brought by an applicant denied admission to the Connecticut State Bar by its Examining Committee. Therefore, this section will examine the regulation of applicants in the legal profession.

"Although formal character requirements for practicing attorneys span almost two millennia . . . the English tradition from which the American bar drew gave no priority to systematic character [and fitness] certification." In eighteenth century Britain, fitness to practice law was largely a matter of social status and wealth in order to exclude presumptively unqualified groups. Traditionally, in America, the state courts have exercised jurisdiction over the admission and discipline of the state's practicing attorneys, in exchange for accepting legislative specifications of minimum admission requirements. However, "[o]ver the last two centuries, the administration of [admission] requirements has been delegated increasingly to the organized [state] bar [associations], subject to varying degrees of judicial oversight." 

Recently, state legislatures have placed the sole responsibility of certifying bar applicants with the state bar association character and fitness examining committees, which are predominately comprised of practicing attorneys. The purpose behind the investigation of an applicant's character and fitness is apparently twofold: one being the protection of the public and the other being the protection of the profession.

The public is in need of protection "[s]ince the 'technical nature of law' and the attorney's 'peculiar position of trust' place clients in

63. Arline, 480 U.S. at 288.
64. See supra note 4 and accompanying text.
66. Id.
67. See Is Admission to the Bar a Judicial or a Legislative Function?, 1 B. EXAMINER 222, 224 (1932).
68. Rhode, supra note 65, at 496.
69. See, e.g., CONN. GEN. STAT. ANN. § 51-81 (West 1985).
70. Rhode, supra note 65, at 507-09; see also supra text accompanying note 1.
71. Although there are no cases discussing this point, see infra note 73 and accompanying text.
a vulnerable position, individuals whom the state certifies as fit to practice should be worthy of the confidence reposed in them." Therefore, one objective of screening applicants is to deny admission to those applicants who pose the greatest risk of being unfit and unable to uphold the responsibilities as an officer of the court.

However, bar associations are professional organizations which, like other such associations, are interested in protecting their image and economic well being. "[A] single [unfit or presumptively unfit] lawyer brings ‘disrepute to the whole profession,’ penalizing the thousand who slave ‘mightily and righteously.’" Therefore, the screening of bar applicants may be applied discriminatingly against those regarded as disabled or presumptively unfit in order to protect the reputation of the profession. This is especially true with applicants who are regarded as disabled due to a prior mental illness.

IV. ARGUMENTS AND PRECEDENTS

A. BACKGROUND ON ANONYMOUS

As stated earlier, Anonymous v. Connecticut Bar Examining Committee will be used as an illustration for this Note. The plaintiff, "Anonymous," was graduated from Boston University Law School and was an attorney licensed to practice in the State of New York and a member in good standing of the New York State Bar. "Anonymous" passed the Connecticut Bar Exam and was required to appear before the Examining Committee after disclosing that he was once voluntarily hospitalized for depression and had ongoing psychological treatment.

This appearance before the Examining Committee was to look further into his psychiatric history to determine if he was fit to practice law.

In September of 1991, before the Examining Committee, “Anon-

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72. Rhode, supra note 65, at 508-09.
73. Rhode, supra note 65, at 511. If the bar would allow a person with an impairment to begin to practice, that individual may bring disrespect to the profession if that impairment led to future malpractice.
76. Id. at 4-5. This disclosure was in response to Question 41 of the application for admission to the bar. Id.
77. See CONN. GEN. STAT. ANN. § 51-81 (West 1985).
ymous" introduced a letter from his treating physician which diagnosed his condition as a "Bipolar Disorder, Not Otherwise Specified." The treating physician went on to state that

unlike a person who has manic episodes, a person who has hypomanic episodes is not ordinarily subject to impaired judgment or other severe symptoms. Hence a person such as [the plaintiff], who is very compliant to his treatment and is demonstrating no active psychiatric symptoms, would not be expected to show impaired judgment or significant decrease in function. The letter concluded that the treating physician continued to feel that the plaintiff could resume the practice of law.  

After hearing the treating physician's opinion that bipolar-disorder should not adversely affect "Anonymous" ability to practice law, the five-member panel of the Examining Committee held that plaintiff's "psychological impairment... rendered him 'unfit at this time to practice law in this state."

Subsequently, "Anonymous" submitted additional letters from two doctors who agreed that if the applicant's condition was properly treated, there would be no reason why he could not competently practice law. The additional letters contained the following opinions:

Physician A:

(1) The plaintiff's "mental functioning and judgment are such that he can resume his professional responsibilities," and
(2) "There is no psychiatric reason, in my opinion, that should prevent [the plaintiff] from practicing law."

Physician B:

The plaintiff's Bipolar Disorder "is a condition that, with proper and effective treatment, does not prevent professionals in fields such as medicine, law, dentistry, etc. from functioning effectively and without incident."

However, the Committee refused to admit the additional evi—

80. Id. "The Examining Committee did not have the plaintiff examined by a physician, psychologist or other licensed mental health professional." Id. at 7.
81. Id.
82. Id. at 7-8 (quoting two physicians who had previously examined "Anonymous").
dence, reconsider their determination, or explore modifications to its licensing policies, practices and procedures. This decision, "Anonymous" alleges, was made without any further psychological evaluation or any consultation with other mental-health experts to determine the applicant's mental or emotional condition. "Anonymous" further asserted that the Examining Committee did not attempt to modify their policies, practices or procedures with respect to qualified individuals with mental disabilities. Therefore, the Examining Committee's character and fitness determination was made on an ad-hoc basis, which could easily be influenced by personal bias.

"Anonymous" lawsuit was brought against the Examining Committee under Title II of the ADA, alleging that its decision not to admit him to the state bar nor modify its licensing policies was discriminatory. This Note will not only analyze whether the determination of the Examining Committee was discriminatory, but will also examine if the licensing boards can justly require applicants to disclose their mental health history.

B. WHAT PLAINFF MUST PROVE

This section will consider the contention that the action of the Examining Committee was discriminatory and that requiring the disclosure of an applicant's mental health history was in violation of the ADA. A proposition is that this questioning was discriminatory and contrary to the designated intent of the ADA, which prohibits decisions "based on . . . stereotypical assumptions not truly indicative of the individual ability of such individuals."

83. Scheffey, supra note 78, at 6.
85. Id.
86. The Examining Committee did not incorporate the prognosis that Anonymous' doctor provided for them and did not have any additional testimony from experts in this field. See supra Part III.
88. See supra text accompanying note 7.
1. The ADA Applies to State Bar Admission

A contention of an applicant denied admission to a state bar could be that the actions of the Examining Committee "reflect the fundamental prejudices and misconceptions which the ADA sought to combat without achieving their purpose of ensuring competent and qualified attorneys." For a plaintiff to obtain relief under this theory, he or she would first need to prove that the ADA applies to an Examining Committee. Title II of the Act 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." Plaintiffs would allege that licensing boards are to be governed by the ADA as public entities; therefore as a "public entity [licensing boards] may not administer a licensing or certification program in a manner that subjects qualified individuals . . . to discrimination" based on a disability.

2. Plaintiff Was Disabled and Otherwise Qualified

Applicants such as "Anonymous" with a history of mental illness may be unjustly regarded as substantially and permanently impaired, regardless of whether or not there is any additional evidence of impairment, any proof of treatment, or complete recovery. Although "Anonymous" and others similarly affected are regarded as disabled, their abilities to practice law may not necessarily be impaired. Assuming the ADA is applicable to state professional licensing, "Anonymous" would then be required to prove that an individual with a history of mental illness is protected by the Act. To accomplish this requirement, one must first prove that he or she is disabled by having: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impair-

90. Bar Examiners, supra note 7, at 10; see infra Part IV(B)(4).
92. "The term 'public entity' means — (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ." Id. § 12131.
Although "Anonymous" would be able to rely on both the second and third standards, the "regarded as" standard is designed to protect those who are not currently impaired but treated by a public entity as such. Congress and the courts have been concerned with the stigma attached to specific disabilities, such as mental illness. Although an individual may no longer be currently impaired, the stigma associated with a history of a mental illness undoubtedly will lead to discrimination. Although "Anonymous" physicians diagnosed him as able to function as an attorney, his denial to the Connecticut State Bar proves that he is nonetheless "regarded as" impaired by the Examining Committee.

Discrimination is prohibited by Title II of the ADA if "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . [will] meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." Therefore, the next hurdle for "Anonymous" to gain protection under the Act is proving that he is otherwise qualified.

Since the Examining Committee may deny admission to an applicant who poses a legitimate threat to the public or is otherwise unqualified without violating the Act, "Anonymous" would need to establish that his condition, which prohibited his admission to the state bar, was treated and would not adversely affect his ability to practice law. In a 1993 decision, the Supreme Court of Washington held "[that it does not] offend[] the dignity of the judiciary or the reputation of the bar for persons who have suffered from a mental illness and [have] been successfully treated to thereafter practice law in this state." In the case of In re McLendon, an attorney successfully challenged his disbarment by claiming his ethical violations...

95. 42 U.S.C. § 12102(2) (Supp. V 1993); see supra Part II(B).
96. See supra Part II(B)(1).
98. See supra Part II(B)(2).
100. See supra Part III.
101. See supra Part IV(A).
103. 845 P.2d 1006 (Wash. 1993).
were caused by an involuntary mental illness. In dicta, the court opined that the conversion of over one million dollars in client funds "mandates disbarment in virtually every circumstance to ensure the protection of the public, the deterrence of lawyer misconduct, and the preservation of public confidence in the bar." However, the court found McLendon's involuntary condition to be an extraordinary mitigating circumstance which warranted an exemption from the typical disbarment.

In 1978, McLendon was prompted to seek medical help because of his severe mood swings. At that time he was diagnosed as depressed and was prescribed antidepressant drugs. Although he saw many different psychiatrists and was prescribed different antidepressants, his condition steadily deteriorated and at "times McLendon's friends characterized his behavior as wired, grandiose, and angry... [and] at other times... withdrawn... and suicidal." McLendon was apparently treated improperly and his strange behavior climaxed in 1986 when he began building a new office complex which included a courtroom, a swimming pool, tennis and racquetball courts and a sauna. He also bought twelve horses, eight mules, ten tons of hay and more than five thousand dollars worth of horseshoes. To finance these expenses, McLendon improperly converted over one million dollars of his clients' funds between 1982 and 1986.

In 1987, McLendon was involuntarily admitted into a psychiatric hospital, diagnosed with a bipolar disorder and then successfully treated with lithium carbonate. "Bipolar disorder is recognized by the American Psychiatric Association, [it]... is biochemical in nature and involves abnormal levels of neurotransmitter in the brain..."

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105. Id. at 1013.
106. Id. at 1006.
107. Id. at 1012. The court considered that, because of his illness, McLendon's judgment was impaired and he did not have actual knowledge of his actions. Id. at 1011.
108. Id. at 1007.
109. Id.
110. Id. His condition deteriorated due to the fact that he was not accurately diagnosed and, therefore, was not prescribed the correct medication. Id. at 1009.
111. Id.
112. Id.
113. The majority of this money was misappropriated from client trust accounts; however, the record is inadequate to determine the accuracy of this amount. Id.
114. McLendon was brought to Pine Crest Psychiatric Hospital in Idaho for 43 days. He was treated by hospital psychiatrist Joe Leggett, M.D. who also testified at his bar hearings. Id. at 1007-09.
which involuntarily trigger cycling between the manic and depressive phases of the illness." Although a complication of this disorder involves impaired judgment, there is well-documented success in controlling the disorder through the use of lithium therapy. In February 1990, McLendon pleaded guilty to first degree theft for embezzling his client’s funds; he accepted the responsibility of his acts but added that “during [this] time... I was given the wrong medication... which rendered me incapable of proper rationalization.” When evaluating McLendon’s status as a member of the Washington State Bar, a hearing panel officer and disciplinary board both held that McLendon’s illness was not a mitigating factor and that he should be disbarred. McLendon appealed this decision; the Supreme Court of Washington overturned the disciplinary proceeding due to the involuntary nature of his illness. A plaintiff such as “Anonymous” should use the McLendon decision to demonstrate that an attorney with an involuntary mental illness who is successfully treated is not to be considered per se unqualified to practice law. Therefore, if applicants can prove that their conditions are successfully treated and that they meet all the other requirements, they should be considered otherwise qualified.

3. Discrimination

As stated above, not only must plaintiffs prove that they are disabled and otherwise qualified, but they must also show that they were subject to discrimination. The most obvious claim of discrimination by applicants “regarded as” disabled is that the Licensing Board denied their admission through bias and criteria that is not related to their ability to practice in the profession. There is a notable concern for individuals disabled by the stigma associated with a history of mental illness and treated as though they are substantially and permanently impaired.

115. Id. at 1007-08.
117. McLendon, 845 P.2d at 1009.
118. Id.
119. Id. at 1010.
121. Bar Examiners, supra note 7, at 10.
122. Bar Examiners, supra note 7, at 10.
Even if an applicant is not excluded outright on the basis of a psychiatric history, the applicant will nonetheless be subjected to more extensive and intrusive scrutiny. Indeed, if such heightened scrutiny does not result from affirmative answers to the application questions, there is no apparent reason for seeking the information. This heightened scrutiny is itself discriminatory, for it subjects individuals, based on the mere fact of a disability, to a more-rigorous qualification process.  

Furthermore, other disabled applicants, especially those physically impaired, are not required to disclose any additional information to the Examining Committee even though their impairment may affect their abilities as attorneys.

However, in a case such as Anonymous, where the applicant is denied admission by an ad-hoc determination after disclosing a prior mental illness, there is a more distinct claim of discrimination. Although the Examining Committee found “Anonymous” unfit to practice law, its conclusion was contrary to the medical testimony presented. It could be argued, therefore, that the Examining Committee’s decision went beyond its expertise and that it should have relied on the professional opinion offered or an independent opinion.

Yet another issue that arises is whether or not all determinations by a licensing board, concerning the mental fitness of an applicant, require an expert opinion. “[An expert] does not have the final word on determining what is or is not reasonable . . . [b]ut in a case where there is no . . . evidence to the contrary, and the . . . opinion [given by the expert is not] outrageous, it is appropriate . . . to give great weight to the [expert’s] opinion.” In D’Amico v. New York State Board of Law Examiners, an applicant for the New York State Bar Examination, with severe visual disability, filed a lawsuit against
the Board of Law Examiners. The plaintiff asserted that the Board of Law Examiners’ refusal to grant all testing accommodations recommended by the applicant’s physician was in violation of the ADA.

D’Amico had taken and failed a prior bar exam, during which she was provided with special accommodations due to her severe visual impairment. When registering for the next bar exam, D’Amico requested four days in which to take the test instead of the normal two days, on the advice of her physician. The Board of Law Examiners concluded that the determination concerning D’Amico’s request ultimately dealt with a testing issue. The Board of Law Examiners concluded this decision was within its expertise and, therefore, its conclusion should take precedence over any recommendations from an applicant’s physician. The district court had difficulty comprehending this line of reasoning and would not uphold the Law Examiners’ conclusion that the applicant’s physician was not qualified to recommend a four-day examination, finding “the opinion and diagnosis of Dr. Lerner [was] precisely the kind of medical opinion that physicians give all the time concerning the ability of their patients to perform [specific] activities.”

4. Compelling Disclosure of Prior Mental Illness Violates the ADA

A separate and distinct matter concerns a licensing board requirement that an applicant disclose whether he or she has ever been diagnosed or treated for any type of mental or emotional problem. The main contention against the above-stated questioning is that it is far too broad and would require disclosure of facts not necessary

130. *Id.* at 218.
131. *Id.*
132. These accommodations included a separate testing room with enhanced lighting, a large print copy of the test and a choice of date and time to take the test. *Id.* at 218-19.
133. *Id.* at 219.
134. *Id.* at 222.
135. *Id.*
136. *Id.* at 223.
137. *Id.*
139. *See* Campbell v. Greisberger, 865 F. Supp. 115, 121 (W.D.N.Y. 1994) (holding that a motion on question 18(c) of the New York State Bar Application (“State whether you have since attaining the age of 18, been adjudged an incompetent, or had proceedings brought against you . . . ”) was moot because the question was no longer used); *cf.* Applicants v. Texas State Bd. of Law Examiners, A-93-CA-740-SS (W.D. Tex. Oct. 10, 1994) (holding that requiring disclosure of diagnosis or treatment within the past ten years of “bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder” was not in violation of the ADA).
to determine an applicant's fitness as a professional. Additionally, this question may encourage applicants with true psychological problems to avoid seeking psychiatric treatment in fear of not obtaining a license, which will pose a greater risk to the public.\(^\text{140}\)

This selective identification process, which subjects those affirmative responders to the risks of heightened scrutiny and potential denial or further review of the application, will serve only to discourage potential applicants from seeking needed mental health treatment... the committee's application question deters those who need it from obtaining effective treatment, while selectively penalizing those who have already done so.\(^\text{141}\)

The American Bar Association's Section of Legal Education and Admission to the Bar, the ABA's Commission on Mental and Physical Disability Law, and the Association of American Law Schools studied this issue for more than one year. The compromise resolution recommended:

when making character and fitness determinations for the purpose of bar admission, state bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should 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.\(^\text{142}\)

C. EXAMINING THE COMMITTEES' RESPONSE

Although the certification of a state bar applicant's character and fitness is no longer carried out by the state courts, the Examining Committees allege that it is clearly a judicial function.

Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an

140. *Bar Examiners, supra* note 7, at 11.
141. *Bar Examiners, supra* note 7, at 11.
The historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a function confined to the courts themselves.143

Therefore, the Examiners Committee's first and foremost response is that judicial immunity bars a lawsuit concerning their certification of bar applicants from being brought against them.144

[Judicial] immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."145

In Anonymous, the plaintiff's complaint alleges the "[defendant Examining Committee is an agent or instrumentality of State Government and thus a 'public entity' within the meaning of Title II of the [ADA]."146 The ADA specifically prohibits a state from claiming immunity for a violation of the Act.147 However, the Examining Committee argues that "the courts have . . . applied immunity defenses to [section] 504 of the Rehabilitation Act."148 The Examining Committee further alleges that judicial immunity survives the waiver section of the ADA.149


A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [sic] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Id.

149. See Defendants' Memorandum in Support of their Motion to Dismiss at 2-7, Anony-
However, if courts disagree with the Examining Committee’s judicial immunity argument, they will assert that their decisions have not violated the ADA. According to the National Conference of Bar Examiners, more than fifty percent of the nation’s bar committees ask applicants questions regarding prior mental illness and treatment.159 Most character and fitness committee members do not believe this line of questioning is discriminatory and believe that the public is not being served “properly if [Examination Committees are] closing [their] eyes to this concern.”151 By questioning an applicant, the Examining Committee attempts to protect the public, which relies on the advocate’s intellect and needs to place one’s trust in that person.152 Although the question concerning prior mental illness poses concern for bar applicants, it is used to determine the fitness of the applicant and an affirmative answer is not an absolute bar to admission.153

As for the allegation that asking the question alone is discriminatory in violation of the ADA,154 bar examiners respond that this information is relevant to decisions concerning the applicant’s admission. Such questions may not be grounds for disqualification, but are not irrelevant because an affirmative answer is used to gain more information on the candidate.155 In Konigsberg v. State Bar of California,156 the petitioner claimed that the Bar of California should not be able to ask whether an applicant had ever been a member of the Communist Party, because that question on its own would not foreclose an applicant’s admission to the bar.157

“In 1953, [Raphael Konigsberg], having successfully passed the California bar examination, applied for certification for bar membership.”158 This application was denied; “[the Committee’s] determina-

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151. Id. (quoting Margaret Cornelle, Director of the Minnesota Board of Law Examiners).
152. See supra Part III.
153. Bar examiners claim that this question is a disclosure device employed to better able them to make an informed decision on the applicant and to determine if the applicant should be admitted as an officer of the court. See, e.g., Konigsberg v. State Bar of California, 366 U.S. 36 (1961).
157. Id. at 46. There was no California statute prohibiting a former member of the Communist Party from becoming an attorney. Id.
158. Id. at 38.
tion centered largely around [his] repeated refusals to answer Committee questions as to his present or past membership in the Communist Party. 159 After the Supreme Court remanded the case to state court and the bar association, the petitioner "reiterated unequivocally to the Bar Association, his disbelief in [the] violent overthrow [of the United States Government], and [further] that he had never knowingly been a member of any organization which advocated such action." 160 However, the bar association once again denied Konigsberg's admission because of his refusal to answer questions concerning membership in the Communist Party. 161

The Bar Committee's Chairman responded to the claim that the question should not be asked by stating:

If you answered the question, for example, that you had been a member of the Communist Party . . . the Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party . . . . [F]ailing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary. 162

Accordingly, the Court regarded the petitioner's argument that the bar committee was restricted from asking questions regarding membership in the Communist Party as "untenable." 163 Instead, the Court was persuaded by the respondents' argument in this matter. It reasoned that although affirmative answers to broad-based questions regarding prior membership in the Communist Party may not automatically disqualify someone from becoming a member of the bar, Executive Committees may require the information in order to fully investigate the applicant. 164 Consequently, those who have suffered from a previous mental illness will not be per se unqualified, but will be required to prove to the Examining Committee that they are fit to become officers of the court as attorneys. 165

159. Id. Konigsberg refused to answer the Committee's questions because he viewed them as an infringement upon his right to "free thought, association, and expression." Id. n.1.

160. Id. at 39.

161. The Bar Association declined to certify him because his refusals obstructed their attempts to conduct a full investigation. Id. at 39.

162. Id. at 46-47.

163. Id. at 46.

164. Id. at 47.

V. CONCLUSION

There is a strong movement which contends that the conduct of the Examining Committee in *Anonymous v. Connecticut Bar Examining Committee*\(^ {166} \) is discriminatory and in violation of Title II of the ADA. The movement’s first contention is that applicants, such as “Anonymous,” who have a history of mental illness but are not currently impaired are being discriminately regarded by licensing boards as disabled.\(^ {167} \) Additionally, this movement claims that any licensing board’s determination regarding the capability of an applicant with a prior mental illness to practice as an attorney, or any professional, should be made by a mental health professional.\(^ {168} \) However, in the legal profession these fitness determinations are traditionally made by Examining Committees, which are typically comprised of no mental health professionals.\(^ {169} \) Although this movement would probably not require Examining Committees to contain a mental health professional, they would want the Examining Committee to rely on professional testimony submitted or an outside opinion. However, there is a genuine concern that Examining Committees are not deferring to medical professionals, as seen in *Anonymous*,\(^ {170} \) and thus are unjustly swayed by the false and prejudicial assumptions about mental illness.\(^ {171} \) Finally, the movement alleges that compelled disclosures of an applicant’s mental health history does adequately uncover those who will become fitness problems, while intimidating applicants who truly need counseling.\(^ {172} \)

The examining committees have a different opinion regarding this problem.\(^ {173} \) They first believe that they should be immune from applicants’ lawsuits on the basis of judicial and legislative immunity.\(^ {174} \) Further, examining committees believe it is their duty to ask this type of question in order to fully obtain the needed information to properly investigate an applicant’s potential fitness problems.\(^ {175} \)

\(^{166}\) See supra note 4.
\(^{167}\) See supra Part IV(A)-(B).
\(^{168}\) See supra Part IV(A).
\(^{169}\) See supra Part IV.
\(^{170}\) See supra Part IV(A).
\(^{171}\) See supra Part IV(B)(4).
\(^{172}\) See supra Part IV(B)(4); see also Scheffey, supra note 78, at 6.
\(^{173}\) See supra Part IV(C).
\(^{174}\) See supra Part IV(C).
\(^{175}\) See supra Part IV(C).
They contend that it is their duty to protect the public, and the profession, and not admit an individual who is disabled and not otherwise qualified. Additionally, examining committees assert that it would be nearly impossible to investigate applicants if they are prohibited from obtaining adequate background information. The examining committees finally allege that a state may require high standards of bar applicants because of their position as an officer of the court. John Moore, executive director of the Florida Board of Bar Examiners, argues "[t]he board is only interested in [weeding out] people who have a fitness problem, not [those] seeking to improve the quality of their life through stress-management therapy."

The certifying of applicants by examining committees or licensing boards, as public entities of the state, should not be immune from lawsuits under the ADA. However, the important function of certifying an applicant’s character and fitness performed by examining committees must continue. This certification must pertain to currently existing fitness concerns, and any decision which is beyond the examining committees’ expertise must be deferred to an expert’s opinion. Accordingly, denying a license after a candidate disclosed a prior mental illness which was not currently impairing may very well be discriminatory in violation of Title II of the ADA.

A solution to this very delicate problem which may accommodate both sides of this debate would be the implementation of conditional licenses for professionals. Due to the inevitable situation whereby an applicant’s prior impairment is currently under control, a viable option would be for the licensing board to grant the applicant a conditional license. These conditional licenses would allow the licensing board to closely monitor the licensees and, under certain conditions, have them revoked. According to the chairman of the [Connecticut] Bar Examining Committee, Raymond W. Beckwith,

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176. See supra Part III.
177. See supra Part IV(C).
178. See supra text accompanying note 1 & Part III.
179. Murawski, supra note 150, at 5.
181. See supra note 2.
183. "A public entity shall make reasonable modifications in policies, practices and procedures when the modifications are necessary to avoid discrimination on the basis of a disability, unless the public entity would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.150(b)(8) (1992).
184. Scheffey, supra note 78, at 6.
there have been experiments with provisional or conditional licenses in some jurisdictions, notably Florida, in the case of attorneys recovering from alcohol or substance abuse.\textsuperscript{185} Although these conditional licensees would change a long standing tradition of the legal profession, the changes may be necessary to come into compliance with the ADA.

\textit{John D. McKenna}

\textsuperscript{185} Scheffey, \textit{supra} note 78, at 6.