IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF AMENDMENT SUPREME COURT RULES 49, 51, 52, 53, 54, 55, 56 and 66; ADDENDUM 1; and RULES REGULATING ADMISSION TO THE PRACTICE OF LAW AND INSTRUCTIONS

ADKT NO.: 0508

FILED

JUN 23 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

COME NOW, your committees, the Board of Governors of the State Bar of Nevada and the Board of Bar Examiners (hereinafter collectively known as the "Board") and respectfully report as follows:

There are three categories of revisions to the relevant Supreme Court Rules ("S.C.R.'s") and Addendum 1 - Policies and Procedures of the Board of Bar Examiners and the Moral Character and Fitness Committee ("Addendum 1") that the Board is respectfully requesting to be revised:

(1) The composition of the Character and Fitness Committee (the "C & F Committee") should be amended to increase the number of attorney members from nine (9) to thirteen (13), and to decrease the quorum for a panel from four (4) members to three (3) members. The increase in the number of attorney members and the reduction in the number of panel members to establish a quorum is necessary because of the higher number of hearings that are required during each bar examination cycle, the greater time demands placed on the current nine (9) attorney members of the C & F Committee and the problems faced by the Admissions Department in scheduling hearings with only nine (9) attorney members and a quorum of four (4) members. Reducing the quorum from four (4) members to three (3) members also eliminates the possibility of a split

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recommendation. The proposed amendments maintain the current ratio of attorney members to the C & F Committee who are appointed by the Court and by the Board of Governors.

(2) The elimination or amendment of certain S.C.R.'s and Addendum 1 (and corresponding questions on the bar exam application) relating to questioning applicants about their mental health status as part of a character and fitness investigation. These revisions are necessary in order to satisfy the position taken by the United States Department of Justice ("DOJ") that asking bar applicants to disclose whether they currently have (or have had in the past) mental health issues violates the "Americans with Disabilities Act" (42 U.S.C. §§ 12101 *et. seq*) ("ADA").

Further, the DOJ's position is that pursuing character and fitness hearings based solely on an applicant's mental health status (without self-disclosure by the applicant or some other justification, such as previous arrests, DUI's or similar conduct), particularly when an applicant is being successfully treated for the mental illness violates provisions of the ADA, as interpreted by courts of various jurisdictions. *See, Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995); *See also* the "Settlement Agreement Between the United States of America and The Louisiana Supreme Court Under the Americans with Disabilities Act," both of which are attached hereto as Exhibits A-1 and A-2, respectively).[1]

[1] Nothing contained herein is intended to constitute an admission that the current Rules or provisions of Addendum 1 or the questions asked on the current bar application violate the ADA or any regulations promulgated thereunder.

(3) The amendment of certain provisions within the S.C.R.'s and Addendum 1 to reflect current practices within the Admissions Department of the State Bar of Nevada (the "Admissions Department.") with regard to the application process and the review of applicants' character and fitness, and to properly reflect the current fees being charged by the Admissions Department for certain services and by the State Bar of Nevada for license fees to existing members (active and inactive).

In order to accomplish the revisions outlined above, the following S.C.R.'s and portions of Addendum 1 should be amended, as follows:

Rule 49. Board of governors of state bar to govern admission to practice law; fees; board of bar examiners.

...

(3) Committee on moral character and fitness; duties and composition. The committee on moral character and fitness is a subcommittee of the board of bar examiners, and has all of those powers and duties delegated under the supreme court rules to the board of bar examiners relating to the conduct of investigations and hearings, and the submission of reports and recommendations to the supreme court respecting the ethical, moral and ~~psychological~~ fitness of applicants for admission to practice law in this state. The committee on moral character and fitness shall be composed of [~~nine~~] thirteen members who are active members of the state bar, and up to four lay members who are professionals with expertise in fields that are germane to the determination of character and fitness issues confronted by the committee. [~~Five~~] Seven of the attorney members shall be appointed by the supreme court,

and [~~four~~] six of the attorney members shall be appointed by the board of governors. The board of governors shall also appoint the lay members of the committee. The supreme court shall appoint one of the attorney members to chair the committee.

For each formal hearing the committee may be divided by its chair into as many hearing panels as the chair believes is necessary to conduct hearings in that district. A hearing panel shall be composed of a minimum of [~~four~~] three members, one of whom, at the chair's discretion, may be a non-lawyer. The chair shall assign applicants for hearings to the panels and may sit as chair or designate an attorney to sit as acting chair in his or her place.

For those applicants whose applications reflect conduct or information warranting further inquiry, but not necessarily warranting a formal hearing, the chair (or a committee member or members, as determined by the chair) and the director of admissions may conduct an informal [~~interview~~] hearing in an attempt to counsel an applicant or to resolve the matter informally. If the matter is not resolved to the satisfaction of the chair, a formal hearing may be held.

For those applicants whose applications reflect conduct or information warranting further inquiry, but not necessarily warranting an informal hearing, the admissions director, after consultation with the chair of the C & F Committee, may conduct an informal interview in an attempt to counsel an applicant, to resolve the matter informally or to determine whether a hearing (formal or informal) is required.

Rule 51. Qualifications of applicants for admission.

(1)...

(g) Not [~~be subject to any mental or emotional disorder~~] have exhibited any past or present conduct or behavior that could call into question the applicant's ability to practice law in a competent, ethical and/or professional manner or which would render the applicant unfit to practice law.

Rule 52. Applications: Filing, number and contents.

(1)(a) In order to permit and facilitate the examination, investigations, interviews and hearings necessary to determine the applicant's morals, character, qualifications and fitness to practice law, an applicant for a license to practice as an attorney and counselor at law in this state shall electronically file with the admissions director of the state bar, an application not later than March 1 if the application is for the following July examination and not later than October 1 if the application is for the following February examination. The applicant shall also file a Verification Form, to be furnished by the admissions director, in duplicate within 21 days of [~~submission of the application~~] mailing of the supplemental package by the admissions director to the applicant.

Rule 53. Fingerprinting of applicants.

...

(2) Each applicant shall, at the applicant's own expense, and on cards provided by the [~~state bar~~], State Bar of Nevada, arrange to be fingerprinted

by any police or sheriff's office and shall submit two completed fingerprint cards and the signed Fingerprint Background Waiver form required by the Nevada Department of Public Safety, to the admissions director within 21 days of [~~submission of the application~~] mailing of the supplemental package by the admissions director to the applicant. The fingerprint cards shall be completed in strict compliance with the requirements established by the Nevada Department of Public Safety and the Federal Bureau of Investigation, from time to time.

Rule 54. Fees.

...

6. The board of bar examiners shall assess against an applicant such further fees or costs as in the opinion of the board are reasonably necessary to conduct investigations, to hold hearings and to take depositions either within or without the State of Nevada concerning the character of the applicant. The board of bar examiners shall [~~estimate the cost of its investigation and provide the applicant with a written estimate of costs. The applicant shall have 10 days from service of the estimate within which to pay the estimated costs to the State Bar of Nevada.~~] establish appropriate fees to be charged for informal and formal hearings to cover the cost of investigations hearings, transcripts and/or depositions. Any such fees assessed shall be paid into the treasury of the [~~state bar~~] State Bar of Nevada prior to the commencement of any investigation, hearing or the taking of a deposition.

Rule 55. Transcripts of academic grades provided to the board of bar examiners.

...

(2) Transcripts shall be filed with the admissions director of the state bar within 21 days of [~~submission of the application~~] mailing of the supplemental package by the admissions director to the applicant.....

Rule 56. Number and disposition of applications; approval by board of bar examiners.

...

(d) Only the board of bar examiners may recommend denial, with or without prejudice, of an application, pursuant to Rule 64, on the grounds that the applicant has failed to demonstrate good moral character and willingness to abide by high ethical standards, or that the applicant has failed to demonstrate that no [~~mental or emotional disorder~~] past or present conduct or behavior exists that could call into question the applicant's ability to practice law in a competent, ethical and/or professional manner or renders the applicant unfit to practice law.....

Rule 66. Examination: Subjects.

1. The essay examination shall be comprised of [not less than seven] ~~eight~~ questions prepared by the board of bar examiners of the state bar, and, beginning with the July 1997 examination, may include one or more Performance Test question(s)....

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 2A.; Composition; The Committee on Moral Character and Fitness (C & F Committee).

The C& F Committee was originally created by court order dated September 29, 1993, as a subcommittee of the board, and was formally codified in S.C.R. 49(3) in November 1996. The C & F C[e]ommittee is composed of [~~nine~~] thirteen members who are active members of the State Bar of Nevada as well as up to four lay members who are professionals with expertise in fields that are germane to the determine of the character and fitness issues presented to the C & F Committee. [~~Five~~] Seven attorney members are appointed by the court, and [~~four~~] six attorney members by the board of governors. The lay members are appointed by the board of governors. The chair is selected by the court from the attorney members.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 11; Supplemental Information. All applicants must submit two letters of reference, certified law school transcripts, certificated undergraduate transcripts, and Department of Motor Vehicle printouts from every state in which the applicant has been licensed to drive in the five years immediately preceding the submission of the application. In addition to the foregoing, all attorney applicants (as defined in S.C.R. 54(2)) must provide certificates of good standing and disciplinary history reports from each jurisdiction in which they have successfully taken and passed the bar examination, whether or not the applicant is licensed in that jurisdiction. These items shall be filed not later than 21 days after [~~the submission of the application~~]

mailing of the supplemental package to the applicant by the admissions director, with the exception of certified law school transcripts from applicants who have not graduated from law school at the time of submission of the application, which must be submitted within the timeframes set forth in S.C.R. 55 (2).

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 20C.; The Investigative Process; Review and Recommendation by the Director of Admissions. The director of admissions shall review each application for admission to determine whether it has been completed and filed in compliance with the requirements of S.C.R. 51 through S.C.R. 55. After thorough investigation, the director may determine that the application is complete and that the applicant has demonstrated that he/she possesses the requisite moral character and fitness required to practice law in the State of Nevada and recommend to the board that the applicant be cleared for character and fitness. If the director determines that information within the application warrants further review by the C & F Committee, the director shall refer the application to the chair of the C & F Committee with a recommendation that the applicant be cleared or that a formal hearing or an informal [~~interview~~] hearing, or an informal interview be conducted with the applicant to determine if the applicant has failed to demonstrate good moral character, or mental or emotional fitness to practice law. The chair of the C & F Committee may accept the director's recommendation and proceed accordingly, or, may make such other determinations as the chair, in his/her sole discretion, deems appropriate.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 22.; Relevant Conduct.

The discovery of any of the following may be considered by the C & F Committee in determining character and fitness to practice law:

- unlawful conduct
- academic misconduct
- false statements, including omissions
- misconduct in employment
- acts involving dishonesty, fraud, deceit or misrepresentation
- abuse of process
- neglect of financial responsibilities, including student loans
- failure or neglect of child and/or spousal support
- neglect of professional obligations
- violation of an order of a court or other tribunal
- contempt of court
- [~~mental or emotional instability~~] conduct or behavior that could call into question the applicant's ability to practice law in a competent, ethical and/or professional manner or renders the applicant unfit to practice law
- substance or alcohol dependency or abuse
- denial of admission to, or suspension from, the bar in another jurisdiction
- disciplinary action by a lawyer disciplinary agency or other professional disciplinary or licensing authority of any jurisdiction.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 26.; Counseling/Treatment/Recovery.

If an applicant has a problem with drugs or alcohol [~~or any other mental or emotional problems~~], he/she is strongly encouraged and may be required to seek counseling or treatment needed. An applicant's recognition of the problem and his/her treatment record may be evidence of recovery to be positively considered by the C & F Committee. The C & F Committee encourages active participation in a recovery program where appropriate.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 27.; Psychiatric or Psychological Counseling. The C & F Committee may inquire into an applicant's mental health status only when self-disclosed by the applicant or when information is obtained after inquiry by the C & F Committee into past or present conduct or behavior that brings into question the applicant's mental health, including, without limitation, past drug or alcohol related activities or arrests. The medical records of an applicant's currently treating licensed professional will carry significant weight when reviewed by the C & F Committee. Independent medical examinations for mental health issues will be considered only when no other means reasonably exist to determine whether the applicant's mental health calls into question whether he/she has the requisite character and fitness to practice law in this state. [~~Mental or emotional instability, like~~

~~substance dependency or abuse, is one of the factors which the C & F Committee considers. The C & F Committee may, in its discretion, require an applicant to undergo a psychological evaluation or psychiatric assessment at the applicant's expense and to submit a written report.]~~

The C & F Committee recognizes that the stresses of law school, as well as other life factors, frequently result in applicants seeking psychiatric or psychological counseling. Again, the C & F Committee encourages applicants to obtain such counseling or treatment. An applicant should not allow a future bar application to color that decision. Only those forms of mental or emotional problems which are untreated and have resulted in conduct or behavior that have been determined to have an adverse impact on the applicant's ability to practice law will trigger an investigation or have an impact on bar admission decisions.

There will not be any specific q[~~Q~~]uestions on the Application for Admission regarding whether an applicant has had professional counseling, treatment, and medication so as [~~are~~] not [~~intended~~] to invade unnecessarily the applicant's privacy or to discourage applicants from seeking professional assistance, although the C & F Committee may inquire into an applicant's mental health or treatment if self-disclosed by the applicant or if the information arises out of inquires into past or present conduct or behavior which call into question an applicant's ability to practice law in this state. Occasional short-term counseling for relationship problems or situational stress, or if an applicant is being successfully treated for mental illness by a licensed professional, standing alone, are generally not reasons for further inquiry. The director of admissions will not seek mental health treatment records without first notifying the applicant and obtaining the proper medical authorization and release form from the applicant.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 31.; Hearings Before the C & F Committee.

...

C. **Procedure.**

(i) Composition of the Committee (Quorum). The C & F Committee consists of [~~nine~~] thirteen members of the State Bar of Nevada, and up to four non-lawyers who specialize in professions whose expertise is germane to matters of moral character and fitness to practice law. Members of the C & F Committee shall be appointed to serve for terms of three years. There is no limit on the number of terms an attorney may serve on the committee.

(a) Formal Hearing. The C & F Committee may be divided by its chair into as many hearing panels composed of a minimum of [~~four~~] three members, on a case-by-case basis, one of whom may be a non-lawyer, as the chair believes necessary to conduct hearings. The chair will assign applicants for hearings to panels and may sit as chair for the panel or designate an attorney to sit as acting chair in his/her place. Formal hearings shall be held only for applicants who are successful on the bar examination. The fee for formal hearings shall be $2,500.00. The director of admissions shall, in his or her judgment, be permitted to reduce the fee or allow for a deferred payment plan based on an applicant's showing of financial hardship, provided that all fees charged must be paid in full before an applicant will be admitted to practice law in this state. The admissions director's decision as to fees shall be final.

(b) Informal [~~Interview~~] Hearing. For those whose applications reflect conduct or information warranting further inquiry, but may not necessarily

require a formal hearing, the chair and the director of admissions, or their designee, may conduct an informal [~~interview~~] hearing in an attempt to counsel with an applicant, or to resolve a matter informally. Informal hearings shall be held only for applicants who are successful on the bar examination. The fee for informal hearings shall be $250.00. The director of admissions shall, in his or her judgment, be permitted to reduce the fee or allow for a deferred payment plan based on an applicant's showing of financial hardship, provided that all fees must be paid in full before an applicant will be admitted to practice law in this state. The admissions director's determination as to fees shall be final.

(c) Informal Interview. For those whose applications reflect conduct or information warranting further inquiry, but may not necessarily require a formal or informal hearing, the director of admissions, after consultation with the chair, may conduct an informal interview in an attempt to counsel with an applicant, or to resolve the matter informally. Informal interviews may be held for applicants before or after the results of a particular bar examination are known. No additional fees will be charged for informal interviews.

...

(iv) Order of Presentation. Although hearings before the C & F Committee are conducted informally, and may deviate from time to time, the following generally describes the manner in which hearings will be conducted.

...

(b) Informal Hearings and Interviews. Informal hearings and interviews shall be conducted informally and shall not be reported.

...

(D) **Decision and Recommendation**. The C & F Committee shall submit findings and make a recommendation to the court (see section titled "Due Process" for adverse recommendations by the C & F C[e]ommittee).

...

(ii) Informal Hearing [~~Interview~~]. The chair, or his/her designee, may clear the applicant for character and fitness after an informal hearing or may refer the matter for a formal hearing.

(iii) Informal Interview. The admissions director may clear the applicant for character and fitness after an informal interview or may refer the matter for a formal or informal hearing.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 33.;Composition of the Exam.

...

A. **Multistate Bar Examination (MBE).** The MBE is a national bar examination prepared by the National Conference of Bar Examiners (the "NCBE"). It is scored and analyzed by the [~~American College Testing Service~~] NCBE. It consists of 200 multiple choice questions involving the following areas of law: real property, contracts, torts, federal civil procedure, evidence, criminal law and constitutional law. It is a six-hour examination administered in two, three-hour sessions.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 39.; Regrade Procedures.

...

Regrade of the MBE. Applicants may request that [~~ACT~~] the NCBE hand grade the MBE examination for an additional administrative fee. Applicants requesting a manual regrade must submit a written request to the department of admissions accompanied by a check in the amount of [~~$6.~~00] $50.00 made payable to [~~American College Testing~~] the NCBE and a check in the amount of $12.50 made payable to the State Bar of Nevada. The state bar will not accept the score of a manual regrade of the MBE unless it is reported to the second decimal place.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 41.; MBE Score Transfers. Successful applicants cannot review their MBE or essay examinations nor can they find out their total scaled scores on the examination. An applicant who wishes to transfer MBE scores to another jurisdiction must put the request in writing and send it, accompanied by a check for $[~~10.00~~] 25.00 made out to the State Bar of Nevada to cover administrative costs, to the Admissions Department of the State Bar of Nevada.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 42.; Unsuccessful Applicants.

A. Notification. Applicants who are unsuccessful on the bar examination shall be notified in writing by the State Bar of Nevada within 30 days of the date the order is filed admitting applicants to practice law in the State of Nevada. This notice shall be accompanied by a statistical analysis of the applicant's scores with an explanation of the grading procedures employed by the board's psychometrician. [~~A $25.00 refund of the license fee shall be sent within 30 days of the notification by the board.~~] The $25.00 license fee shall not be refunded under any circumstances.

B. Review of Answers. To obtain copies of essay exam answers and questions, applicants must send $[~~25.00~~] 35.00 to the Admissions Department of the State of Nevada. ....

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 48.; Bar Cards and Bar Dues. The State Bar of Nevada issues bar cards for new admittees following the swearing-in ceremonies. Active members admitted to practice in any jurisdiction less than five (5) years shall pay an annual membership fee of $[~~200.00~~] 250.00, and active members admitted to practice in any jurisdiction five (5) years or more shall pay $[~~350.00~~] 450.00. Dues shall be billed on or around December 1 of the year the new admittee passed the bar examination. Inactive dues are $[~~75.00 for an attorney who wishes to be placed on the mailing list, and $25.00 for an attorney who does not wish to receive any correspondence~~] $125.00.

Rule Addendum 1. Policies and Procedures of the Board of Bar Examiners and the Moral Character Fitness Committee; Paragraph 49.;Additional Inquiries. Please direct any additional inquiries to the State Bar of Nevada, Attention: Admissions Department, ~~[600 East]~~ 3100 West Charleston Boulevard, Suite 100, Las Vegas, Nevada 8910~~[4]~~2, (702) 382-2200, ~~Fax (702) 382-6676~~ or email (admissions@nvbar.org).

RESPECTFULLY SUBMITTED this 18th day of June, 2015.

STATE BAR OF NEVADA
BOARD OF GOVERNORS

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EXHIBIT "A-1"

880 F.Supp. 430
United States District Court,
E.D. Virginia,
Alexandria Division.

Julie Ann CLARK, Plaintiff,
v.
VIRGINIA BOARD OF BAR EXAMINERS, Defendant.

Civ. A. No. 94-211-A. | Feb. 23, 1995.

Applicant for admission to the Virginia bar filed an action alleging that question on license application addressing applicant's history of mental or emotional disorders violated Americans with Disabilities Act (ADA). The District Court, Cacheris, Chief Judge, found that question asking applicants whether they had been treated or counseled for any mental, emotional or nervous disorders within the past five years was framed too broadly and violated applicant's rights under ADA.

So ordered.

Attorneys and Law Firms

***431** Victor M. Glasberg, Alexandria, VA, for plaintiff.

Peter R. Messitt, Asst. Atty. Gen., Richmond, VA, for defendant.

MEMORANDUM OPINION

CACHERIS, Chief Judge.

The issue before the Court is whether a question appearing on the Virginia Board of Bar Examiners' "Applicant's Character and Fitness Questionnaire" addressing an applicant's history of mental or emotional disorders violates the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (1994). Following a preamble explaining that the Virginia Board of Bar Examiners is concerned only with "severe forms of mental or emotional problems," Question 20(b) asks: "Have you within the past five (5) years been treated or counselled for any mental, emotional or nervous disorders?" If Question 20(b) is answered affirmatively, applicants must then give specific treatment information pursuant to Question 21.

For the reasons set forth below, the Court finds that Question 20(b) is framed too broadly and violates the Plaintiff's rights under the Americans with Disabilities Act. Accordingly, judgment is entered in favor of the Plaintiff and the Virginia Board of Bar Examiners is enjoined from requiring that future applicants answer Question 20(b).

I. FINDINGS OF FACT

Plaintiff Julie Ann Clark brings this action against the Virginia Board of Bar Examiners (the "Board") to have Question 20(b) stricken from the Board's "Applicant's Character and Fitness Questionnaire" (the "Questionnaire") because it violates the Americans with Disabilities Act (the "ADA"). The Board maintains that Question 20(b) is posed appropriately and is necessary to identify applicants with mental disabilities that would seriously impair their ability to practice law and protect their clients' interests. The Court, after reviewing the evidence, authorities and arguments ***432** of counsel, makes the following findings of fact. [1]

1 The complicated procedural history of this case is worthy of a brief review: On July 11, 1994, the Court granted Defendants' motion for summary judgment after concluding that the Court lacked subject matter jurisdiction and that Plaintiff lacked standing to bring suit under the ADA. On August 31, 1994, pursuant to a motion to reconsider, the Court vacated the July 11 Order and held that jurisdiction and standing were proper in this case. At that time, the Court struck Plaintiff's request for an injunction requiring the Board to grant her a license to practice law. On November 3, 1994, the Court denied Defendants' second motion for summary judgment with respect to the Board, but granted summary judgment with respect to Defendant W. Scott Street, III. Because of a conflict with the Court's schedule, the case was continued from

November 22, 1994 until January 18, 1995, at which time a two-day bench trial was held.

A. *The Parties to the Case*

Plaintiff Julie Ann Clark, a resident of Virginia, graduated from George Mason University Law School in June of 1993. She is currently employed as a children's program specialist at the Bazelon Center for Mental Health Law. During law school, Ms. Clark worked as a law clerk for the National Senior Citizens' Law Center, the American Bar Association Commission on Mental Disabilities, and the law firm of Landsman, Eakes & Laster. Additionally, Ms. Clark worked at various times as a paralegal for Legal Services of Northern Virginia and Virginia Legal Aid, and held several positions at the Loudon County Abused Women's Shelter.

Ms. Clark suffers from a condition previously diagnosed as "major depression, recurrent". Plaintiff's Exhibit 68(a).[2] Because the details of Ms. Clark's condition were disclosed in an affidavit filed under seal, they are not reviewed here. In an unsealed affidavit, Ms. Clark avers that, as a result of her condition, she "effectively lost much of [her] ability to concentrate, act decisively, sleep properly, orient [her]self, and maintain ordinary social relationships." Pl.Ex. 68(a). This condition, which occurred a few years ago, affected her for thirteen months.

2 Herein, Plaintiff's Exhibits are referred to as Pl.Ex. and Defendant's Exhibits are referred to as Def.Ex.

The Virginia Board of Bar Examiners, an entity created under the authority of Virginia Code § 54.1–3919 (1994), is responsible for the examination of applicants for licenses to practice law in Virginia. Under Va.Code § 54.1–3925.1(A), the Board must determine, prior to licensing, that each applicant is a "person of honest demeanor and good moral character, is over the age of eighteen and possesses the requisite fitness to perform the obligations and responsibilities of a practicing attorney at law." The Board makes this determination "from satisfactory evidence produced by the applicant in such form as the board may require." *Id.* As a precondition to licensure, the Board requires that applicants answer all of the questions contained in its Questionnaire, including Question 20(b).

Pursuant to its authority under Va.Code § 54.1–3922, the Board promulgated rules governing the admission of bar applicants. Section III of these Rules, titled Character Requirements, explains that the burden is on the applicant to produce evidence satisfactory to the Board that he or she possesses the requisite fitness to perform the obligations of a practicing attorney. Def.Ex. 4. The stated purpose of the character and fitness review is to ensure the protection of the public and safeguard the system of justice. *Id.* The revelation or discovery of characteristics suggesting a lack of fitness to practice law, including evidence of mental or emotional instability, may be treated as cause for further inquiry by the Board.[3] *Id.* The application ***433** does not, however, inquire into physical disabilities which may impair one's ability to practice law.

3 Rule III(2) lists sixteen factors which may be treated as cause for further inquiry by the board, including: (A) commission or conviction of a crime; (B) violation of the honor code of the applicant's college or university, law school, or other academic misconduct; (C) making false statements or omissions, including failing to provide complete and accurate information concerning the applicant's past; (D) misconduct in employment; (E) other than honorable discharge from any branch of the armed service; (F) acts involving dishonesty, fraud, deceit or misrepresentation; (G) abuse of legal process; (H) neglect of financial responsibility; (I) neglect of professional obligations; (J) violation of an order of a court; (K) evidence of mental or emotional instability; (L) evidence of an existing and untreated drug or alcohol dependency; (M) denial of admission to the bar in another jurisdiction on character and fitness grounds; (N) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction, including pending, unresolved disciplinary complaints against the applicant; (O) commission of an act constituting the unauthorized practice of law, or unresolved complaints involving allegations of the unauthorized practice of law; (P) any other conduct which reflects adversely upon the character or fitness of an applicant. *See* Def.Ex. 4. The questions contained in the Questionnaire are designed to illuminate these other characterological factors.

B. *Application for Admission to the Virginia State Bar*

On or about December 13, 1993, Plaintiff completed the Questionnaire and filed it with the Board. Plaintiff declined to answer Questions 20(b) and 21 of the Questionnaire on the grounds that they violated Title II of the ADA.[4] Question 20(b) and 21, and the preamble introducing these questions, read as follows:

4 The parties' arguments are addressed primarily to the propriety of Question 20(b). Question 21 is deemed to violate the ADA only to the extent that it expands upon Question 20(b). Thus, whether Question 21 violates the ADA independently of Question 20(b) is not a question before the Court. Accordingly, the Court will address Questions 20(b) and 21 simultaneously and not as independent issues.

> The Board is required to assess effectively the fitness of each applicant to perform the obligations and responsibilities of a practicing attorney at law. In this regard, a lawyer's chemical dependency or untreated or uncontrolled mental or emotional disorders may result in injury to the public. Questions 20 and 21 request information essential to the Board's assessment. The members of the Board recognize that stress of law school, as well as other life factors, frequently result in applicants seeking psychiatric or psychological counseling. The Board encourages you to obtain counseling or treatment if you believe that you may benefit from it. Because generally only **severe** forms of mental or emotional problems will trigger an investigation or impact on bar admission decisions, your decision to seek counseling should not be colored by your bar application....
>
> * * * * * *
>
> 20. (b) Have you within the past five (5) years, been treated or counselled for a mental, emotional or nervous disorders?
>
> * * * * * *
>
> 21. If your answer to question 20(a), (b) or (c) is yes, complete the following that apply:
>
> (a) Dates of treatment or counseling;
>
> (b) Name, address and telephone number of attending physician or counselor or other health care provider;
>
> (c) Name, address and telephone number of hospital or institution;
>
> (d) Describe completely the diagnosis and treatment and the prognosis and provide any other relevant facts. You may attach letters from your treating health professionals if you believe this would be helpful.

See Pl.Ex. 1 (emphasis in original).

On February 8, 1994, the Board advised Ms. Clark that her refusal to provide relevant information would prevent her from taking the bar examination. Pursuant to agreement of counsel, the Board subsequently agreed to allow Ms. Clark to sit for the February bar examination without answering Questions 20(b) and 21 of the Questionnaire. However, the Board indicated that it would not grant her a license until she completed the Questionnaire.

Ms. Clark took the Virginia bar examination on February 22 and 23, 1994 and passed it. She completed all of the application procedures with the exception of answering Questions 20(b) and 21. The Board concedes that, but for her refusal to answer Questions 20(b), it has no reason to believe that Ms. Clark lacks the requisite character and fitness to practice law in Virginia. Pl.Ex. 6. As the only thing preventing Ms. Clark's licensure is her refusal to answer Question 20(b), the issue of whether Question 20(b) ***434** violates the ADA is properly framed for the Court.

C. *Application Procedures of the Virginia Board of Bar Examiners*

Prior to 1994, only non-resident applicants were required to provide mental health information as part of their application to the Virginia bar. These applicants completed the character and fitness questionnaire created by the National Conference of Bar Examiner's (the "NCBE"), which included a broad question on mental health.[5] Conversely, resident applicants and those enrolled in Virginia law schools could obtain fitness certification from their local

circuit court judge or their law school dean. *See* Pl.Ex. 5. The procedure for resident applicants included no required disclosure of or inquiry into mental health status or counseling history.

5 Question 28 asked: "Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?"

For the February 1994 bar examination, the Board modified its practices to conform to Va.Code § 54.1–3925.1, which removed the ability of circuit court judges and law school deans to certify applicants' fitness to practice law. The Board developed a character and fitness questionnaire based in part on the NCBE's questionnaire. The Board modified the mental health question by explaining its purpose, in a preamble to Question 20, and by limiting the scope of inquiry to the last five years.

The Board reviews approximately 2,000 applications per year. Because it lacks the resources to review all of these applications in-depth, the Board relies on the self-reporting of verifiable facts to obtain relevant information about each applicant. The Board sends the applications to the NCBE, which prepares a character and fitness report on each applicant. The NCBE verifies all of the answers to the Questionnaire, including Question 20(b). To verify an affirmative answer to Question 20(b), the NCBE inquires from the health care professional disclosed in Question 21 whether the information disclosed is true.

After preparation of the character and fitness report, the NCBE returns the applications and verifying information to the Board for reevaluation. Upon receipt from the NCBE, employees of the Board review and mark the applications for items that may be pertinent to applicants' character and fitness, such as convictions, unpaid debts, job terminations, drug or alcohol use, mental health counseling, and institutionalization. *See also* Footnote 3, *supra.*

The Secretary–Treasurer of the Board, Mr. W. Scott Street, III, reviews the marked applications and decides which should be brought to the attention of the full Board for further examination. Although neither Mr. Street nor any member of the Board has any training in psychiatric or psychological problems, Pl.Ex. 9, the Board assesses the disclosed mental health information to determine whether further investigation is warranted. The Board has broad authority to conduct additional hearings to determine an applicant's fitness, and to subpoena witnesses and documents at such hearings. Va.Code § 54.1–3925.1 and 3925.3. In the twenty-three years Mr. Street has served as the Secretary–Treasurer, he has never brought to the attention of the Board an application disclosing the mere receipt of treatment or counseling for stress, depression, or marital or adjustment problems. Further, no applicant has been denied the right to sit for the bar examination based on their answer to Question 20(b).

In the last five years, forty-seven applicants have answered "yes" to Questions 20(b) or its predecessor, Question 28 of the NCBE's questionnaire. Of these forty-seven applicants, only two cases warranted further inquiry by the Board. In those two cases, the Board asked each applicant to provide letters from current health care providers stating that they were fit to practice law.[6] ***435** Both applicants provided the requested letters, but, because one applicant failed the bar examination, only one applicant was licensed by the Board.

6 One applicant had a bipolar disorder, had attempted suicide, and was voluntarily hospitalized on numerous occasions. The applicant's refusal to take prescribed medications resulted in further institutionalization. Upon receipt of a letter from the health care provider stating that the applicant had gained insight into the nature of the disease, was in compliance with a plan of treatment, and was fit to engage in the practice of law, the applicant was licensed. The second applicant was diagnosed with a manic depressive disorder and refused to acknowledge the existence of the problem. Untreated, the applicant engaged in irrational behavior such as spending money wildly. Although the applicant provided the requested letter attesting to his mental fitness, the applicant failed the bar exam.

Unlike the practice in some other states, the Board does not grant conditional licenses to practice law. Although licensed attorneys are subject to certain ethical constraints, the Board cannot impose requirements, such as continued counseling or treatment, as a condition to licensing. As the Board lacks any ability to ensure the mental fitness of applicants post-licensure, it must identify and screen out the unfit applicants prior

to licensing. The Board avers that Question 20(b) is essential to the identification of such unfit applicants.

D. *Battle of the Experts*

Plaintiff maintains that Question 20(b) must be rejected because it is overbroad and is ineffectual in identifying those applicants unfit to practice law. Plaintiff offered the testimony of Dr. Howard V. Zonana, Director of the Law and Psychiatric Division and Professor of Clinical Psychology at the Yale University School of Medicine, to support its contention that there is no correlation between past mental health counseling and fitness to practice law. Dr. Zonana testified that Question 20(b) elicits information that, unlike evidence of past behavior, is unrelated to applicants' present ability to practice law and has little or no predictive value. According to Dr. Zonana, there is little evidence to support the ability of bar examiners, or even mental health professionals, to predict inappropriate or irresponsible future behavior based on a person's history of mental health treatment. Dr. Zonana believes that evidence of past behavior, as elicited by the Board's other "characterological" questions, provides the best indicator of an applicant's present ability to function and work. [7] *See* Record at 84–87.

7 Unlike mental health questions, "characterological" or "behavioral" questions are those questions which are designed to elicit information about applicants' character from evidence of past behavior (e.g. work experience, military service, academic achievements, etc.). Most of the questions on the Questionnaire are behavioral or characterological in nature. *See* Pl.Ex. 1. The Court uses the terms "characterological" and "behavioral" interchangeably.

The credibility of Dr. Zonana's position is supported by its consistency with the position of the American Psychiatric Association (the "APA"). According to the APA, psychiatric history should not be the subject of applicant inquiry because it is not an accurate predictor of fitness. The APA offers the following guidelines for mental health inquiry by licensing boards, regulatory agencies, and training programs:

> 1. Prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current functioning. A past history of work impairment, but not simply of past treatment or leaves of absence, may be gathered.
>
> 2. The salient concern is always the individual's current capacity to function and/or current impairment. Only information about current impairing disorder affecting the capacity to function as a physician, and which is relevant to present practice, should be disclosed on application forms. Types of impairment may include emotional or mental difficulties, physical illness, or dependency upon alcohol or other drugs.
>
> 3. Applicants must be informed of the potential for public disclosure of any information they provide on applications.

Pl.Ex. 16. The Guidelines' focus on current ability to function, versus prior history of treatment or counseling, echoes the testimony offered by Dr. Zonana. Plaintiff contends that, unlike the guidelines offered by the APA, Question 20(b) is framed to identify mental or emotional illnesses that do not currently affect the applicant.

***436** In support of maintaining Question 20(b), the Board offered the testimony of Dr. Charles B. Mutter, a psychiatrist, assistant professor of Psychiatry and Family Medicine at the University of Miami School of Medicine, and member of the Florida Board of Bar Examiners from 1989 to 1993. Dr. Mutter, drafter of a question similar to Question 20(b) included in Florida's bar application, testified that Question 20(b) is appropriate as posed. He stated that attorneys, as protectors of clients' rights and assets, hold a special position of trust with the public which must be safeguarded with mental health pre-screening. Record at 171–72. Further, Dr. Mutter insisted that broad mental health questions are essential for collecting complete information regarding applicants' fitness to practice law. Narrower mental health questions, in Dr. Mutter's view, are inadequate because they allow applicants to filter their responses and provide self-promoting answers. *Id.* at 177.

Dr. Mutter's immoderate position, however, is unsupported by objective evidence and is discordant

with a contemporary understanding of mental health questions under the ADA. For one, Dr. Mutter was unable point to any evidence proving a correlation between mental health questions and an inability to practice law. Despite this absence of correlative evidence, Dr. Mutter expressed the view that broad psychological pre-screening should be used in other professions, such as medicine, banking, law enforcement, and firefighting. Record 192. Significantly, Dr. Mutter's somewhat extreme advocacy of mental health inquiry is controverted by the official position of the APA, a fact of which Dr. Mutter, an APA member, was unaware. Further, Dr. Mutter's position has been rejected by the Florida Board of Bar Examiners which, pursuant to a settlement agreement in *Ellen S. v. Florida Board of Bar Examiners, et al.,* 859 F.Supp. 1489 (S.D.Fla.1994), struck the mental health question drafted by Dr. Mutter. [8] Accordingly, the Court finds that, although both doctors have impressive *curricula vitarum,* Dr. Zonana's position is more credible and persuasive than that of Dr. Mutter.

8 Question 29 of the Florida Bar, as drafted by Dr. Mutter, formerly read:

> a. Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use?
> b. Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem?
> c. Have you ever been prescribed psychotropic medication?

These inquiries were replaced by a narrower mental health question which is reviewed in footnote 15, *infra.*

E. ***Need for Inquiry into Mental Health***

The Court accepts that an attorney's uncontrolled and untreated mental or emotional illness may result in injury to clients and the public. This conclusion is supported by the recent cases of acute mental disability among lawyers which have resulted in license suspensions by the Virginia State Bar. *See* Def.Ex. 8–15. Dr. Zonana acknowledged that there are many mental illnesses which may adversely affect, or even preclude, a person's ability to practice law. *See* Record at 48–58. He also indicated that, while responses to behavioral questions are better indicators of mental health, inquiry into an applicant's mental health is necessary for a complete evaluation of their fitness to practice law. *Id.* at 62–66. [9] Thus, it is clear from the facts before the Court that, at some stage in the application proceeding, some form of mental health inquiry is appropriate. [10]

9 According to Dr. Zonana, mental health inquiry may be appropriate as a second stage of the application proceedings. Dr. Zonana testified that an applicant's fitness to practice law should be assessed from other characterological inquiries first and, where the results suggest some mental disorder, should be followed up with a second stage of mental health inquiries. Record at 71.

10 While some would suggest that mental health questions might be stricken entirely from bar applications, *see e.g.* Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing an Applicant's Fitness to Practice Law by Alternate Means,* 8 Geo.J.Legal Ethics 401–37 (1995), it is unnecessary for the Court to embrace this position for the disposition of this case.

437 F.** ***Efficiency of Question 20(b)

Assuming that a mental health question is allowed under the ADA, the Court must determine whether Question 20(b) is a permissible mental health inquiry. Although characterological questions elicit useful information about past behaviors likely to shed light on applicants' fitness, the Board insists that it is necessary to probe applicants' mental health with Question 20(b). Conversely, Ms. Clark maintains that the question is objectionable because it is intrusive without being effective.

According to testimony presented by both Plaintiff and Defendant, approximately twenty percent of the population suffers from some form of mental or emotional disorder at any given time. *See* Record at 30 and 213–214. [11] However, despite reviewing some 2000 applications per year, the Board has received only forty-seven affirmative answers to its mental health questions in the past five years. [12] This affirmative response rate, or "hit" rate, of less than one percent is far below the expected rate of twenty percent. The Board has presented no evidence to suggest, nor is

there any reason to believe, that bar applicants are not reflective of the general population. Thus, the great discrepancy between the Board's hit rate and the reported percentage of persons suffering from mental impairment indicates that Question 20(b) is ineffective in identifying applicants suffering from mental illness.

11 Dr. Zonana, relying on a study by Drs. Darrel A. Regier and William E. Narrow, *The de Facto U.S. Mental and Addictive Disorders Service System,* 50 Arch. of Gen. Psych. 85–94 (1993), testified that approximately twenty-two percent of the population suffers from some form of mental or emotional disorder at any given time. Record at 30. Similarly, Dr. Mutter offered two estimates, placing the figure between seventeen and twenty-five percent. *Id.* at 213–214.

12 Notwithstanding its receipt of 47 affirmative responses, the Board has never denied a license on the basis of prior mental health counseling. Plaintiff's Exhibit 5. Although the Virginia State Bar has suspended attorneys for mental disability, *see* Defendant's Exs. 8–15, the Board is unable to point to a single instance where an affirmative answer to Question 20(b) has prevented licensure. Thus, Question 20(b) has failed to serve its purpose of preventing the licensure of applicants lacking the fitness to practice law.

Notwithstanding its receipt of forty-seven affirmative responses, the Board has never denied a license on the basis of prior mental health counseling. Pl.Ex. 5. Although the Virginia State Bar has suspended attorneys for mental disability, *see* Def.Ex. 8–15, the Board is unable to point to a single instance where an affirmative answer to Question 20(b) has prevented licensure. Thus, based on the Board's own experience, Question 20(b) has failed to serve its purpose of preventing the licensure of applicants lacking the fitness to practice law.

G. *Deterrent Effect*

In addition to being ineffectual, Plaintiff argues that Question 20(b) has a deterrent effect which inhibits applicants from getting necessary mental health counseling or treatment. Plaintiff presented the deposition testimony of Dean Paul M. Marcus, Acting Dean and Professor of Law at the Marshall–Wythe School of Law at the College of William and Mary, and Philip P. Frickey, Professor of Law at the University of Minnesota Law School, on the deterrent effect of broad mental health questions, like Question 20(b). Drawing on his experience counseling law students as both a teacher and administrator, Dean Marcus concluded that questions such as Question 20(b) deter law students from seeking counseling or treatment from which they might otherwise benefit. Similarly, Professor Frickey stated that broad mental health questions like Question 20(b) have a strong negative effect upon many law students, often discouraging them from seeking beneficial mental health counseling. Pl.Ex. 69.

The declarations of Messrs. Marcus and Frickey were echoed by the testimony of Drs. Zonana and Mutter, both of whom acknowledged the deterrent effect of broad mental health questions. Record at 43–44, 75, 232–33. The Board tacitly acknowledges this danger when, in its preamble to Question 20, it warns "your decision to seek counseling should not be colored by your bar application." While the Board's warning may be intended to assuage applicants' fears, it is ***438** uncertain that applicants, intimidated by the bar application process, heed such advice.

Additionally, broad mental health questions may inhibit the treatment of applicants who do seek counseling. Faced with the knowledge that one's treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist.[13] Without full disclosure of a patient's condition, physicians are restricted in their ability to accurately diagnose and treat the patient. Thus, it is possible that open-ended mental health inquiries may prevent the very treatment which, if given, would help control the applicant's condition and make the practice of law possible.

13 The Court recognizes that the "Applicant's Character and Fitness and Questionnaire" remains confidential and is not available to the public. Va.Code § 54.1–108(2). However, as the Board is made up of practicing attorneys, applicants may be reluctant to disclose mental or emotional problems to a group who, at some level, comprise the applicants' peers and colleagues.

H. *Data from other Jurisdictions and Authorities* [14]

14 The Court takes judicial notice of the information contained in this section. Although most of this data was supplied by the parties, some data was supplied by disinterested third-parties. This information is included merely to frame Question 20(b) vis-a-vis other states' mental health inquiries, and is not a factor in evaluating the propriety of Question 20(b).

The imposition of mental health questions like Question 20(b) is not unique to Virginia. All fifty states and the District of Columbia have moral character qualifications which applicants are required to demonstrate as a condition of admission to the bar. Not all of these jurisdictions inquire into applicants' mental health, however, and many states inquire only into hospitalization or institutionalization for mental illness. The various approaches of the bar examiners in the other forty-nine states' can be broken down as follows:

- Two (2) states, Arizona and Massachusetts ask no mental health questions;
- Five (5) states have recently stricken their mental health questions. These include: Hawaii, Illinois, New Mexico, Pennsylvania and Utah. [15]

15 These states formerly asked: **Hawaii** ("37. During the past ten (10) years, have you ever been treated for any mental, emotional or nervous disorders? 38. Have you ever been voluntarily or involuntarily committed to an institution for mental, emotional or nervous disorders?"); **Illinois** ("11.j. During the past ten years, have you been treated or counseled for any mental, emotional, nervous, or behavioral disorder or condition? 11.k. During the last ten years, have you voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional, nervous, or behavioral disorder or condition ...?"); **New Mexico** ("18. Have you ever been a patient in any sanitarium, hospital or mental institution for the treatment of a mental illness?"); **Pennsylvania** ("B. Mental Impairments: __ Mental Retardation, __ Emotional Illness, __ Specific Learning disabilities, __ Other (specify). Describe your disability below. In addition, please provide documentation on the attached corresponding form from your treating physician(s) or therapist(s) of your diagnosis and prognosis, date of onset, and current mental condition, based on an examination conducted within the past year."); and **Utah** ("15. Have you ever ben a patient in any sanitarium, hospital or mental institution for the treatment of a mental illness? 21. Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court?").

- Ten (10) states and the District of Columbia ask only about hospitalization or institutionalization for mental impairment or illness. The states include: California, Georgia, Iowa, Kansas, Louisiana, Montana, New Hampshire, New Jersey, South Dakota, and Vermont. [16]

16 **California** ("13.8. In the last two years, have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder/condition ...? 13.9. In the last two years, have you ever been adjudged an incompetent or a conservatee, or have any proceedings ever been brought against you for such purpose?"); **District of Columbia** ("26. During the past five years have you voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional, or nervous disorder or condition?"); **Georgia** ("30. Have you been admitted to a hospital or other health care facility for treatment of any mental or emotional illness within the last five years? 31. Have you ever been declared legally incompetent?"); **Iowa** ("38. Have you ever been adjudicated a mentally-ill, mentally-impaired, or mentally-incapacitated person, or been committed to a hospital or institution for treatment of a mental, emotional, or nervous disorder?"); **Kansas** ("15.c. Have you ever been hospitalized or institutionalized for reasons of mental health? 15.d. Have you ever been adjudged a mentally incapacitated or disabled person or placed under guardianship or conservatorship, or declared a ward of the Court, for any reason?"); **Louisiana** ("20. Have you ever been hospitalized in either a private or public institution because of any mental condition or disorder?"); **Montana** ("9. Have you ever been a patient in a sanitarium, hospital, or mental institution for the treatment of a mental illness?"); **New Hampshire** ("11. Are you now

or have you ever been a party to any suit in equity, action at law, suit in bankruptcy or other statutory proceeding, matter in probate, incompetency, guardianship, or any other civil judicial or administrative proceeding of any kind?"); **New Jersey** ("XIV. Have you, since your last Statement to the Committee, been: Hospitalized or institutionalized for the treatment of emotional, mental or nervous disorders?"); **South Dakota** ("15.(b) Have you ever been declared a ward of any court, or adjudged an incompetent, or a conservatee, or have any proceedings ever been brought for such purposes, or have you ever been committed to any institution?"); and **Vermont** ("Have you ever been a voluntary or involuntary patient at a sanitarium, hospital or institution for the treatment of mental illness? Have you ever been adjudged to be insane or an incompetent person by any court?").

*439 • Thirty-two (32) states ask broad questions concerning treatment or counseling for mental and emotional disorder or illness. These thirty-two states are further divided into two groups:

- One (1) state, Arkansas limits inquiry to continuous treatment for mental or emotional disorder. [17]

17 **Arkansas** ("9.(f). Are you now or have you ever suffered from or been treated for any mental illness which resulted in hospitalization or institutionalization, or required continuous treatment for a period of one (1) year or more?").

- Thirteen (13) states limit their question to specific diagnoses or ask applicants if they have any mental disorder which they believe will affect their ability to practice law. This group includes: Alabama, Alaska, Connecticut, Delaware, Florida, Idaho, Maine, Maryland, Minnesota, New York, Rhode Island, Texas, and Washington. [18]

18 **Alabama** ("43.(a) In the past 5 years, have you received treatment for a serious nervous, emotional or mental illness which would adversely impact upon your ability to practice law?"); **Alaska** ("18. Have you ever had any disability or undergone treatment for any health problem that may have a bearing on your fitness to practice law (e.g. alcoholism or mental illness)?"); **Connecticut** ("Since you became a law student, have you ever had an emotional disturbance, mental illness or physical illness which has impaired you ability to practice law or to function as a student of law?"); **Delaware** ("28.a. At any time during the last ten years have you been diagnosed as having, or received treatment for, any of the following: bipolar or major depressive mood disorder, schizophrenia, paranoia or other psychotic disorder, kleptomania, pathological or compulsive gambling, pedophilia or exhibitionism? b. Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, you ability to practice law in a competent and professional manner? ... 'Currently' means any time which is recent enough that it could have an impact on your ability to function as an attorney."); **Florida** ("27.a. During the last ten (10) years, have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Schizophrenia or any other psychotic disorder, Bipolar or Major Depressive mood disorder, Antisocial Personality disorder, drug or alcohol abuse, Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism, Voyeurism? 27.b. Do you currently (as hereinafter defined) have a mental health condition (not reported above) which in any way impairs or limits, or if untreated could impair or limit, your ability to practice law in a competent and professional manner? ... 'Currently' means recently enough so that the condition may have an ongoing impact on one's functioning as a licensed attorney."); **Idaho** ("32. Have you ever had any mental health condition which might impair your ability to engage in the practice of law?"); **Maine** ("32. Have you ever been diagnosed or treated for the following conditions or disorders, or do you currently suffer from any of the following conditions or disorders: A. Pedophilia, exhibitionism, or other sexual behavior disorder that may affect your interaction with the public; B. Compulsive gambling, kleptomania, or pyromania...."); **Maryland** ("17. Have there been any circumstances or unfavorable incidents in your life, whether in school, college, law school, business or otherwise, which may have a bearing upon your character or your

fitness to practice law, not called for by the questions contained in this questionnaire or disclosed in your answers? If so, give full details, including any assertions or implications of dishonesty, misconduct, misrepresentation, mental or emotional disability, financial irresponsibility, and disciplinary measures imposed (if any) by attaching a supplemental statement."); **Minnesota** ("4.28. Do you have, or have you had in the past 2 years, a mental illness, an emotional condition or a learning disability which in any way impairs or limits your ability to practice law?"); **New York** ("Attachment A. (1) Do you have any physical, mental or emotional condition that could adversely effect your capability to practice law?"); **Rhode Island** ("29.(b) Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law?"); **Texas** ("11.a. Within the last ten (10) years, have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"); and **Washington** ("I. Have you ever experienced, or undergone treatment for any psychiatric problem, or for alcohol or drug dependency during the past five years, that would interfere with your ability to practice law?").

***440** • Eighteen (18) states which ask broad mental health questions like Question 20(b). These include: Colorado, Indiana, Kentucky, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, West Virginia, Wisconsin and Wyoming. [19]

19 **Colorado** ("39. During the last ten years, have you ever received a diagnosis, or treatment for, a mental, emotional, or nervous disorder?"); **Indiana** ("25. From the age of 16 years to the present, have you been treated for any mental, emotional or nervous disorder?"); **Kentucky** ("21. Have you ever been diagnosed or received regular treatment for amnesia, emotional disturbance, nervous or mental disorder?"); **Michigan** ("51.a. Have you ever had a mental illness, meaning a substantial disorder of thought or mood which significantly impaired your judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life, to such an extent that you required care and treatment for your own welfare or the welfare of others or of the community?"); **Mississippi** ("27. Have you suffered any type of psychiatric or psychological disorder which required treatment including hospitalization and/or the prescription of anti-psychotic medication?"); **Missouri** ("24. During the last ten years or during the period since you attained age 18 (whichever time is shorter), have you ever been treated or counseled for any mental, emotional or nervous disorder or illness?"); **Nebraska** ("17. Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?"); **Nevada** ("44. Have you ever been treated for mental or emotional illness, disease, incapacity or disorder of any kind or nature, or have you ever been committed to any institution, sanatorium or hospital for the treatment of such condition?"); **North Carolina** ("24.a. Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? 24.b. Have you ever received *REGULAR* treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?"); **North Dakota** ("28. Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?"); **Ohio** ("20.b. Have you ever been treated or counseled for any mental, emotional or nervous disorders?"); **Oklahoma** ("24. Have you ever been diagnosed or received treatment for any form of mental disorder, suffered from any mental illness, or been declared incompetent?"); **Oregon** ("13.n. During the past 7 years, have you received mental health counseling or treatment for symptoms or a condition that affected your ability to function on a day-to-day basis?"); **South Carolina** ("19.d. Have you ever received treatment for amnesia, or any form of insanity, emotional disturbance, or mental disorder?"); **Tennessee** ("13.b. During the past ten (10) years, have you ever been treated for any mental, emotional or nervous disorder?"); **West Virginia** ("50.a. Have you ever had a mental illness, meaning a substantial disorder of thought or mood which significantly impaired your judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, to such extent that you required care and treatment for your own welfare or the welfare of others or the community?"); **Wisconsin** ("29.

> Have you been treated for any mental illness or severe emotional disturbance during the past five years?"); and **Wyoming** ("28. Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?").

In the wake of the passage of the ADA, which became effective for public entities in January 1992, the inclusion of mental health questions on bar applications has gained new significance. At least eight states, including Connecticut, Florida, Maine, Minnesota, New York, Pennsylvania, Rhode Island and Texas, have recently altered their mental health questions in light of potential or actual litigation under the ADA.

The changes in these states are reflected in similar adjustments in the policies of the American Bar Association ("ABA") and the NCBE, two leading national legal organizations. In August 1994, the House of Delegates of the American Bar Association ("ABA") adopted a recommendation that:

> when making character and fitness determinations for the purpose of bar admission, state and territorial bar examiners, in carrying out their responsibilities to the public to admit only qualified applicants worthy of the public trust, should consider the privacy concerns of bar admission applicants, tailor questions concerning mental ***441** 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.

Proposal 110, A.B.A. House of Delegates (August 9, 1994). While not the most strongly worded admonition, the resolution represents an acknowledgement of the changing atmosphere under the ADA.

Recently, the NCBE has acted to change the mental health questions on its character and fitness questionnaire. Formerly, questions 28 and 29 of the NCBE's character and fitness application asked, respectively: "Have you ever been treated or counseled for any mental, emotional or nervous disorder or condition?" and "Have you ever voluntarily entered or been involuntarily admitted to an institution for treatment of a mental, emotional or nervous disorder or condition?" These questions formed the basis for many states' mental health questions, including Virginia. As of February 17, 1995, the NCBE altered its mental health questions to limit their scope and to more sharply focus on chronic mental conditions which affect the ability to practice law.[20] While the actions of the NCBE and ABA are not binding on the states, they signify the substantial impact the ADA is having on the formulation of mental health inquiries.

20 Although NCBE President Erica Moeser indicated that these changes have been approved by the NCBE, the new questions were not available in final form at the time of this opinion. Ms. Moeser expected the NCBE to distribute the new questions in early March, 1995.

II. CONCLUSIONS OF LAW

Title II of the Americans with Disabilities Act prohibits discrimination against disabled persons by public entities. 42 U.S.C. §§ 12101 *et seq.* (1994). It 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 subject to discrimination by such entity." 42 U.S.C. § 12132. A "public entity" is defined as "any department, agency ... or other instrumentality of a State ... government." 42 U.S.C. § 12131(1)(B). The Virginia Board of Bar Examiners concedes that it is a public agency within this definition.

A "qualified individual with a disability" is defined as "[a]n individual with a disability who, with or without reasonable modification to rules, policies, or practices ... meets the essential eligibility requirements

for the receipt of services or participation in programs or activities provided by the public entity." 42 U.S.C. § 12131(2). Under regulations promulgated by the Department of Justice, pursuant to 42 U.S.C. § 12134, "disability" is further defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment." 28 C.F.R. § 35.104. "Major life activities" include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

The Court finds, based on the affidavit Plaintiff filed under seal, that Ms. Clark is a person with a disability or, alternatively, a person with a past record of impairment within the meaning of the ADA. 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104. Further, Ms. Clark has shown that she can meet the essential eligibility requirements of practicing law and is "a qualified person with a disability" under the ADA. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104. While Defendant argues that Ms. Clark is not an "otherwise qualified individual" because she failed to answer Question 20(b), this argument begs the question of whether Question 20(b) must be answered at all.

[1] An applicant may not meet the essential eligibility requirements, however, where they "pose[ ] a direct threat to the health or safety of others." 28 C.F.R. pt. 35, app. A at 446. A determination that a person poses a "direct threat"[21] must be based not on generalizations or stereotypes, but on:

> ***442** an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence to determine: the nature, duration, and severity of the risk; the probability that potential injury will actually occur; and whether reasonable modification of policies, practices and procedures will mitigate the risk.

Id. at 446. The Board has presented no evidence to suggest that all or most of the applicants answering Question 20(b) affirmatively threaten the health or safety of the public. Nor is there any evidence that the Board engaged in any individualized assessment in formulating Question 20(b) as called for by 28 C.F.R. pt. 35, app. A at 446. Absent a showing that Ms. Clark would pose a direct threat to the health or safety of others, the Court finds that Ms. Clark meets all of the "essential eligibility requirements" for admission to the bar of the Commonwealth of Virginia.

[2] **[3]** In addition to the general provisions of Title II, public entities are specifically prohibited from acting discriminatorily in administering licensing programs. 28 C.F.R. § 35.130(b)(6). This regulation provides:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability....

28 C.F.R. § 35.130(b)(6). Further, 28 C.F.R. § 35.130(b)(8) forbids a public entity from:

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

21 Defined as a "significant risk to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 28 C.F.R. pt. 35, app. A at 446.

Id. As a public licensing agency, the Board must comply with the strict requirements of 28 C.F.R. §§ 35.130(b)(6) and (8) in probing applicants' mental health histories.

In assessing the propriety of Question 20(b), the Court is faced with two issues: (1) whether the Board has established requirements or imposed eligibility criteria that subject qualified individuals to discrimination on the basis of their disability, and (2) whether such requirements or criteria are necessary to the Board's licensing function.

A. *Question 20(b) Subjects Qualified Individuals with a Disability to Discrimination on the Basis of that Disability*

[4] To find a violation of the ADA, the Court first must determine whether the Board, in posing Question 20(b), subjects persons with disabilities to discrimination on the basis of their disability. While it is not clear that Question 20(b) "screens out" potential applicants, it is clear that Question 20(b) imposes an additional burden on applicants with disabilities to satisfy additional eligibility criteria. *See Ellen S. v. Florida Board of Bar Examiners,* 859 F.Supp. 1489, 1494 (S.D.Fla.1994) (Florida's mental health questions "discriminate against Plaintiffs by subjecting them to additional burdens based on their disability."); *Medical Society of New Jersey v. Jacobs,* 1993 WL 413016, * 7 (D.N.J.1993) (mental health questions imposed extra burdens on qualified persons with disabilities in violation of ADA); *In re Applications of Underwood and Plano,* No. BAR–93–21, 1993 WL 649283 at * 2 (Me. Dec. 7, 1993) (requirement that applicants answer mental health questions discriminates on the bases of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities).

Unlike other applicants, those with mental disabilities are required to subject themselves to further inquiry and scrutiny. The Court finds that this additional burden discriminates against those with mental disabilities. Thus, to avoid violating the ADA, the Board must show that Question 20(b) is necessary *443 to the performance of its licensing function.

B. *Necessity of Imposing Question 20(b)*

[5] [6] "The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character." *Baird v. State Bar of Arizona,* 401 U.S. 1, 8, 91 S.Ct. 702, 707, 27 L.Ed.2d 639 (1971). It is generally accepted that a state can set high standards of qualification and, to this end, may investigate an applicant's character and fitness to practice law. *See Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); *Martin–Trigona v. Underwood,* 529 F.2d 33, 38 (7th Cir.1975); *Hawkins v. Moss,* 503 F.2d 1171, 1175 (4th Cir.1974). It is equally clear that all states have set qualifications of moral character as preconditions for admission to the practice of law, with the burden of demonstrating good character borne by the applicant. *See Konigsberg v. State Bar of California,* 366 U.S. 36, 41 n. 4, 81 S.Ct. 997, 1002 n. 4, 6 L.Ed.2d 105 (1961). While the Board's broad authority to set licensing qualifications is well established, such authority is subject to the requirements of the ADA.

1. *Duty to assess the character and fitness of applicants*

[7] The Board is charged with a statutory duty to find, prior to licensure, that each applicant has the "requisite fitness to perform the obligations and responsibilities of a practicing attorney at law." Va.Code § 54.1–3925.1. As part of this duty, the Board must identify those people who suffer from mental conditions which would severely affect or impair their ability to practice law.

[8] The Board contends that, in fulfilling this duty, it is necessary to ask Question 20(b) to uncover all of the skeletons hidden in each applicant's psychological closet. Further, the Board opines that its ability to investigate applicants' character and fitness is limited by inadequate resources and time constraints. According to the Board, Question 20(b) is necessary because it enables the Board to identify potentially unfit applicants with the limited resources and time available to it. While the Court recognizes that the Board has limited resources with which to discharge its duty under Va.Code § 54.1–3925.1, the Court finds such limitations do not make Question 20(b) "necessary" under the ADA.

2. *Decisions in other jurisdictions*

Other courts, considering broad mental health questions similar to Question 20(b), have concluded that such inquiries would violate Title II of the ADA. *See Ellen S.*, 859 F.Supp. at 1494 (court stated, in *dicta,* that licensing board's broad inquiry into applicants' mental health would violate Title II);[22] *Medical Society of New Jersey,* 1993 WL 413016 (court concluded, in *dicta,* that licensing agency's question "have you ever suffered or been treated for any mental illness or psychiatric problem" violates ADA); *Underwood,* No. BAR–93–21, 1993 WL 649283 at * 2 (bar examiner's inquiry into diagnosis and treatment for emotional, nervous or mental disorders, and accompanying medical authorization form, violates ADA).[23] "Although it is certainly permissible for the Board of Bar Examiners to fashion other questions more directly related to *behavior* that can affect the practice of law without violating the ADA, the questions and medical authorization objected to here are contrary to the ADA" ***444** *Underwood,* 1993 WL 649283 at * 2 (emphasis in original). While not binding authority, these cases offer persuasive guidance in the evaluation of Question 20(b) under the ADA.

22 The *Ellen S.* court considered the mental health questions reviewed in footnote 8, *supra. See* 859 F.Supp. at 1491 n. 1. These questions, originally drafted by Dr. Charles Mutter, were stricken by the Florida Board of Bar Examiners as part of a settlement of the *Ellen S.* litigation. Florida's revised mental health questions appear in footnote 18, *supra.*

23 The *Underwood* court considered questions 29 and 30 of the Maine bar application which asked, respectively: "Have you ever received diagnosis of an emotional, nervous or mental disorder?" and "Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder?" As a result of the *Underwood* litigation, the Maine Board of Bar Examiners revised its mental health inquiry. The new questions are reviewed at footnote 18, *supra.*

In support of maintaining Question 20(b), the Board relies on *Applicants v. Texas State Board of Bar Examiners,* No. 93 CA 740SS, 1994 WL 776693 (W.D.Tex. October 10, 1994), which upheld the right of the Texas Board of Bar Examiners to inquire into an applicant's mental history. Unlike Question 20(b), however, the questions considered in *Texas State Board of Bar Examiners* were addressed only to specific behavioral disorders found relevant to the practice of law.[24] Further, the *Texas State Board of Bar Examiners* court noted that the mental health question used by the Texas Board of Bar Examiners before 1992, which asked "[h]ave you within the last ten (10) years ... [b]een examined or treated for any mental, emotional or nervous conditions," was "revised ... to comply with the ADA." *Id.* at 4. Hence, the *Texas State Board of Bar Examiners* decision has limited application and does not support the breadth of inquiry posed by the Board.[25]

24 The *Texas State Board of Bar Examiners* court reviewed question 11 of the bar application which asked:

> (a) Within the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?
>
> (b) Have you, since attaining the age or eighteen or within the last ten years, whichever is shorter, been admitted to a hospital or other facility for the treatment of bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

The *Texas State Board of Bar Examiners* court concluded that these inquiries did not violate the ADA because they narrowly addressed only those disorders relevant to the practice of law. *Id.* at 24.

25 The United States, appearing before the Court as *amicus curiae,* argues that the *Texas State Board of Law Examiners* decision is wrong to the extent that it allowed even limited inquiry into "severe" mental disabilities. The United States argues that the diagnoses listed are unnecessary classifications that violate title II of the ADA. However, as this issue is not properly before the court, it is unnecessary to reach the merits of such an argument.

Hence, recent decisions in other jurisdictions support the conclusion that the ADA restricts licensing boards' freedom to inquire into mental health background. Even *Texas State Board of Bar Examiners,* which

upheld the Texas bar examiners' mental health inquiry, indicates that a broader mental health inquiry might violate the ADA. Consequently, the Board's position that Question 20(b) is necessary to the performance of its licensing function is unsupported by any of the cases which have addressed this issue.

3. *Other mental health questions insufficient*

The Board avers that Question 20(b) is necessary because a more restricted mental health question would be ineffective in identifying the characteristics necessary for a determination of applicant fitness. The Board maintains that a narrower question, however posed, would be underinclusive.

According to the Board, a mental health question limited to certain listed diagnoses would be incomplete because it would fail to include non-diagnosed applicants or those with unlisted diagnoses. Further, a list-based question would be inadequate because of the impossibility of creating a comprehensive list of diagnoses. *See* 28 C.F.R. pt. 35, App. A at 443 ("It is not possible to include a list of all of the specific conditions ... that would constitute ... mental impairments because of the difficulty of ensuring the comprehensiveness of such a list."); *see also* Record at 57–59, 68 (testimony of Dr. Zonana that more than thirty mental disorders exist and admitting that a question listing diagnoses would not be a good solution).

Similarly, the Board objects to questions which yield to applicants the determination of whether a mental or emotional condition would affect their fitness to practice law.[26] The Board argues that placing this determination with the applicant allows them to certify their own fitness. A broad mental health question, however, prevents the self-filtering ***445** or self-promotion applicants might otherwise exercise in answering such questions. Record at 177. Because a more limited question would be either incomplete or overly yielding, the Board insists that Question 20(b) is necessary to fulfill its duty of assessing applicants' fitness to practice law.

26 For example, Alaska asks: "Have you ever had any disability or undergone treatment for any health problem that may have a bearing on your fitness to practice law? (e.g. alcoholism or mental illness)." *See e.g.* Footnote 18, *supra.*

The Defendant's argument, however, lacks objective support and does not justify the imposition of Question 20(b). As Question 20(b) has been unsuccessful in identifying applicants with mental disabilities, it is difficult to imagine other mental health questions, however posed, being more ineffectual. Even if Question 20(b) were better at eliciting mental health information, a fact the Board fails to prove, this would not compel the Court to find that Question 20(b) is "necessary" under the ADA. Thus, the Board's argument can be rejected as unsupported factually and unpersuasive legally.

4. *Deterrent and stigmatic effect*

Ms. Clark argues that Question 20(b) is objectionable because it is overinclusive and has adverse deterrent and stigmatic effects. According to Plaintiff, Question 20(b) is overbroad in that it burdens mentally disabled applicants without effectively identifying those applicants who are unfit to practice law. Further, the imposition of Question 20(b) has the adverse effect of deterring mental health treatment and stigmatizing those who do seek treatment.

Plaintiff avers that Question 20(b), while burdening all mentally disabled applicants, offers no marginal utility over the other behavioral questions posed on the Questionnaire. Neither the Board nor its expert, Dr. Mutter, presented any evidence of correlation between positive answers to Question 20(b) and otherwise undisclosed mental illnesses. The extremely small number of applicants answering Question 20(b) affirmatively, compared with the comparatively large percentage of the population suffering from mental illnesses at any given time, attests to the practical ineffectiveness Question 20(b).

The only corollary evidence presented by the Board was the "anecdotal study of applications which discussed issues pertaining to mental health" of Mr. James P. Newes, an employee of the Minnesota Board of Law Examiners. Newes Dep. at 9. Mr. Newes found nine cases in which positive answers to Minnesota's mental health question revealed information which otherwise would have remained hidden. However, the results of the Newes study alone cannot be

extrapolated to provide substantive support for the effectiveness of Question 20(b). For one, much of the extreme behavior of the nine study cases would have been revealed by the characterological questions contained in the Board's Questionnaire.[27] Further, Newes' survey pool is too small to support broad generalizations regarding the effectiveness of mental health questions. Hence, the Newes study offers little support for the proposition that, but for Question 20(b), the Board would be unable to identify applicants with mental disabilities so severe that they are unfit to practice law.

27 Five of the applicants had been hospitalized or institutionalized because of mental problems or alcohol abuse; two suffered from alcohol or drug abuse; and one was involved in a shooting and spent time in jail as a result. This information would have been revealed by truthful answers to the characterological questions on the Board's Questionnaire, even excluding Question 20(b).

Conversely, Plaintiff presented considerable evidence of the stigmatizing and inhibiting effect of broad mental health questions. The imposition of Question 20(b) both amplifies the stigmatization of disabled persons and, at the same time, deters the counseling and treatment from which such persons could benefit. Requiring applicants to answer Question 20(b), especially considered in relation to the preceding and succeeding questions regarding drug or alcohol addiction and hospitalization for mental illness, suggests that those answering affirmatively are somehow deficient or inferior applicants. Further, by the admission of Mr. Street, Question 20(b) may be overbroad in that it elicits unnecessary and unintended mental health information. Record at 165.

In addition to being overbroad, there is ample support, from the testimony of Drs. ***446** Zonana and Mutter, Dean Marcus, and Professor Frickey, for the conclusion that Question 20(b) deters applicants from seeking mental health counseling from which they might otherwise benefit. Thus, it is apparent that the costs of administering Question 20(b) are not justified by the insignificant results it achieves.

III. CONCLUSION

[9] On the basis of the record produced at trial, the Court easily reaches the conclusion that question 20(b) is too broad and should be rewritten to achieve the Board's objective of protecting the public. Question 20(b)'s broadly worded mental health question discriminates against disabled applicants by imposing additional eligibility criteria. While certain severe mental or emotional disorders may pose a direct threat to public safety, the Board has made no individualized finding that obtaining evidence of mental health counseling or treatment is effective in guarding against this threat.

In fact, the Board presented no evidence of correlation between obtaining mental counseling and employment dysfunction. Question 20(b), while offering little marginal utility in identifying unfit applicants, has strong negative stigmatic and deterrent effects upon applicants. Both Drs. Zonana and Mutter acknowledged this deterrent effect and testified that past behavior is the best predictor of present and future mental fitness. Thus, the Board has failed to show that Question 20(b) is necessary to the performance of its duty to license only fit bar applicants.

As the Court's job in this case is to decide whether 20(b) complies with the ADA, not to draft a question that would comply with the ADA, the Court will refrain from offering any *dictum* guidance. The imposition of Question 20(b) by the Board violates the ADA. 42 U.S.C. § 12132; 28 C.F.R. §§ 35.130(b)(6) and (8). While the licensure of attorneys implicates issues of public safety, the Board has failed to show that Question 20(b), as posed, is necessary to the Board's performance of its licensing function. Accordingly, judgment is entered for the Plaintiff and the Virginia Board of Bar Examiners is enjoined from requiring that future applicants answer Question 20(b) of the Questionnaire.

An appropriate Order shall issue.

ORDER

For the reasons put forth in the accompanying Memorandum Opinion, it is accordingly ORDERED:

(1) that the Virginia Board of Bar Examiners is enjoined from requiring that applicants for admission to the Virginia bar answer Question 20(b) of its "Character and Fitness Questionnaire."

Parallel Citations

63 USLW 2546, 4 A.D. Cases 110, 8 A.D.D. 596, 6 NDLR P 161

End of Document

EXHIBIT "A-2"

Press Release

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE LOUISIANA SUPREME COURT UNDER THE AMERICANS WITH DISABILITIES ACT

INTRODUCTION

1. This Settlement Agreement (the "Agreement") is entered into this 14th day of August, 2014 (the "Effective Date") by and between the United States of America (the "United States") and the Louisiana Supreme Court ("Court"), which, for purposes of this Agreement, includes the Louisiana Supreme Court Committee on Bar Admissions ("Committee"), and the Court-appointed Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel ("ODC") (collectively referred to herein as "the Court" unless otherwise expressly indicated). The United States and the Court are hereinafter referred to collectively as "the Parties."

2. This Agreement resolves the investigation conducted by the United States concerning alleged violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35, with respect to the Court's policies, procedures and practices for screening and evaluating bar applicants and law student registrants with mental health disabilities.

3. The ADA applies to the Court because it is a "public entity" pursuant to Title II, which prohibits discrimination against qualified individuals with disabilities on the basis of disability in the "services, programs, or activities of a public entity." 42 U.S.C. § 12132.

BACKGROUND

4. In March 2011, the United States Department of Justice (the "Department") notified the Court of its investigation of Louisiana's attorney licensure system. The investigation was initiated pursuant to Title II of the ADA in response to a complaint filed by the Bazelon Center for Mental

Health Law on behalf of an individual, TQ. The Bazelon Center later filed a complaint on behalf of another individual, JA. The Department subsequently identified several other bar applicants and attorneys with mental health disabilities who alleged they had been subject to additional inquiries and/or conditions on admission on account of a mental health disability.

5. During its investigation, the Department spoke with the Honorable Chief Justice Bernette Johnson, members of the Committee, Committee staff, ODC staff, and counsel for the Louisiana Supreme Court to discuss the complaints that prompted the Department's investigation, the scope and status of that investigation, and to obtain more information regarding character and fitness inquiries and recommendations, the conditional admissions process, and the monitoring of conditionally admitted attorneys. The Department also reviewed various records provided by Committee staff, as well as the published policies, procedures and forms of the Court, the Committee, and the ODC relating to the application and conditional admission processes. In addition, the Department spoke to individuals who had applied for admission to the Louisiana bar and received conditional admission after providing information relating to their mental health.

6. The Court and its staff cooperated in good faith at all stages of the Department's investigation. In addition, since July 2013, the Court has voluntarily undertaken several steps to address concerns that the Department raised during the course of its investigation.

7. On February 5, 2014, the United States issued a letter reporting the findings of its investigation. On March 10, 2014, the Court sent a letter to the United States responding to, and disagreeing with, the findings set forth by the United States in its Letter of Findings.

8. The Department acknowledged in its letter of findings, and the United States acknowledges here, the great responsibility placed on the Louisiana Supreme Court to safeguard the administration of justice by ensuring that all attorneys licensed in the State of Louisiana are competent to practice law and worthy of the trust and confidence clients place in their attorneys. The United States further acknowledges that the Court can, should, and does fulfill this important responsibility by asking questions related to the conduct of applicants, which enable the Court and the Committee to assess effectively and fully the applicant's fitness to practice law, and that the Court can appropriately take the responses to such questions into account in its licensing

decisions.

9. The Department has concluded that certain of the Court's processes for evaluating applicants to the Louisiana bar, and certain aspects of its practice of admitting persons with mental health disabilities under a conditional licensing system, discriminate against individuals on the basis of disability, in violation of Title II of the ADA.

10. The Court disputes the Department's findings, denies that it has discriminated against any applicants for licensure or any conditionally admitted attorneys, and denies that its attorney licensure process violates the ADA.

11. The Parties have determined and agreed that the findings resulting from the United States' investigation can be resolved in a timely manner without further investigation, enforcement action, or litigation, and without further expense, and therefore enter into this Agreement.

12. The United States and the Court agree that it is in the Parties' best interests, and the United States believes it is in the public interest, to fully and finally resolve this matter on mutually agreeable terms as set forth herein.

TERMS AND CONDITIONS

A. General Policies and Procedures

13. To the extent that it has not already done so, the Court shall promptly implement the following measures. It shall:

a. Refrain from requiring applicants to complete Questions 25-26 of the National Conference of Bar Examiners' Request for Preparation of a Character Report as that Request form was in effect prior to February 24, 2014 ("old Questions 25-26");

b. Refrain from requiring applicants to complete Question 27 of the National Conference of Bar Examiners' Request for Preparation of a Character Report as that Request form was in effect prior to February 24, 2014 ("old Question 27");

c. Refrain from inquiring into mental health diagnosis or treatment, unless (1) an

applicant voluntarily discloses this information to explain conduct or behavior that may otherwise warrant denial of admission, or in response to new Question 26 or 27 (as defined below); or (2) the Committee learns from a third-party source that the applicant raised a mental health diagnosis or treatment as an explanation for conduct or behavior that may otherwise warrant denial of admission. Any such inquiry shall be narrowly, reasonably, and individually tailored. If any such inquiry is made, the Committee (or a medical professional retained by the Committee) will first request statements from the applicant and, if reasonably deemed necessary by the Committee (or a medical professional retained by the Committee), the applicant's treating professional. The treating professional's statements shall be accorded considerable weight, and medical records shall not be requested unless a statement from, and any further dialogue with, the applicant's treating professional fails to resolve the Committee's reasonable concerns regarding the applicant's fitness to practice law. Any medical or hospital records requested shall be by way of narrowly tailored requests and releases that provide access only to information that is reasonably needed to assess the applicant's fitness to practice law. An independent medical examination shall not be requested unless all other means described in this paragraph fail to resolve the Committee's reasonable concerns regarding the applicant's fitness to practice law, and if requested, shall occur at a time and location convenient to the applicant. All personal or health-related information shall be kept strictly confidential and shall be accessed only by individuals with a legitimate need for such access.

d. Not recommend or impose conditional admission solely on the basis of mental health diagnosis or treatment. The Committee shall not recommend conditional admission for applicants who reveal a mental health diagnosis unless information properly obtained by the Committee indicates that (i) the applicant has a history of conduct that would otherwise warrant denial of admission, and the Committee believes that any conduct-related concerns have not been fully mitigated by the applicant's treatment or other factors; or (ii) the applicant has a condition that currently impairs the ability to practice law in a competent, ethical, or professional

manner. Where conduct would not warrant denial of admission when disclosed by applicants without a mental health diagnosis, the same conduct shall not be the basis for denial of admission or conditional admission when disclosed by applicants with a mental health diagnosis;

e. Ensure that any conditions of admission imposed on an applicant who reveals a mental health diagnosis, including the duration of conditional admission, are individually tailored to address the conduct or current impairment of the applicant's ability to practice law that justified the recommendation and any other information that the Committee properly obtained as part of its character and fitness investigation;

f. Ensure that any applicants who reveal mental health diagnoses who are conditionally admitted pursuant to paragraph (d) are not referred for monitoring by the ODC. Such applicants may be subject to review by the ODC only to the extent necessary for ODC to perform its customary enforcement function relating to an attorney's compliance with a LAP agreement. With respect to any applicants who reveal mental health diagnoses who are conditionally admitted pursuant to paragraph (d), ensure that:

i. Any reporting requirements are reasonably and individually tailored to address the concerns that justified the conditional admission;

ii. No additional fees or costs must be paid to the Court, Committee, or Lawyers' Assistance Program ("LAP") by applicants on the basis of disability, beyond any standard fees associated with conditional admissions.

iii. If information regarding a conditionally admitted attorney's mental health treatment is appropriately requested pursuant to paragraph (f)(i), LAP or a medical professional designated by LAP will first request statements from the applicant and, if reasonably

deemed necessary by LAP or such medical professional, the applicant's treating professional. The treating professional's statements shall be accorded considerable weight, and medical records shall not be requested unless the statement from, and any further dialogue with, the applicant's treating professional fails to resolve reasonable concerns regarding the applicant's fitness to practice law. Attorneys and applicants shall not be required or requested to provide or authorize access to their health or mental-health related information except as provided herein, and only by way of narrowly tailored releases that limit the scope of the release to information that is reasonably needed to assess the attorney's or applicant's fitness to practice law, and limit the individuals who will have access to that information to those with a legitimate need for such access. Any and all personal or health-related information, including information shared with the Committee, LAP or a medical professional designated by LAP, shall be kept strictly confidential. Attorneys and applicants shall not be required or requested to waive confidentiality with respect to their private or health-related information except as provided herein, or as necessary for ODC to perform its customary enforcement function relating to an applicant's compliance with a LAP agreement;

iv. Applicants, attorneys, and their employers shall not be required or requested to provide or authorize access to client files;

v. No reporting requirements relating to the conditional admission of an individual with a mental health diagnosis shall be imposed on or requested of employers of the attorneys or applicants; and

vi. Any reporting requirements relating to the conditional admission of an individual with a mental health diagnosis do not interfere with the applicant's or attorney's reasonable ability to practice law.

g. Publicize modifications to the Court's rules, policies, and practices related to character and fitness screening, conditional admission, and confidentiality to prospective applicants, including at Louisiana law schools and in preparatory courses for the Louisiana bar examination; and

h. Provide a copy of this Agreement to LAP and to any medical professional designated by LAP to assist with character and fitness reviews, and ensure that LAP and any such medical professional complies with its terms insofar as LAP or such medical professional is providing services to the Court relating to character and fitness.

i. Include a link to this Agreement on the Committee's website during the term of the Agreement, with text that identifies the Court's Agreement Coordinator selected pursuant to Paragraph 27.

j. Provide training for all relevant Committee, ODC, and LAP employees regarding their obligations under this Agreement within forty-five (45) days after the Effective Date of this Agreement, and annually thereafter for the term of the Agreement. The training will be sufficiently detailed to enable staff to effectively implement all provisions of this Agreement, including any policies and procedures developed pursuant to this Agreement.

14. The Court has informed the United States, and the United States hereby acknowledges, that, in lieu of old Questions 25-26, the Court is now using and intends to continue using Questions 25-26 from the current version of the National Conference of Bar Examiners Request for Preparation of a Character Report ("new Questions 25-26"). In addition, the Court has informed the United States, and the United States hereby acknowledges, that, in lieu of old Question 27, and within sixty (60) days of the Effective Date of this Agreement, the Court intends to begin using a new Question 27 ("new Question 27"), worded substantially as follows:

"27. Within the past five years, have you engaged in any conduct that:

(1) resulted in an arrest, discipline, sanction or warning;

(2) resulted in termination or suspension from school or employment;

(3) resulted in loss or suspension of any license;

(4) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an employer, educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; or

(5) endangered the safety of others, breached fiduciary obligations, or constituted a violation of workplace or academic conduct rules?

If so, provide a complete explanation and include all defenses or claims that you offered in mitigation or as an explanation for your conduct.

__ Yes __ No

If you answered yes, furnish the following information:

Name of entity before which the issue was raised (i.e., court, agency, etc.) _____

Address _____

City _____ State _____ Zip _____

Telephone (_____)

Country_____ Province _____

Nature of the proceeding _____

Relevant date(s) _____

Disposition, if any _____

Explanation _____"

15. Nothing in this Agreement shall limit the Court's right to revoke an individual's conditional admission pursuant to Supreme Court Rule. Any such revocation shall be exercised in a manner

consistent with this Agreement and the ADA.

16. Nothing in this Agreement shall limit the Court's right to discontinue the conditional admission process should the Court decide to do so.

B. Confidentiality

17. Within forty-five (45) days after the Effective Date of this Agreement, the Court must ensure that all files of applicants who disclosed mental health diagnosis or treatment and were conditionally admitted have been sealed, if the Court has not already done so.

18. Within ninety (90) days after the Effective Date of this Agreement, and annually thereafter for the term of this Agreement, the Court shall provide training for all Court employees regarding proper handling of sealed application and admission files and documents.

19. Within forty-five (45) days after the Effective Date of this Agreement, and to the extent it has not already done so, the Court will issue orders sealing (a) all previously entered orders conditionally admitting individuals who disclosed mental health diagnosis or treatment, (b) any filings recommending these individuals' probation, and (c) any orders terminating their probation. Within fifty (50) days after the Effective Date of this Agreement, copies of these orders to seal shall be transmitted to LexisNexis, Westlaw, Fastcase, and Bloomberg Law with a list of the sealed orders that need to be removed and a request that they remove all of the listed orders from their databases.

20. Within forty-five (45) days after the Effective Date of this Agreement, and to the extent that it has not already done so, the Court shall delete from its website copies of all orders conditionally admitting individuals who disclosed their mental health diagnosis or treatment, and all references to these orders. Within forty-five (45) days after the Effective Date of this Agreement, and to the extent it has not already done so, the Court shall request the removal of this information from the Google and Bing internet search engines.

C. Review of Prior and Pending Applications

21. With regard to applications that have already been processed or are currently pending, the

Court shall:

a. Within sixty (60) days after the Effective Date of this Agreement, provide all individuals who have pending applications that include an affirmative response to old Questions 25-27 with new Questions 25-27, and evaluate the applications of those individuals based upon that information and other information contained in the applicant's pending Request for Preparation of a Character Report, but not on the basis of an applicant's affirmative response to old Questions 25-27 or information requested based on those responses.

b. Identify all individuals (including law student registrants) who responded affirmatively to old Questions 25-27 since August 1, 2008 based upon a mental health diagnosis or treatment and were conditionally admitted and:

i. Take all necessary steps to terminate the conditions of admission, unless (a) the applicant engaged in conduct that would otherwise warrant conditional admission and the conduct-related concerns have not been fully mitigated; or (b) the individual has a condition that currently impairs his or her ability to practice law in a competent, ethical, or professional manner.

ii. Ensure that any Court records pertaining to these individuals' conditional admission are sealed, redacted or destroyed, as the Court deems appropriate, such that the individuals' medical records, medical history, diagnoses, prognoses, full names, and/or conditions of admission are not publicly available; and

iii. For any individuals who remain conditionally admitted, ensure that the conditions of admission and reporting requirements comply with Paragraph 13(f).

c. Identify applicants who responded affirmatively to old Questions 25-27 based on a mental health diagnosis or treatment and were denied admission and:

i. Re-evaluate their original applications to consider whether they may be

qualified for unconditional or conditional admission consistent with the requirements of this Agreement;

ii. Inform any individuals who are preliminarily determined to be qualified for possible unconditional or conditional admission that they may be qualified for unconditional or conditional admission under these revised policies for conducting character and fitness inquiries;

iii. Invite such individuals to petition the Court for admission to the Louisiana bar without additional application expense for the character and fitness review; and

iv. Re-evaluate and process the updated applications and any additional information received on a priority basis, in a manner consistent with this Agreement.

d. Identify applicants (including law school registrants) who withdrew from the admissions process following an affirmative response to old Questions 25-27 that was based on a mental health diagnosis or treatment and:

Inform these individuals of revisions to the processes for conducting character and fitness inquiries;

ii. Invite these individuals to re-apply for admission to the Louisiana bar without additional application expense for the character and fitness review; and

iii. Subject to their having passed the Louisiana bar examination, re-evaluate and process their applications on a priority basis, in a manner consistent with this Agreement.

D. Compensation for Affected Individuals

22. The Court agrees to pay a total of two hundred thousand ($200,000), for the purpose of compensating seven of the individuals who the United States asserts have been harmed as a result

of actions which the United States alleges herein to be discriminatory (the "Affected Individuals"). The payment shall be in the form of an electronic funds transfer pursuant to written instructions to be provided in a timely manner by the United States. Payment shall be due within thirty (30) days of the Effective Date of this Agreement.

23. Within forty-five (45) days after the United States has received payment from the Court, as described in the preceding paragraph, the United States will obtain a signed release from each of the Affected Individuals, the form of which is attached hereto as Exhibit 1. The United States shall thereafter distribute payment checks to the Affected Individuals after delivering the original, signed releases to counsel for the Court. If any Affected Individual elects not to sign a release, the amount of money that would otherwise have gone to that Affected Individual shall be returned by the United States to the Court.

24. The Court will not retaliate against any Affected Individual in violation of 42 U.S.C. § 12203. Nothing in this paragraph, however, or in any other provision of this Agreement, shall limit the Court's right to apply all policies, rules and procedures to the Affected Individuals as are applicable to other applicants to and members of the Louisiana bar, including but not limited to disciplinary policies, rules, and procedures.

REPORTING AND MONITORING

25. The Court will provide a report to the United States two weeks after each set of admissions ceremonies for the duration of this Agreement regarding its compliance with this Agreement. Reports will include copies of any rules, policies, and procedures promulgated or adopted in response to this Agreement, as well as summaries of applicant outcomes and the reasons for those outcomes for applicants whose mental health diagnosis or treatment is disclosed to the Committee. These shall include, but are not limited to:

a. the total number of such applicants;

b. the number of such individuals admitted without conditions;

c. the number of such individuals conditionally admitted, the duration of the conditional admission, and the reason;

d. the number of such individuals denied admission, and the reason;

e. the number of such individuals who responded affirmatively to new Questions 26-27 and the outcome of their applications;

f. the number of such individuals who disclosed a mental health diagnosis or treatment to explain conduct or behavior that may otherwise warrant denial of admission, and the outcome of their applications;

g. the number of such applicants referred to LAP for monitoring or evaluation and the basis for the referral;

h. the number of such conditionally admitted attorneys from whom LAP requested medical records and the basis for the request;

i. the number of such applicants from whom medical records were requested, the basis for the request, and the type and duration of records requested; and

j. the number of such applicants referred for an independent medical evaluation, and the basis for the referral.

26. The United States may review compliance with this Agreement at any time for the duration of the Agreement. The Court shall maintain sufficient records to document that the requirements of this Agreement are being properly implemented and shall make such records available to the United States for inspection upon reasonable notice and request, subject to any applicable state and federal privacy laws. The Court will also comply with any additional, reasonable compliance review requests from the United States, subject to applicable state and federal law and any confidentiality obligations owed to applicants or attorneys.

27. Within thirty (30) days after the Effective Date of this Agreement, each Party shall select and appoint a Coordinator to oversee compliance with this Agreement and to serve as a point of contact, and shall provide notice to other Party of the Coordinator's name, title, address, telephone number, and e-mail address.

TERM AND ENFORCEMENT

28. This Agreement shall remain in effect until four (4) years from the Effective Date.

29. If the United States believes that this Agreement or any of its requirements has been violated, it may, after providing notice and an opportunity to cure in accordance with Paragraph 30 of this Agreement, commence a civil action in the United States District Court for the Eastern District of Louisiana (the "Federal Court") to enforce the terms of this Agreement or the ADA. In any such proceeding the United States may request any remedy authorized by law or equity, including, but not limited to, an order declaring that the Court has violated the Agreement, an order requiring compliance with the Agreement, an award of any damages which may have been occasioned by the alleged failure to perform, and an award of damages that the United States is authorized to recover in actions that it brings under the ADA.

30. If the United States believes the Court has failed to fulfill any obligation under this Agreement, the United States shall, prior to initiating any court proceeding, notify the Court in writing of any alleged non-compliance with the Agreement and request that the Court take action to correct such alleged non-compliance. The Court shall have thirty (30) days from the date of such written notice to respond to the United States in writing by denying that noncompliance has occurred, or curing the alleged noncompliance. If the Court fails to respond within 30 days, or denies that noncompliance has occurred, or fails to take sufficient steps to cure the alleged noncompliance to the reasonable satisfaction of the United States, the United States may seek an appropriate judicial remedy.

31. The venue for all legal actions concerning this Agreement shall be the Federal Court. The Parties acknowledge that venue is proper in this district and that the Federal Court has subject matter jurisdiction to enforce the terms of this Agreement.

32. The Court agrees to waive formal service of process for any Complaint filed by the United States pursuant to Paragraph 29. The Complaint will instead be provided to the Court in accordance with the Notice provisions of this Agreement. The Court will file its responsive pleading to any such Complaint within ten (10) days after the Complaint is filed.

33. The Parties agree that in any action filed pursuant to Paragraph 29, the Parties will hold the conference required by Rule 26(f)(1) of the Federal Rules of Civil Procedure within five (5) business days after the Court's responsive pleading is filed, and will submit their Rule 26(f) report and a joint proposed scheduling order no later than five (5) business days thereafter. The Parties agree to recommend that the period for discovery be expedited in a reasonable manner that is consistent with the scope of the issues raised by the Complaint.

34. The Court reserves all rights and defenses that it may have with respect to any claims asserted or relief requested by the United States; provided, however, the Court will not assert a venue or jurisdictional defense, or a defense challenging the validity of this Agreement or any of its provisions.

GENERAL PROVISIONS

35. This Agreement resolves the findings of the United States' investigation, which was limited to a review of the Court's character and fitness screening process for bar applicants with mental health disabilities under Title II of the ADA.

36. This Agreement does not affect the Court's continuing responsibility to comply with all aspects of the ADA.

37. The United States hereby releases the Court from any and all ADA claims that the United States could assert on behalf of any individual who receives a monetary payment pursuant to Paragraph 22 of this Agreement. In addition, for the duration of the Agreement, except as set forth in Paragraph 29, the United States releases the Court from any and all other ADA claims arising (i) out of the allegations set forth in the Letter of Findings, or (ii) from the Court's use of new Questions 25-27, when used as provided herein.

38. The Parties represent and acknowledge that this Agreement is the result of extensive, thorough and good faith negotiations. The Parties further represent and acknowledge that the terms of this Agreement have been voluntarily accepted, after consultation with counsel, for the purpose of making a full and final compromise and settlement of any and all claims or allegations set forth by the United States Department of Justice in its Findings Letter.

39. This Agreement is binding upon the Parties, by and through their officials, agents, employees, and successors for the term of this Agreement. The Court shall ensure that all of its components and all employees of the Court take all actions necessary for the Court to comply with the provisions of this Agreement. If the Court contracts with, engages, arranges for, or delegates responsibility to, a third party or outside entity to conduct any activities relating to the provisions of this Agreement, it shall provide a copy of the Agreement to all such third parties and outside entities, with instructions that they comply with its terms. The Court will remain responsible for any failure of such third parties or entities to comply with the terms of the Agreement.

40. This Agreement and any documents incorporated by reference constitute the entire integrated agreement of the Parties. No prior or contemporaneous communications, oral or written, or prior drafts shall be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.

41. Any modification of this Agreement shall be by written agreement of the Parties.

42. If any provision of this Agreement is determined by the Federal Court to be unenforceable, the other provisions of this Agreement shall nonetheless remain in full force and effect, provided, however, that if the severance of any such provision materially alters the rights or obligations of the Parties, the Parties shall engage in good faith negotiations in order to adopt mutually agreeable amendments to this Agreement as may be necessary to restore the Parties as closely as possible to the initially agreed upon relative rights and obligations.

43. Failure by any Party to enforce this entire Agreement or any provision hereof with respect to any deadline or any other provision herein shall not be construed as a waiver.

44. The Parties agree that, as of the Effective Date of this Agreement, for purposes of the Parties' preservation obligations pursuant to Federal Rule of Civil Procedure 26, litigation is not "reasonably foreseeable" concerning the matters described in the Findings Letter. To the extent that any Party previously implemented a litigation hold to preserve documents, electronically stored information, or things related to the matters described in the Findings Letter, the Party is no longer required to maintain such a litigation hold. Nothing in this paragraph relieves the United States or the Court of any other obligations imposed by this Agreement or other applicable law.

45. "Notice" under this Agreement shall be provided by electronic mail or overnight courier to the following or their successors:

Joy Levin Welan
Trial Attorney
DJ# 204-32-88
United States Department of Justice
Disability Rights Section, Civil Rights Division
1425 New York Avenue NW
Washington, DC 20005

Alanah Hebert
Deputy General Counsel
Supreme Court Office of the Judicial Administrator
Louisiana Supreme Court
400 Royal Street, Suite 4200
New Orleans, LA 70130-8102

With copies, if applicable, to:
Elizabeth S. Schell
Executive Director
Louisiana Supreme Court Committee on Bar Admissions

2800 Veterans Memorial Blvd., Suite 310
Metairie, LA 70002

Charles B. Plattsmier
Chief Disciplinary Counsel
Louisiana Attorney Disciplinary Board
Office of Disciplinary Counsel

4000 S. Sherwood Forest Blvd., Suite 607

Baton Rouge, LA 70816

46. The signatures below of officials and/or attorneys representing the United States and the Court signify that these Parties have given their final approval to this Agreement. Each Party represents and warrants that the person who has signed this Agreement on behalf of his or her entity or client is duly authorized to enter into this Agreement and to bind that Party to the terms and conditions of this Agreement.

47. This Agreement may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same Agreement, notwithstanding that each Party is not a signatory to the original or the same counterpart.

48. This Agreement and any amendment hereto shall be public documents.

49. The United States and the Court will bear the cost of their own fees and expenses incurred in connection with this Agreement.

AGREED:

FOR THE UNITED STATES OF AMERICA:

DATED: ____August 14_____, 2014

KENNETH ALLEN POLITE, Jr.
United States Attorney for the Eastern District of Louisiana

MOLLY J. MORAN
Acting Assistant Attorney General
Civil Rights Division

EVE L. HILL
Deputy Assistant Attorney General
Civil Rights Division

PETER MANSFIELD, Civil Chief
SUNNI LEBEOUF, Deputy Civil Chief
United States Attorney's Office for the Eastern

REBECCA B. BOND, Chief
ANNE RAISH, Deputy Chief
Disability Rights Section

District of Louisiana

GLENN SCHREIBER
Assistant United States Attorney
United States Attorney's Office for the Eastern
District of Louisiana

Civil Rights Division

/s/ Joy Welan
ALYSE BASS, Trial Attorney
JOY LEVIN WELAN, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 307-0663
Facsimile: (202) 305-9775
Joy.Welan@usdoj.gov

FOR THE LOUISIANA SUPREME COURT:

DATED: August 13, 2014

/s/
BERNETTE J. JOHNSON
Chief Justice

ACKNOWLEDGED BY:

FOR THE LOUISIANA SUPREME COURT
ON BAR ADMISSIONS:

DATED: August 13, 2014

/s/
ELIZABETH S. SCHELL
Chief Disciplinary Counsel

FOR THE LOUISIANA ATTORNEY
DISCIPLINARY BOARD OF OFFICE OF
DISCIPLINARY COUNSEL:

DATED: August 13, 2014

/s/
CHARLES B. PLATTSMIER

Chief Disciplinary Counsel

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August 15, 2014