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A Message from the Section Chair

As we greet 1999, we are mindful of the passing of time and major changes on the horizon. The last year of the "old millennium" will be a busy one for health care lawyers. Some of the changes we can anticipate are set out below:

- On January 1, 1999, a prospective payment system (APPS) will go into effect for skilled nursing facilities participating in Medicare. This changes the retrospective "cost based per diem" reimbursement which has existed in Medicare since July 1, 1966. A surprising number of problems have surfaced, including the requirement that facilities have to provide directly physical therapy and certain other ancillary services which previously they were able to provide by contract. The Health Care Financing Administration is still wrestling with the "Year 2000 Problem," so it has not been able to devote the necessary time to prepare instructions for the PPS.

- The recent election suggests that the new Congress will address, in ways not immediately clear, problems of HMO reform and physician self-referrals. There appears to be a consensus that some of the efforts against self-referral and kickback have "gone too far." However, it is not clear what action, if any, the new Congress will consider to remedy the situation. Previous efforts to ameliorate some of the harshness of the anti-kickback and physician self-referral prohibition have met with outcry on the part of "consumer advocates" who see every step aimed at rationalization as a step away from vigorous enforcement and consumer protection.

- We can expect further consolidation in the managed care industry. The recent decision of a number of managed care providers to withdraw from the Medicare Managed Care Program suggests that the administration of Medicare Managed Care may be more complicated than people imagine. Subtle demographic changes and the ability of persons to enroll and withdraw from the program depending upon their health status has created uncertainty for insurers, and will now cause consequent uncertainty in the marketplace. The future of Medicare Managed Care itself is called into question.

- Emerging issues with respect to remote diagnosis and treatment continue to loom on the horizon. Twenty-first century medical technology is available, particularly at regional medical centers. Remote consultation, forwarding of radiological and other test data by computers and related technological developments make possible remote diagnosis and treatment of many ailments. Nevertheless, twenty-first century professional conduct

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statutes and local "protectionism" on the part of certain providers who fear the "imperialism" of high-tech medical centers in neighboring states will present impediments to rapid spread of "telemedicine." Issues of professional responsibility in telemedicine confront state regulators with major concerns. It is clear that states have a legitimate interest in protecting the health of their residents from shoddy or dangerous practices, and the need to regulate those providing medical advice and treatment to residents of a state can not be dismissed lightly. On the other hand, restrictive practices of state regulatory bodies will impede the dissemination of technological advances for the benefit of all the people.

Against the background of the foregoing and other important issues, our Section's growth and development continues. We reach 1999 approaching 1,000 members, a great rate of growth for a Section that is only two years old. Our activities, as shown by our fall telemedicine program and numerous Committee programs, demonstrate the dedication and willingness to work on the part of our Section members and leaders. The program for the annual meeting is of particular interest. Health Law Section Day at the Bar Association's Annual Meeting will be Wednesday, January 27, 1999. There will be a morning program on human cloning, which should attract widespread interest. The afternoon will address the assault on attorney-client privilege. In addition, we will have our customary luncheon presentation by Henry A. Greenberg, Esq., General Counsel to the New York State Department of Health, who will advise us of legislative initiatives of Governor Pataki and the Health Department.

Our Section is growing and engaging in dynamic activities; with your increased involvement it can be even better for you and for all of the lawyers who practice in health care law in New York state.

Jerome T. Levy

From the Editors

This issue of the *Health Law Journal* contains Claudia Torrey's "For Your Information" column, in which she discusses the recent Ninth Circuit opinion in *Grijalva v. Shalala,* which found that HMO denials of medical services to Medicare recipients constituted state action, triggering due process protections. Also included is a synopsis of New York's recent legislation creating an external review process for denial of coverage claims, written by Steve Kasarda, a second-year Pace University School of Law student. Again, we are happy to include Margaret Moreland Murray's online research column. Finally, this issue contains another student-authored piece on the propriety of mental health questions by State Bar Examiners. This article, by Ava Zelenetsky, is an in-depth discussion of the issue both on the state and the national level.

We welcome and encourage the submission of articles on topics of interest to the health law practitioner. We also invite letters and comments relating to articles or columns printed in the *Health Law Journal*, or suggestions on what you would like to see in the *Journal*. You can reach us at the following address:

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For Your Information

by Claudia O. Torrey

On August 12, 1998, the United States Court of Appeals, Ninth Circuit, in the case of *Grijalva v. Shalala,*[1] upheld a federal district court opinion[2] and injunction against the Secretary of Health and Human Services (the "Secretary") regarding procedural protections for Medicare enrollees/beneficiaries. Granting summary judgment for the *Grijalva* class action plaintiffs, the district court held that denials of medical services by health maintenance organizations (HMOs) to Medicare beneficiaries constitute state action, thereby triggering constitutional due process protections. The district court also issued an injunction mandating certain requirements for HMO-enrolled Medicare beneficiaries because the court found that regulations issued by the Secretary failed to provide due process[3] because of, among many things, inadequate notice.

State Action Doctrine and Due Process

In affirming the part of the district court opinion concerned with state action, Judge Wiggins, writing for the Ninth Circuit Court of Appeals, stated that there must be a sufficiently close nexus between the state and the challenged action.[4] Government action exists if there is a symbiotic relationship with a high degree of interdependence between the private and public parties such that they are "joint participants" in the challenged activity.[5] Judge Wiggins listed several reasons for finding the federal government and HMOs joint participants in providing Medicare services, including that: the Secretary extensively regulates the provision of Medicare services by HMOs; the Secretary is required to ensure that HMOs provide adequate notice and meaningful appeals procedures to beneficiaries; and the federal government has created the legal framework within which HMOs make adverse determinations, issue notices, and guarantee appeal rights.[6] Although HMOs are private entities, they qualify as state actors because they are joint participants with the federal government in carrying out the dictates of the Medicare Act.[7]

As a state actor, an HMO must provide sufficient due process protection(s) to satisfy the Constitution. This is a significant recognition by the Ninth Circuit because Medicare beneficiaries rights are being rooted in the Constitution, and not merely in statutes or regulations, subject to change by the Congress or the President.[8]

Eldridge Factors

Using the due process balancing test set forth in *Mathews v. Eldridge*,[9] the Ninth Circuit determined that additional due process protections were needed for HMO-enrolled Medicare beneficiaries. The *Eldridge* test looks at three factors:

(1) the private interest affected by the official action;

(2) the risk of erroneous deprivation of that private interest with the use of the current procedures; and

(3) the government's interest.

Judge Wiggins found that the overwhelming private interest at stake was the potential for no medical services! The judge noted that although some HMO service denial cases may be easily remedied, most cannot. The private interest of the Medicare HMO enrollees in having medical services weighs in favor of additional procedural protections beyond those offered by the Secretary's regulations.[10]

"Although HMOs are private entities, they qualify as state actors because they are joint participants with the federal government in carrying out the dictates of the Medicare Act."

In the *Grijalva* case, *Eldridge* factor two concerns the failure of HMOs to provide adequate explanations to their Medicare enrollees regarding medical service denials. Judge Wiggins found that such a failure creates a high risk of erroneous deprivation of medical care to Medicare beneficiaries.[11] The appeal rights and other procedural protections available to Medicare beneficiaries are meaningless if the beneficiaries are unaware of the reason for service denial, and therefore cannot argue against the denial.[12] Inadequate notice creates the risk of erroneous deprivation by undermining the appeal process.[13] Thus, due process requires notice that gives an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense.[14]

As for the third *Eldridge* factor, the government's interest, the Ninth Circuit was not persuaded by the Secretary's argument that additional procedures would be burdensome to HMOs, thereby affecting the benefits received by Medicare enrollees. Adequate notices do not impose a burden on HMOs that outweighs the beneficiaries' need for them.[15] The *Eldridge* factors suggest that the administrative burden of providing an explanation for denying a benefit is minimal in light of the added potential for spotting erroneously withheld benefits.[16]

Scope of the Injunction

The Secretary challenged the district court injunction by asserting that it was widely and irrationally broad in scope. In lifting the district court injunctive stay, Judge Wiggins found nothing wrong with the injunction mandates regarding HMO hearings and notices of service denials to Medicare enrollees. Some of the mandates included: using legible 12-point type[17] notices that clearly explain to enrollees the reason(s) for a denial and their appeal rights;[18] requiring any hearings to be informal and in-person;[19] and providing instruction on how to obtain supporting evidence.[20] In the Ninth Circuit's opinion, the district court neither erred nor abused its discretion.[21]

Endnotes

1. *Grijalva v. Shalala,* 946 F. Supp. 747 (D. Ariz. 1996), *aff'd,* 152 F.3d 1115 (9th Cir. 1998).
2. *Id*.
3. *See Grijalva v. Shalala,* No. CIV 93-711 TUC ACM, 1997 WL 155392 (D. Ariz. Mar 3, 1997), *as cited in Grijalva* 152 F.3d at 1119.
4. *Grijalva,* 152 F.3d at 1119, *citing Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L.Ed. 2d 534 (1982) (*quoting Jackson v. Metropolitan Edison Company,* 419 U.S 345, 351, 95 S. Ct. 449, 42 L.Ed 2d 477 (1974)).
5. *Id*. at 1119-1120, *citing Burton v. Wilmington Parking Authority* 365 U.S. 715, 725, 81 S. Ct. 856, 6 L.Ed 2d 45 (1961).
6. *Id*. at 1120.
7. Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq*.
8. Robert Pear, *Rights Expanded in Medicare Case: Court Rules for Consumers in Lawsuit Involving HM0s*, N.Y. TIMES, August 14, 1998, at A1.
9. 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed 2d 18 (1976).
10. *Grijalva,* 152 F.3d at 1122.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id., citing Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992).
15. *Grijalva*, 152 F.3d at 1123.
16. *Id., citing Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir 1992).
17. *Grijalva,* 152 F.3d at 1124.
18. *Id.*
19. *Id.*
20. *Grijalva,* 946 F. Supp. at 761.
21. *Grijalva,* 152 F.3d at 1124. In October 1996, the Department of Health and Human Services' Office of Inspector General and the Health Care Finance Administration's Office of Managed Care produced a Medicare beneficiary advisory manual. The manual *specifically* encouraged Medicare enrollees to exercise their appeal rights if they believe that medically necessary care has been reduced, denied, or inappropriately terminated (*See* Claudia O. Torrey, "For Your Information," *Health Law Journal* of the New York State Bar Association, Spring 1997, at 23.).

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Health Care Obtains External Review

by Steven C. Kasarda*

While Congress seems preoccupied with other issues rather than passing a federal HMO patient's "bill of rights," the New York State Legislature, along with Governor Pataki, have taken the initiative and passed a law that will have a dramatic effect on health care providers and their enrollees in the state of New York. This act amended the public health and insurance law by authorizing external appeals of adverse determinations by a health care provider.[1]

Prior to this legislation, enrollees could only appeal the denial for coverage to a heath care provider itself; but effective July 1, 1999, the state of New York will establish an independent process for such appeals.[2] The appeals may carry up to a $50 application fee, which is returned if the appeal is successful and would be waived if the patient cannot afford the fee.[3] The enrollee will have 45 days in which to initiate an external appeal after being notified of an adverse determination by their provider.[4] All adverse notifications must be in writing and contain instructions for filing an external appeal.[5] The external appeal agent must make a determination within 30 days.[6] The external appeal agent reviews the coverage denial by the utilization review agent of the health care provider when coverage was deemed not to be "medically necessary" and decides if "the health care plan acted reasonably and with sound judgment and in the best interest of the patient."[7] The agent must notify the health care provider within two business days after making a determination.[8] If the enrollee's attending physician states that a delay in providing the health care service would pose "an imminent and serious threat" to the health of the patient, the external appeal must be completed in three days.[9]

Another facet to this legislation is that it addresses the problem of health care providers' reluctance to cover experimental treatments. Providers have long labeled even more commonplace treatments as experimental. Under the new law, when reviewing experimental treatments, an external review by a panel of experts or "clinical peer reviewers" must be used.[10] This panel would be made up of an odd number of experienced, board-certified physicians who practice in the area being reviewed.[11] The panel, when reviewing treatments for life-threatening or disabling diseases or conditions, would consider the enrollee's medical records along with applicable medical and scientific evidence.[12] The treatment would be covered if a majority of the panel believes that the treatment is more beneficial than standard treatment.[13] Experimental treatments can include clinical trials or pharmaceutical products.[14] No external appeal agent or clinical peer reviewer will be liable for the medical opinions unless they are made in bad faith or constitute gross negligence.[15]

Medicare and Medicaid patients will also have the right of an external appeal. All these determinations would be pursuant to all state and federal laws relating to these programs.[16] What has been deliberately excluded from this act are patients being treated under worker's compensation.[17]

Legislators built many safeguards into this act to establish and maintain the intent of this legislation. External appeal agents for HMOs will be certified by application to the commissioner of the state Health Department.[18] The commissioner will have the power to grant or revoke certifications according to guidelines set by the commissioner, but the act outlines mandatory minimum standards for every agent certification.[19] The commissioner also has the power to conduct random audits of health care plans and external appeal agents to ensure complete compliance with the provisions of the act.[20] In addition, each health care provider and external appeal agent is required to report annually all requests for external appeals and the outcomes of each appeal.[21] The commissioner will compile this information and present it annually to both the governor and the state legislature.[22] The act "also requires that provider contracts include an explanation of provider payment methodologies, the time periods for provider payments, the information to be relied upon to calculate payments and adjustments, and the process to be used to resolve disputes over provider payments."[23] Similarly, the act creates the same procedures, protections and controls for enrollees in traditional indemnity insurance plans, though the state superintendent of insurance governs them.[24]

New York has joined a group of other states that have passed external appeal legislation, and some health care providers already have begun preparing for the external appeal process. It is too early to tell what effect the act will have on health insurance rates, but it is a significant first step in reforming the state's health care system.

Endnotes

1. 1998 N.Y. Laws 586.
2. 1998 N.Y. Laws 586 § 45.
3. 1998 N.Y. Laws 586 § 11 *amending* N.Y. Pub. Health Law article 49 (McKinney 1998).
4. *Id*. (*creating* N.Y. Pub. Health Law § 4914(2))
5. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(a)).
6. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(b)).
7. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(d)).
8. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(b)).
9. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(c)).
10. *Id.* (*creating* N.Y. Pub. Health Law § 4914(2)(d)(B)(i)).
11. 1998 N.Y. Laws 586 § 12 *amending* N.Y. Pub. Health Law §§ 4408, 13(2)(a).
12. 1998 N.Y. Laws 586 § 11 *creating* N.Y. Pub. Health Law § 4914(2)(d)(B)(1).
13. *Id.*

14. *Id.*
15. *Id.* at § 4914(2)(d)(B)(2)(v).
16. *Id.* at § 4910(4) (McKinney 1998).
17. 1998 N.Y. Laws 586 § 43.
18. 1998 N.Y. Laws 586 § 11 *creating* N.Y. Pub. Health Law § 4911(1).
19. *Id.* at § 4911(2).
20. *Id.* at § 4916(1)(c).
21. *Id.* at § 4916(2).
22. *Id.* at § 4916(3).
23. N. Y. Legislative Executive Memo 586.
24. 1998 N.Y. Laws 586 § 29 *amending* N.Y. Ins. Law Article 49 (McKinney 1998).

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'NET WORTH

by Margaret Moreland Murray

In the last issue I discussed *MedicineNet*, which includes a section on "Pharmacy/Drugs." There are also many other excellent Internet sources for this category of medical information.

RxList: The Internet Drug Index
http://www.rxlist.com/

The RxList was created by Neil Sandow, PharmD, a hospital pharmacy director for more than 12 years and currently manager of automated technologies for a major pharmaceutical distributor. It includes data on more than 4,000 prescription and non-prescription drugs. It can be searched by generic or brand name, by category, by keyword, or by imprint code. Keyword searches can use Boolean connectors (and, or, not) and * may be substituted for unknown letters at the beginning or end of a word (ampi*, *mycin, redu*). You can also search for a category of drug by placing a * at the end of a category name (antibiotic*). Entries are quite extensive, including: the brand and generic names, categories, manufacturers, cost of therapy, description, clinical pharmacology, indications and usage, contraindications, warnings, precautions, drug interactions, adverse reactions, drug abuse and dependence, overdosage, dosage and administration, and how supplied/rated therapeutically equivalent. One name I searched was "Redux" and I found, in addition to the standard information, a red letter announcement at the top of the entry: "FDA Removed From US Market 9/15/97." From there I could connect to the full text of many FDA reports and press releases, an article in *Morbidity and Mortality Weekly Report*, and dozens of Fen-Phen sites on the Internet. RxList is truly a wonderful resource.

Pharmaceutical Information Network
http://pharminfo.com/

This site is a product of VirSci Corporation, which uses virtual technology to design communications/training materials for medical, pharmaceutical and other health care clients. PharmInfoNet contains three databases, the largest of which is "DrugDB." Both generic and brand names are arranged alphabetically and are fully browsable. Each entry lists the generic name, brand name, manufacturer, treatment class, and indications, and links to the full text of relevant articles in the PharmInfoNet archives. Articles currently come from: *Medical Sciences Bulletin*, published by Pharmaceutical Information Associates, Ltd. (PIA), a provider of scientific, medical and regulatory writing services for the pharmaceutical industry; *PNN Pharmacotherapy Line*, published by the Pharmacotherapy News Network; *Electronic Highlights Bulletin* (VirSci and PIA); *CardioConsult Reviews* (VirSci); *HIT News* (VirSci); *Rheumatoid Arthritis Research News* (VirSci); *Med-Brief* (Intelligent Network Concepts); *MedWatch News*, containing data from the FDA's MedWatch Program (VirSci); *Obesity Meds and Research News* (Hirsch Communications); *H. Pylori News* (VirSci and PIA); and *AHCPR Research Activities* (U.S. Agency for Health Care Policy and Research). Under "dexfenfluramine" there were links to more than 20 articles covering the use of the drug, effects on heart valves, and the removal of the drug from the market. A second database, "DrugPR," only includes pharmaceutical and biotechnology press releases. The third database, "DrugFAQs," is organized by type of drug and contains frequently asked questions that are answered by PharmInfoNet's Expert Panel, a group of medically-qualified consultants and organizations.

Healthtouch—Online for Better Health
http://www.healthtouch.com/level1/menu.htm

This collection of databases was created by Medical Strategies, Inc. from information provided by numerous health organizations and government agencies. Many of these are listed, with links to their home pages, under "Health Resource Directory." The information in the "Drug Information" database comes from Medi-Span. Entries for more than 7,000 prescription and over-the-counter medications can be found by searching on a partial or complete name. (However, partial name searches seem somewhat quixotic: when I entered "dexfen" I retrieved "dexfenfluramine," but when I entered "dexfenflur" I retrieved nothing.) Also, correct spelling is essential. Each entry includes generic and brand names, common uses, how to use the medication, cautions, possible side effects, information to be given a doctor or pharmacist before taking the medication, over-dosage, and some brief additional warnings. Note: the entry for dexfenfluramine did not include any information about the withdrawal of this drug from the market.

Doctor's Guide to the Internet
http://www.docguide.com

This website was created by P\S\L Consulting Group Inc. as a user-friendly gateway to Internet resources for doctors and other health professionals. "New Drugs or Indications" contains a list of links to current news regarding "approval of new drugs or of new indications for previously available drugs." Pages that have been updated within the past week are indicated. Otherwise, there is no subject or name organization to the list. The most recent article on November 5 was "FDA Approves Actiq for Breakthrough Cancer Pain."

MT Desk: Alphabetical Index of Terminology
http://www.mtdesk.com/index.htm

New drugs, equipment and procedures are included in this alphabetical, browsable database. It does seem to be slanted toward brand names, and entries are quite brief. "Redux" was listed, and the entry referred to dexfenfluramine as the generic name, but the generic was not listed separately.

The entry did refer to the previously suggested use of the drug and that it was "voluntarily withdrawn from the market." However, there was no link to the PR Newswire (CNN) report listed as the source of that information. A nice feature of this database is a direct link from the product entries to the web pages of the manufacturers.

USP Drug Information
http://www.usp.org/did/elements.htm

United States Pharmacopeial Convention, Inc., a publisher of standard pharmacology resources in print format, has determined five standard elements of useful patient information on medicines: Description of use, before using this medication, proper use of this medication, precautions while using this medication, and side/adverse effects. This database covers those elements for more than 750 generic medicines. A limitation is that searching can only be done by the generic name.

PhRMA: New Medicines in Development Database
http://www.phrma.org/webdb/database.html

This database was created as a public service by the Pharmaceutical Research and Manufacturers of America specifically to disseminate information on products that are still in the research and testing phase. Searches are directed through a three-step process: type of disease, particular indication and then drug name. Due to the nature of this database, the information may not be comprehensive.

World Wide Pharmacy: How to Read the Prescription
http://www.ns.net/users/ryan/rxabrv.html

Ryan G. Seo, PharmD, has assembled this useful page of almost 100 abbreviations used by doctors when writing prescriptions.

Glossary of Terms and Symbols Used in Pharmacology
http://www.bumc.bu.edu/www/busm/pharmacology/Programmed/framedGlossary.html

Found on the website of the Department of Pharmacology, Boston University School of Medicine, this alphabetical glossary includes terms of pharmacology rather than pharmaceuticals.

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The Propriety of Mental Health Questions by Bar Examiners

by Ava Zelenetsky*

Introduction

The Americans With Disabilities Act (ADA)[1] was enacted to protect persons who suffer from either physical or mental disabilities. In light of the ADA, employers are prohibited from discriminating on the basis of an individual's disability.[2] When applicants to the bar are required to divulge confidential, personal information about their psychiatric treatment and specific diagnoses they may have received, this screening process violates the nondiscriminatory principles of the ADA. Although several states have modified these types of questions,[3] or do not ask such questions on their screening applications,[4] most states, including New York, continue the practice of asking for the information for the sole purpose of screening out unfit applicants.[5] It seems apparent that using someone's mental health history to deny her or him a job or to determine if she or he is competent for a certain job on the sole basis of this information is a violation of the ADA. Since the bar admission committees are in the position to determine whether an applicant will be able to practice law, they serve as employers for the purposes of the ADA.[6]

The practice of asking mental health questions of bar applicants is in contrast with the nondiscriminatory principles of the ADA. The fact that such questioning has found support by some legal scholars[7] does not bring the practice into conformity with the goals of the ADA. That bar admission screening committees specifically seek to obtain information about an applicant's mental health history to assess whether he or she is fit to practice law only perpetuates the myth that mentally ill attorneys should not be practicing law even if they are "otherwise qualified."[8] The ADA does not make any distinction between attorneys and other individuals who may be discriminated against on the basis of their disability. The theory that mentally ill attorneys may be subjected to a more rigorous line of inquiry and scrutiny, while all other professions may be protected from such treatment, is not logical.[9]

Part I of this article examines the guidance of the Rehabilitation Act of 1973 and discusses some cases that were decided under this act. The Rehabilitation Act of 1973 has laid the foundation for the ADA and this section discusses how it has done so. Part II details the purpose of enacting the ADA and assesses specific provisions of the act which prohibit the screening of individuals on the basis of their disability. Part III examines the questions about mental health history that various bar admissions committees, including New York, require prospective attorneys to answer. Part IV explores the arguments in support of such questioning as a means of protecting the public from potentially incompetent attorneys and against such questioning as a violation of the ADA and a deterrent to needed psychiatric treatment. Part V examines when disciplinary committees treat mental illness as a mitigating factor when attorney misconduct has occurred. Part VI concludes that since disciplinary committees usually consider mental illness a mitigating factor and frequently impose lesser discipline on mentally ill attorneys who commit offensive acts, bar admission committees should act consistently with this practice and refrain from attempting to dismiss applicants on the basis of their mental health history. Such lines of questioning are rooted in prejudice against the mentally ill and impose a higher level of scrutiny on a mentally ill attorney who is seeking treatment than on a mentally ill attorney who has not yet been diagnosed or refuses to acknowledge that there is a problem. The public is not protected by this process, which has a discriminatory effect on mentally ill applicants and contradicts the goals of the ADA.

I. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973[10] (the "Act") prohibits discrimination by federal employers on the basis of a person's disability. The Act also applies to those institutions that receive federal funds.[11] Section 504 of the Rehabilitation Act specifies that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance."[12] An "individual with a disability" is "any individual who . . . has a physical or mental impairment which for such an individual constitutes or results in a substantial impediment to employment."[13] If an individual had a "physical or mental impairment which substantially limits one or more of such person's major life activities," had "a record of such impairment," or was "regarded as having such an impairment," the individual qualifies as an "individual with a disability" for the purposes of the Rehabilitation Act.[14] Once a person is covered by the Act as an "individual with a disability," the person must show that he or she is qualified to do the job. In order to be considered "qualified," the person must be able to perform the essential functions of the job, with or without any reasonable accommodations provided by the employer.[15] The accommodation would be considered "reasonable" so long as it does not create any "undue hardship" for the employer.[16] These terms have been incorporated into the ADA, and the basic concepts put forth in the Rehabilitation Act have been extended by the ADA.[17] The Rehabilitation Act and pivotal cases decided under the Act have been looked at when deciding how to interpret the ADA.

In the precedent setting case of *School Board of Nassau County v. Arline*,[18] the U.S. Supreme Court held that a woman who had a history of being treated for tuberculosis could qualify as an individual with a disability for the purposes of the Rehabilitation Act.[19] Arline, a school teacher, was fired because she had been treated for tuberculosis.[20] She filed suit

under the Rehabilitation Act and contended that her history of treatment for this contagious disease was a stigma and qualified her as an individual with a disability who was entitled to the protection afforded by the Act.[21]

In reasoning that an individual with a record of having a contagious disease, evidenced by medical treatment received for the disease, could be considered "disabled" for the purposes of the Rehabilitation Act, the Supreme Court also noted that there was no investigation of whether Arline was contagious at the time she was fired or whether she would pose any type of health threat to others.[22] These latter considerations were pertinent to the issues of whether Arline could perform her job and was qualified to do so despite her disability and whether her record of illness was used to stigmatize her, which resulted in her termination.[23] The Court reasoned that if Arline posed a health threat to others that could not be eliminated through "reasonable accommodations" by her employer, then she may not be considered "otherwise qualified" despite her disability.[24] The Supreme Court explicitly stated that the courts must safeguard individual rights by "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks."[25] Since the school board did not make any inquiry into these areas, the Supreme Court remanded the case to the District Court to determine whether Arline was "otherwise qualified" for her job.[26]

Another case decided under the Rehabilitation Act was *Doe v. New York University*[27] in which the U.S. Court of Appeals, Second Circuit held that the university's refusal to readmit Doe as a medical student did not automatically violate the Act. The Court denied Doe's request for a preliminary injunction, but held that since she raised substantial issues of fact, the university was not entitled to summary judgment.[28] Doe had been admitted to New York University Medical School but had not answered honestly the questions about her mental health history.[29] After taking a leave of absence from the medical school due to her psychiatric problems, she reapplied and was denied admission.[30]

Doe was asked in the application if she had "chronic or recurrent illnesses or emotional problems" and she answered that she had not.[31] Doe did have a history of psychiatric problems which included violent acts toward others, inflicting serious injuries upon herself, and suicide attempts.[32] She was later diagnosed as having a borderline personality disorder.[33] On one occasion she drank potassium cyanide after an interview at the University of San Francisco Medical School.[34] She had also attacked one of her psychiatrists when she felt he did not see her quickly enough by biting him, trying to kick him in the groin, and lunging at him with a pair of scissors.[35]

After Doe was accepted to the New York University Medical School, her psychiatric problems resurfaced and she evidenced self-destructive behavior.[36] On one occasion she had a meeting with the school's associate dean to discuss a scheduling conflict, and when Doe saw that the dean was not in his office at the appointed time, Doe went to a bathroom and "bled herself with a catheter."[37] After this incident she explained her actions to the associate dean as "the only way she could cope with stress."[38] Doe was asked to resign from medical school and she agreed to take a leave of absence.[39] The school made it clear that Doe would have to reapply and that there would be no guarantee that she would be accepted.[40]

In refusing to grant Doe's request for an injunction, the court held that she would not be "irreparably harmed" by not attending school while she waited for her case against NYU to be resolved.[41] The court, while skeptical of Doe's likelihood of success on the merits, held that summary judgment would be inappropriate and that Doe was entitled to have her case heard. In explaining its decision the court stated:

> It is conceivable, although on this record not probable, that substantial additional evidence might be offered at trial as to the significance of the risk that she will suffer a recurrence of her mental disorder or that the testimony of the experts offered by affidavit upon the application for preliminary relief might be sharpened or weakened by examination and cross-examination on trial. Thus we cannot say unqualifiedly that no issue exists as to the determinative material fact, which is whether Doe could adduce evidence entitling the trier of the fact to infer that despite her handicap she is at least as qualified as other applicants accepted by NYU as medical students . . . [42]

The court also stated that NYU was entitled to present evidence at trial to show that Doe was not "otherwise qualified" because of the risks the recurrence of her particular mental illness created.[43] The university had to balance the duty of safety it owed to others—such as professors, students, or visitors—with Doe's right to readmittance. Since Doe's particular mental illness had caused her to act violently toward others in the past and toward herself, the fact-finder concluded that she was not "otherwise qualified" because of the risk of harm she posed to others and to herself.[44] The court held that even if the risk of Doe suffering a recurrence of her mental illness was "minimal," the university would still be entitled to show that the risk made Doe less qualified than other applicants.[45]

II. The Americans With Disabilities Act

A. Purpose

The purpose of the ADA was to provide some protection for persons with disabilities and to combat the prejudices that often surround people with disabilities.[46] Senator Tom Harkin, a significant sponsor of the ADA, said, "The point of the bill is to start breaking down those barriers of fear and prejudice . . . so that people begin to look at people based on their abilities, not first looking at their disability."[47] The ADA includes peo-

ple suffering from mental disabilities and prohibits discrimination on the basis of such disability.

B. Disabled but "Otherwise Qualified"

The ADA prohibits discrimination on the basis of disability.[48] The Act states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual [relating] to . . . the hiring, advancement, or discharge of employees."[49] A "qualified individual with a disability" is defined under the Act as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[50] Not all individuals suffering from a mental or physical impairment will be covered by the ADA. The Act specifically defines "disability," and those who do not meet the criteria of this definition are not protected under the ADA, which defines "disability" as either "(A) a physical or mental impairment that substantially limits one or more of the major life activities of individual[s]; (B) a record of such impairment; or (C) being regarded as having such an impairment."[51]

C. "Undue Hardship" and "Reasonable Accommodation"

The ADA is designed to protect individuals with disabilities from discrimination on the basis of their disability. The Act does not unfairly impinge on the rights of employers. It merely prevents employers from discriminating against qualified individuals on the basis of a disability. The ADA does not prohibit the firing of a person who is disabled or the refusal to hire the individual so long as the decision is not based on the individual's disability.[52] An individual who is not qualified for a job does not have a valid claim under the ADA unless that person is not hired due to a disability.[53] In the case of *EEOC v. Kinney Shoe Corp.*,[54] the court held that an employer was justified in firing a shoe salesman who suffered from epilepsy and had epileptic fits that negatively impacted on the business. In granting a summary judgment motion in favor of the shoe store, the court explained that "Kinney did not fire Martinson because it stereotypically assumed that epileptics are a danger to themselves and others . . . [but] . . . took the action it did because it had first-hand experience with Martinson's seizures and their effect, and because . . . Martinson's seizures undermined the proper functioning of the store."[55] Although Martinson's epileptic fits were directly related to his disability, the court weighed the countervailing interest of the store in being able to run an effective business, which it could not do with a salesman having repeated fits.[56] Had the store required Martinson to divulge his confidential medical records before they hired him, and refused to hire him because he suffered from epilepsy, this action would have been prohibited by the ADA. The court took notice of the fact that the store only fired Martinson after he had epileptic fits that adversely affected the business and not based on predisposed notions of those suffering from epilepsy.[57]

The employer is also protected by not having to undergo "undue hardship" to accommodate those with disabilities.[58] If the employer would have to incur great expense or difficulty in the following, then the employer would not be required to make such accommodations under the ADA.[59] Factors used to determine whether the expense or difficulty would be too great for the employer to justify not providing the accommodation are: the type and expense of the accommodation; the economic impact implementing the accommodations would have on the company or employer; the resources that are available to the employer; and how the accommodations relate to the business.[60]

The employer must also have notice or knowledge of the disability in order for a discharged employee to maintain a claim under the ADA.[61] In *Hedberg v. Indiana Bell Telephone Co., Inc.*,[62] the court reasoned that "[a]n employer cannot be liable under the ADA for firing an employee when it undisputedly had no knowledge of the disability."[63] The court went on to say that "it is intuitively clear when viewing the ADA's language in a straightforward manner that an employer cannot fire an employee 'because of' a disability unless it knows of the disability."[64] The employer should also be given an opportunity to make reasonable accommodations for a disabled employee and can only do so if the employer is aware that the employee suffers from a disability.[65]

D. State Bar Admission Boards Covered by the ADA

While Title I of the ADA specifically prohibits employers from discriminating against individuals on the basis of any disability,[66] Title II extends this prohibition to public entities, including licensing agencies such as state bar boards.[67] Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[68] Although licensing agencies are not specifically addressed in the language of the ADA, the Department of Justice (DOJ) regulations do include such agencies as falling within the ambit of the ADA.[69] The DOJ was authorized by the ADA and the inclusion of these agencies is valid.[70]

The state admission boards could be viewed as a super employer since it is impossible for an attorney to legally practice law without a license, and such a position would bring the board within the meaning of Title I of the ADA. We do not need to reach this far to bind these boards to the non-discriminatory policies of the ADA, since Title II covers public entities, which the board is. Title II specifically includes state governments and other agencies that carry out the goals of state governments.[71] Bar admission licensing boards act on behalf of the state and issue licenses to those it deems fit to practice law. The board cannot discriminate on the basis of disabilities without running afoul of the ADA. The boards are not exempt from the provisions of the ADA, and while they may not be covered by Title I, they are covered by the broader scope of Title II.[72]

III. Mental Health Questioning by Bar Admission Committees

Despite the clear and unambiguous language of the ADA, most bar admission committees continue to ask applicants mental health questions as a prerequisite for admission to the bar.[73] These questions are designed to assess the applicant's risk of committing professional misconduct based on either the applicant's mental health status, history, or diagnosis. The use of this information to deny admission to the bar to otherwise qualified individuals conflicts with the ADA; the Act specifically prohibits stereotyping on the basis of disability, which is what these questions are used to do.

Questions about mental health that are not conduct-specific, stereotype the attorney-applicant and subject her or him to a higher level of scrutiny.[74] For example, the attorney-applicant who truthfully discloses that she or he was diagnosed with schizophrenia or bipolar disorder will have to undergo further interviews and inquiries about her or his mental illness and how it may impact on her or his ability to practice law.[75] While such disorders have been identified as psychoses, and individuals suffering from them often have difficulty practicing law and coping with high levels of stress, the use of these questions singles out applicants for further injuries on the sole basis of their mental disability or record of mental disability.

A. When Questioning Has Constituted a Violation of the ADA

Certain types of questions about the mental health of a prospective attorney have been held to violate the ADA. When the questions were so broad and vague that their utility was highly questionable, the courts have held that bar admission boards were not allowed to use them.[76] In the case of *Clark v. Virginia*,[77] the court ruled that the mental health question was too broad and should not be allowed. The question in this case was "[h]ave you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?"[78] If the applicant answered "yes," he or she was forced to waive confidential treatment information so that the admissions board could further investigate the applicant's mental health history.[79] Clark, the attorney-applicant, suffered from major depression which was recurrent.[80] While the court held that "some form of mental health inquiry is appropriate,"[81] the challenged inquiry was inappropriate because it was not useful in screening out unfit applicants and had "strong negative, stigmatic, and deterrent effects" upon qualified applicants.[82]

In *Ellen S. v. Florida*,[83] the court noted that by using certain questions about an applicant's mental health, the admissions board added a heightened level of scrutiny for applicants based solely on their mental health status. The questions asked if the attorney-applicant had *ever* been diagnosed or sought treatment for *any* nervous, mental, or emotional condition.[84] The court held that the mental health questions on the bar were discriminatory even if the questions did not prevent the applicants from ultimately gaining admission.[85] The court held that such conduct made it more difficult for an attorney-applicant to obtain licensing on the sole basis of his or her disability.[86] In defending its position, the court reasoned that "[t]he Board can discriminate against qualified disabled applicants by placing additional burdens on them and this discrimination can occur even if these applicants are subsequently granted licenses to practice law."[87] The court further reasoned that while the board is allowed to assess the fitness of an applicant to practice law, it is "not permitted to conduct such investigation in violation of federal law."[88] The court was referring to how the broad questioning of attorney-applicants about their mental health status or diagnosis was a clear violation of the ADA.

B. "Permissible" Questioning

If the mental health question is narrowly constructed and is "necessary" to further an admission board's screening process, then the question usually will be allowed.[89] In *Applicants v. Texas State Board of Bar Examiners*,[90] the court held that the question about mental health did not violate the ADA because it was narrow. The questions asked: "[w]ithin the last ten years, have you been diagnosed with or have you been treated [for] bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" and "[h]ave you, since attaining the age of eighteen or within the last ten years, whichever period is shorter, been admitted to a hospital or other facility for treatment of bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?"[91] If the applicant answered "yes" to either question, he or she had to describe the circumstances and waive confidential medical treatment by giving the names of the treating mental health professionals and allowing the admissions board to ask them questions about the applicant's mental health.[92]

These questions had been narrowed in an attempt to comply with the ADA.[93] The court held that the questions were justifiable because the illnesses they targeted "may bear on an applicant's present fitness to practice law."[94] The court also stated that the "Board would be derelict in its duty if it did not investigate the mental health of prospective lawyers."[95]

The court did not address the fact that the admissions board was only investigating the mental health of those individuals who had already been diagnosed with a mental illness and was not screening applicants on the basis that they might have a current illness that would affect their ability to practice law. The court also did not address whether applicants with undiagnosed mental illnesses would most likely pose a greater threat to the sanctity of the legal profession than those who are undergoing treatment for mental illnesses. The court did not explore the likelihood that many individuals would be less than truthful on the application or that the application would have a deterrent effect on those who needed treatment but were fearful of not being admitted to the bar. The court also was silent on the issue that increasing the burden for individuals with a history of psychiatric treatment to prove their fitness to practice law based solely on their mental disability is inconsistent with the goals of the ADA.

C. New York's Mental Health Questions

The New York State bar revised its mental health questions during litigation that challenged the previous mental health questions as violative of Title II of the ADA.[96] In *Campbell v. Greisberger*,[97] an applicant for admission to the New York bar challenged the mental health questions as being too broad and requested an injunction to prevent the bar committee members from further inquiring into his background as a result of his answer to the challenged question. The court agreed with the applicant's argument that the question he had answered was overly broad, but denied him an injunction because he failed to demonstrate that he would suffer "irreparable harm" by the committee members investigating his background in order to determine that he possessed the requisite character and ability to practice law.[98] The court also refused to enjoin the use of mental health questions on the bar admission application because the questions had been revised and narrowed in an effort to assess the applicant's ability to practice law and not to discriminate on the basis of disability.[99]

Campbell answered question 18(c), which asked:

> State whether you have since attaining the age of 18, been adjudged an incompetent, or had proceedings brought to have you adjudged an incompetent, or been committed to or been a patient in any institution for the care of persons suffering from mental or nervous disorders or drug addiction, drug abuse or alcoholism.[100]

Campbell answered "yes" to this question and also responded to another question that asked whether he had ever been arrested.[101] In narrative response, Campbell stated that he had been arrested for and charged with assault by a police officer who witnessed Campbell slap his wife.[102] Campbell explained that at the time of this incident he was intoxicated and suffering from schizophrenia and bipolar disorder.[103] Campbell also stated that he had been committed to a psychiatric ward at a hospital from March 21, 1990 through April 5, 1990.[104] And in his narrative response he stated that he defaulted on his Perkins student loan as a result of his mental illness.[105]

During an interview with a member of the Character and Fitness Committee, Campbell explained the nature of his first arrest for slapping his wife and disclosed another arrest one month later for "a disturbance at his sister's home."[106] Campbell explained that his second arrest was the precipitating factor that led to his commitment to a psychiatric unit,[107] but that he had not disclosed his second arrest on his written application.[108] When Campbell was questioned about his mental illness and how it had affected his conduct, he stated that specific questions about his illness would best be answered by the professionals who were treating him.[109] Campbell was asked to sign a medical release form so that his records could be investigated.[110] Campbell contacted the interviewer several days after his interview with her and stated that he did not wish to sign the waiver and that the information she was requesting was not relevant.[111] He offered to supply her with a letter from his doctor about his diagnosis and prognosis[112] and supplied three letters from a nurse and a doctor who treated him.[113] In a letter by his doctor, Campbell's initial diagnosis of schizophrenia and bipolar disorder was questioned since Campbell had appeared to have made a "full recovery" and did not require further medication, which is "rare" for a person suffering from these illnesses.[114]

The Character and Fitness Committee requested a hearing during which Campbell would have to address certain issues, including his past and current employment resignations; financial debts incurred by him; the circumstances which gave rise to his arrests; and his current ability to perform the duties of a lawyer[115] despite any disability he may have.[116] Some members of the Character and Fitness Committee submitted affidavits stating that they would question Campbell only about his conduct and any inconsistencies in his application.[117] The members stated that they did not intend to ask any further questions about his mental disability, but that Campbell could raise the issue, as he had done in his application and interview, as an explanation for his conduct.[118]

In deciding this case, the court noted that "[m]embership in the bar of the State of New York is a privilege burdened with conditions."[119] Since the issue of whether mental health questions on bar exams may violate the ADA is new, and had not been previously addressed in New York, the court compared this case to *In re Anonymous*[120] which alleged that a bar admission applicant was discriminated against based on his bankruptcy status.

In *In re Anonymous*, the applicant alleged that the Character and Fitness Committee denied him admission because of his bankruptcy status, in violation of 11 U.S.C. section 525, which prohibits a governmental unit from refusing to grant a license solely on the basis of an applicant having declared bankruptcy.[121] The court held that "[a] determination of bankruptcy must rest not on the fact of the bankruptcy, but on conduct reasonably viewed as incompatible with a lawyer's duties and responsibilities as a member of the Bar."[122] In extending this reasoning, the *Campbell* court held that "the Character and Fitness Committee may not disapprove Campbell's application on the basis of his mental illness per se . . ." but may investigate his conduct, which could be "incompatible with a lawyer's duties."[123] The court concluded that if Campbell's conduct is found to be incompatible with a lawyer's duties and responsibilities, then the Character and Fitness Committee would be allowed to declare him unfit and deny him bar admission even though the conduct rose out of Campbell's mental illness.[124]

While the court did not prohibit the use of mental health questions on bar applications, it clearly focused on the issue of an attorney-applicant's conduct and whether that conduct would be affected by any mental impairment the attorney suffered from. The issues raised in *Campbell* were not only the fact that Campbell had to answer questions about his mental health status, but whether his mental illness constituted a mit-

igating factor for his admission to the bar after he had committed criminal acts, been arrested, and defaulted on student loans. The Character and Fitness Committee made it clear that Campbell would only be questioned about his conduct and how that conduct might have been affected by his mental illness. Even if mental health questions were not asked in New York, Campbell's answers to several other questions about his conduct would have presumably triggered further inquiry by the committee.

The fact that the Character and Fitness Committee and the court were primarily concerned with Campbell's conduct, rather than the potential risks his mental illness may create, indicates New York's reluctance to place much emphasis on answers to mental health questions in the absence of questionable conduct by the attorney-applicant. The New York courts have not ruled that questions about mental health violate the ADA, but coupled with the revised, narrower questions about mental health in New York and with the focus on specific acts committed by the attorney-applicant, the mental health questions may be of little significance in the screening process. This trend in New York toward according little weight to mental health questions may ultimately lead to the withdrawal of such questions on bar admission applications. The practical effect *Campbell* has on mental health questioning is to diminish the significance such questions have in the screening process.

IV. The Countervailing Arguments Over Mental Health Questions

A. Proponents

Proponents of the use of mental health questions on bar admission applications are likely to argue that the information obtained will be relevant to the attorney's fitness to practice law, the protection of the public from unfit attorneys, and that it is necessary to maintain professional integrity.[125] The interests raised are valid and important to protect. Even assuming that the use of mental health questions may identify individuals who would be more likely to commit certain acts of misconduct due to a mental illness they suffer from, such stereotyping is prohibited by the ADA. The proponents of such inquiry ignore or minimize the potential for discrimination on the basis of mental disability. The questions are asked to discern an individual's ability to practice law. The applicant must survive character and fitness scrutiny as well. Some bar applications have preambles which assure applicants that they will not be discriminated against on the sole basis of their mental health histories. The National Conference of Bar Examiners has the following preamble:

> Through this application, the National Conference of Bar Examiners makes inquiry about recent mental health and addiction matters. This information, along with all other information, is treated confidentially by the National Conference and will be disclosed only to the jurisdiction(s) to which report is submitted. The purpose of such inquiries is to determine the current fitness of an applicant to practice law. The mere fact of treatment for mental health problems or addictions is not, in itself, a basis on which an applicant is ordinarily denied admission in most jurisdictions, and boards of bar examiners routinely certify for admission individuals who have demonstrated responsibility and maturity in dealing with mental health and addiction issues. The National Conference encourages applicants who may benefit from treatment to seek it. Boards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the licensing responsibilities assigned to bar admission agencies; further the responsibility for demonstrating qualification to practice law is ordinarily assigned to the applicant in most jurisdictions.
>
> The National Conference does not, by its questions, seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief counseling, and counseling for eating or sleeping disorders. Generally, the National Conference and the various boards of bar examiners do not view these types of counseling as germane to the issue of whether an applicant is qualified to practice law.[126]

B. Opponents

Opponents point to the fact that such questions are a violation of the ADA. The questions are designed to use the propensity a certain mentally ill attorney has to commit certain acts based on the attorney's mental illness and history of psychiatric treatment. Many prejudices and fears of mental illness already pervade our society. The legal community is not immune, as evidenced by the imposition of these questions on applicants. The ADA was enacted to combat such discriminatory practices, and there is no logical reason that bar admission committees should be exempt from the provisions of this act.[127]

Certain questions about mental health may tend to stigmatize mental illness[128] and discourage those who need treatment but fear professional reprisal.[129] The effect that this line of inquiry has on attorneys is to discourage those who are most in need of treatment from seeking it. This, in turn, encourages attorneys suffering from serious mental illnesses to remain untreated and will most likely result in a greater risk to clients.

If bar admission committees wished to screen out attorneys who are not able to practice law due to psychological instability, the committees should require psychological testing of all its applicants. When only attorneys with a history of a mental illness are required to submit to a greater level of scrutiny, there is discrimination on the basis of a disability, a violation of the ADA.

V. Attorney Discipline in Light of Mental Illness

While employers are allowed to discipline or fire employees for their acts of misconduct in spite of any disability the employee may be suffering from without violating the ADA, attorney disciplinary committees generally view mental illness as a mitigating factor.[130] Despite the fact that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction,"[131] the disciplinary committee in *In re Chikofsky*[132] declined to disbar an attorney who failed to return $15,000 to a client, and instead ordered a censure because the attorney suffered from severe depression. Similarly, in *In re Bedell*,[133] the court ordered a three-year suspension for an attorney who was convicted of forgery while he suffered from a "mixed personality disorder."[134] The court noted that the attorney had not committed his crime for financial gain, had done so because he was suffering from a mental illness, and that his prognosis for recovery was good.[135]

In *In re Winston*[136] the court, in addressing mitigation in light of mental illness, stated that "[w]here a mental or physical infirmity is the cause of an attorney's misconduct, that factor may be considered in mitigation of the sanction to be imposed."[137] In *Winston* the attorney supplied the court with a "bad check," converted an escrow fund, and refused to cooperate in the disciplinary investigation of his activities.[138] The court suspended him for three years and viewed his mental impairment, which was caused by cocaine usage, as a mitigating factor.[139] The courts consistently look to mitigating factors of addictions or mental illness when they determine what level of sanction is appropriate for the misconduct.

The courts have held that just because an attorney suffers from a mental illness or addiction problem, it is not by itself a mitigating factor. If the attorney's misconduct did not rise out of the disability, or if the attorney's mental illness poses a direct threat to her or his ability to practice law, the attorney will be disciplined as any other attorney would be.[140] In *In re Colp*[141] an attorney was indefinitely suspended after he had been accused of engaging in sexual misconduct with a client and had made false allegations that a judge and other attorneys had conspired to commit murder.[142] Colp was examined by a psychiatric expert who diagnosed him as having a delusional disorder, paranoid type, and concluded that he would not be able to adequately practice law.[143] The court held that since he posed a threat to his clients' adequate representation and was not otherwise qualified to practice law by reason of his mental illness, his indefinite suspension did not run afoul of the ADA.[144]

VI. Conclusion

The Americans With Disabilities Act was designed to combat discrimination on the basis of disability. The questioning by bar admission committees about confidential psychiatric treatment a lawyer might have undergone or a specific psychiatric diagnosis the lawyer might have received undermines the goals of the ADA and the Rehabilitation Act of 1973. While an argument can be made that such questions could identify those who would pose greater risks to the public, the argument ignores the fact that in the process of such screening on the basis of mental disability, bar applicants who have not yet committed any infractions are at risk of being denied admission to the bar.

This practice is in direct conflict to the disciplinary process applicable to mentally ill attorneys. In discipline cases, the attorney has committed a specific act of misconduct. The disciplinary committees usually will consider an attorney's mental illness as a mitigating factor (if the illness has attributed to the attorney's misconduct), and often will give the attorney a lighter penalty due to his or her mental disability, in an effort to assist the attorney. Anne E. Thar, vice president and general counsel of ISBA Mutual, stressed how important it is to support mentally ill attorneys when she wrote: "[m]ental illnesses such as clinical depression and substance abuse are treatable [and] . . . [b]y helping troubled attorneys, we benefit the entire profession and retain a bit of humanity in the process."[145]

In the bar admission cases where mentally ill attorneys are forced to divulge their mental health history and provide medical waivers, no misconduct on the part of the attorney-applicant has occurred. In cases where misconduct has occurred, the misconduct should be the focus, not the attorney's mental health status. The attorney's mental health should only be focused on if the attorney raises the issue as an explanation for her or his conduct.[146]

Although some states have responded to ADA challenges of their mental health questions by narrowing the scope of the questions,[147] in doing so these states have revealed a bias against individuals with certain mental illnesses. The questions impose a harsher standard for evaluation of individuals based solely on their record of treatment for or diagnosis of a mental illness.

This practice is inconsistent with the actions of attorney disciplinary committees, which tend to take mental impairments into account when determining the level of punishment to impose.[148] In disciplinary cases, even when the misconduct arises out of a mental illness, there has been some actual misconduct committed. In applications that pose questions about the mental health of attorneys applying for admission to the bar, misconduct need not have occurred. The mental health questions, unlike the disciplinary process, seek to stereotype mentally ill attorneys on the basis of their mental illness and not on their conduct.

Questioning attorney-applicants about their mental health imposes a greater burden on mentally ill attorney-applicants and subjects them to a higher level of scrutiny for admission to the bar. This practice is rooted in prejudice against the mentally ill and seeks to perpetuate stereotypes that the mentally ill are not able to function in high level jobs, such as that of attorneys. This conduct is discriminatory and not in line with the ADA. Bar admission committees should revise their questions so that they are conduct oriented and not require applicants to divulge their mental health histories in order to be considered competent to practice law.

Endnotes

1. Americans With Disabilities Act of 1990, *codified as amended*, 42 U.S.C. §§ 12101-12213 (1994).
2. *Id.*
3. *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995) (stating that Hawaii, Illinois, New Mexico, Pennsylvania, and Utah revised their mental health questions to be more narrowly tailored).
4. Arizona and Massachusetts do not ask any mental health questions. *Id.* at 438.
5. California, Georgia, Iowa, Kansas, Louisiana, Montana, New Hampshire, New Jersey, South Dakota, and Vermont ask their applicants if they have received hospitalization or were institutionalized for mental illness. Arkansas asks applicants if they received continuous treatment (at least one year) for a mental or emotional illness. Alabama, Alaska, Connecticut, Delaware, Florida, Idaho, Maine, Maryland, Minnesota, New York, Rhode Island, Texas and Washington ask applicants if they suffer from any mental illness that they believe would adversely affect their ability to practice law. Colorado, Indiana, Kentucky, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, West Virginia, Wisconsin, and Wyoming continue to ask broad questions about the mental health history of their applicants. *Id.* at 438-439.
6. *See* Part III. D, *infra* .
7. *See, e.g.*, Kelly R. Becton, *Attorneys: The ADA Should Not Impair the Regulation of the Legal Profession Where Mental Health Is An Issue*, 49 Okla. L. Rev. 353 (1996).
8. *See* note 1, *supra,* and accompanying text.
9. Some other professions, such as practicing medicine, require skill, intelligence, and the ability to interact well with other people, often during times of stress, requiring applicants to answer similar questions about their mental health histories.
10. 29 U.S.C. §§ 706, 791, 793-794 (1996).
11. 29 U.S.C. § 794 (1996).
12. *Id.*
13. 29 U.S.C. § 706(8)(A) (1996).
14. 29 U.S.C. § 706(8)(B) (1996).
15. 45 C.F.R. § 84.12 (1996).
16. *Id.*
17. *See* section III, *infra.*
18. 480 U.S. 273 (1986).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 287.
26. *Id.*
27. 666 F.2d 761 (2d Cir. 1981).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 767.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 773.
42. *Id.* at 779-780.
43. *Id.*
44. *Id.* at 780.
45. *Id.*
46. Sen. Tom Harkin, ADA sponsor, 135 Cong. Rec. 19, 866 (1989).
47. *Id.*
48. 42 U.S.C.A. § 1211 (a) (1994).
49. *Id.*
50. 42 U.S.C.A. § 12111(8).
51. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).
52. *Id.*
53. *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419 (W.D. Va. 1996).
54. *Id.*
55. *Id.* at 423.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. 42 U.S.C. § 12111(10).
61. *Hedberg v. Indiana Bell Telephone Co., Inc.*, 47 F.3d 928 (7th Cir. 1995).
62. *Id.*
63. *Id.* at 930.
64. *Id.*
65. *Id.*
66. 42 U.S.C. § 12132 (1994).
67. 28 C.F.R. § 35.130(b)(6) (1995).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *See* note 5, *supra.*

74. *See* note 3, *supra*, *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 442 (stating that broad-based mental health questions may impose additional burdens on qualified applicants).

75. *See, e.g.*, *Applicants v. Texas State Board of Bar Examiners*, 1994 WL 776693 (W.D. Tex. 1994) (upholding the use of mental health questions that asked about specific psychoses as necessary and not violative of the ADA).

76. *See* note 3, *supra, Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430; *Ellen S. v. Florida*, 859 F. Supp. 1489 (S.D. Fla. 1994); and *Campbell v. Greisberger*, 865 F. Supp. 115 (W.D. N.Y. 1994).

77. *See id.*

78. *Id*. at 431.

79. *Id.*

80. *Id.*

81. *Id.* at 436.

82. *Id.* at 445.

83. *Ellen S. v. Florida*, 859 F. Supp. 1489 (S.D. Fla. 1994).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1494.

88. *Id.* at 1492.

89. *See, e.g.*, *Applicants v. Texas State Board of Bar Examiners* 1994 WL 776693 (W.D. Tex. 1994), note 75, *supra,* and accompanying text.

90. *See id.*

91. *Id.*

92. *See, e.g.*, *In re Colp*, 592 N.Y.S.2d 297 (1st Dep't 1993).

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Campbell v. Greisberger*, 865 F. Supp. 115 (W.D. N.Y. 1994).

97. *Id.*

98. *Id.*

99. The revised question is as follows: "Attachment A . . . (1) Do you have any physical, mental or emotional condition that could adversely affect your capability to practice law? (2) Are you currently using any illegal drugs?" *Id.* at 117.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id*. at 121.

104. *Id.*

105. *Id.*

106. *Id.* at 117.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 118.

113. *Id.*

114. *Id.*

115. Such as the handling of client funds; trustworthiness, and any aspects affecting his representation of clients *Id.* at 121.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 120, *citing In re Rouss*, 221 N.Y. 81, *cert. denied*, 246 U.S. 661 (1918).

120. 74 N.Y.2d 938 (1989).

121. *Id.*

122. *Id.* at 940.

123. 865 F. Supp. at 121.

124. *Id.*

125. *See* note 75, *supra,* and accompanying text citing *Applicants v. Texas Board of Bar Examiners*, 1994 WL 776693, for the principle that using mental health questions on bar admission exams is necessary to protect the public from unfit attorneys.

126. Applicant's Request For Character Report (1995).

127. *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 440.

128. *Id.* at 445.

129. *Id.*

130. *See, e.g., In re Winston*, 528 N.Y.S.2d 843 (1st Dep't 1988); *In re Chikofsky*, 668 N.Y.S.2d 586 (1st Dep't 1998). *See also, In re Hoover*, 779 P.2d 1268 (Ariz. 1989) (the disciplinary committee declined to disbar an attorney who misappropriated clients' funds while he was suffering from manic depression); *In re Driscoll*, 575 N.E.2d 46 (Mass. 1991) (ordering a public censure for an attorney who suffered from depression and misappropriated client funds instead of disbarring the attorney); *Florida Bar v. Jahn*, 509 So.2d 285 (Fla. 1987) (refusing to disbar a drug addicted attorney for possession of cocaine, stating "[a]n attorney with a chemical dependency problem, whether his drug of choice is legal such as alcohol, or illegal such as cocaine, should be encouraged to seek treatment and rid himself of the dependency").

131. *In re Adams*, 579 A.2d 190, 191 (D.C. 1990) *en banc*.

132. *In re Chikofsky*, 668 N.Y.S.2d 586 (1st Dep't 1998).

133. 577 N.Y.S.2d 805 (1st Dep't 1991).

134. *Id.* at 806.

135. *Id.*

136. *In re Winston*, 528 N.Y.S.2d 843 (1st Dep't 1988).

137. *Id.* at 844.

138. *Id.*

139. *Id.*

140. *See, e.g., In re Colp*, 592 N.Y.S.2d 297 (1st Dep't 1993).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Thar, Anne E., *The New Malpractice Time Bomb: Problem Associates and Partners*, 85 Ill. B.J. 85 (1997).

146. *See, e.g., Campbell v. Greisberger*, 865 F. Supp. 115 (W.D. N.Y. 1994).

147. *See* note 3, *supra,* and accompanying text.

148. *See* section V, *supra*.

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