Mental Health Screening in Lawyer Licensing

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EXECUTIVE SUMMARY

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Aspiring lawyers who have struggled with their mental health face a major disincentive to seeking help. Many states ask about a bar applicant's mental health status or history as part of the "moral character" inquiry. These questions take a variety of forms, but all can be used to deny an applicant's admission into the bar.

Advocates have long argued that these questions discourage treatment, stigmatize those suffering from mental health problems, punish those honest enough to fill out bar questionnaires truthfully, and fail to keep the public—or the profession—safe. That advocacy has resulted in a wave of reforms to mental health screening practices. Still, some worry that those reforms do too little to adequately promote applicants' mental health, and these critics point out that there's very limited data to support the utility of any inquiry regarding bar applicants' mental health.

This White Paper discusses the mental health crisis afflicting the United States in general and in the legal profession in particular, compiles a comprehensive list of current state of mental health screening practices, and situates those practices amid the broader policy landscape. Ultimately, we find that the past two decades have seen a growing number of states move away from mental health screening that broadly inquires into applicants' mental health and treatment history. But states have declined to eliminate mental health screening altogether. Instead, most states have adopted more targeted mental health and substance abuse questions that, despite being seen as improvements, continue to face criticism and spur debate.

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Introduction

The United States is in the grips of a staggering mental health crisis. The latest evidence suggests that some 34% of Americans aged 18 to 29 report that they have been diagnosed with depression.[1] Data from Johns Hopkins indicate that about 10% of American adults will suffer from major depression, bipolar disorder, or persistent depressive disorder each year, and those in their 20s and women are particularly prone to these illnesses.[2] Suicide rates increased 37% between 2000 and 2018.[3] Emergency department visits related to suicidal ideation and self-directed harm also increased in the late 2010s.[4] Many debate why these rates are skyrocketing, but few question the basic trends.

The mental health crisis affecting American society has not spared the legal profession.[5] It has long been thought that, as compared to others, lawyers and law students are particularly susceptible to anxiety, stress, depression, and death by suicide.[6] That "conventional wisdom" is now being reevaluated, however, in light of a robust study that plumbed data from the National Health Interview Survey. Authored by Yair Listokin and Raymond Noonan, the study indicates that only 0.7% of lawyers surveyed between 2010 and 2017 suffered from a serious mental illness—suggesting that lawyers might be less prone to mental illnesses than those without a college degree or with only a bachelor's degree, and that lawyers' rates of mental illness are comparable to those among workers with other graduate degrees.[7] However, the study also found that lawyers consume alcohol at an "extraordinary" rate.[8] According to the data, lawyer alcohol consumption is twice that of others with advanced professional degrees and has gotten worse over the last 15 years.[9]

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1 Dan Witters, *U.S. Depression Rates Reach New Highs*, GALLUP (MAY 17, 2023), https://news.gallup.com/poll/505745/depression-rates-reach-new-highs.aspx.

2 *Mental Health Disorder Statistics*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics (last visited Aug. 23, 2024).

3 *Suicide Data and Statistics*, CDC, https://www.cdc.gov/suicide/suicide-data-statistics.html (last updated Nov. 29, 2023).

4 Bridget M. Kuehn, *Rising Emergency Department Visits for Suicidal Ideation and Self-Harm*, 323 JAMA 917, 917 (2020).

5 Deborah L. Rhode, *Managing Stress, Grief, and Mental Health Challenges in the Legal Profession; Not Your Usual Law Review Article*, 89 FORDHAM L. REV. 2565, 2567-70 (2021).

6 *E.g.*, Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205, 206 (1995) ("[S]everal studies have shown that lawyers experience more mental health problems than the population at large."). More recently, troubling survey evidence has generated widespread concerns and discussion about the problems confronting law students and the legal profession. *E.g.*, Jessica R. Blaemire, *Analysis: Well-Being in Law School–Law Students Aren't OK*, BLOOMBERG (Feb. 3, 2020); Ed Ergenzinger, *The State of Law Students' Mental Health*, NCBARBLOG.COM (Mar. 29, 2023); Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016). But these and other surveys rely on self-reported data and also lack a comparison set—meaning the data might be misleading and suffer from response biases. *But see* W.W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1085 (1990) (finding, in a study that relied on data gathered through structured interviews, lawyers had one of the highest rates of major depressive disorder of any occupation).

7 Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. EMPIRICAL LEGAL STUD. 4, 16 (2021).

8 *Id.* at 6.

9 *Id.*

The upshot is that, contrary to conventional wisdom, lawyers may not be worse off than others.[10] Still, no one doubts that lawyers are caught in the broad and deeply disturbing currents affecting those in the United States more generally. Tens of thousands of lawyers and law students suffer from mental health problems and substance use disorders.[11] And, consequently, the bar has an obligation to think critically about its policies related to mental health and to interrogate how those policies affect lawyers' and law students' well-being.

Law student mental health raises particular concern.[12] In a recent survey of law students by Bloomberg, a majority of respondents self-reported struggling with mental health as a result of law school, with over 75% of respondents reporting anxiety and over 50% reporting depression because of issues related to law school.[13] Older surveys have shown similar struggles among past generations of law students, including one large 2014 survey which found more than one-third of students reported mild to severe anxiety and a quarter of students reported feelings or behaviors associated with elevated risk of alcoholism.[14] Law students have also decried a culture of silence that discourages students from seeking help.[15] The 2014 survey found that 42% of respondents thought they needed help for emotional or mental health problems in the past year,[16] yet only half had actually received counseling.[17]

Students offer many reasons for failing to get help: social stigma, concerns about losing work or academic status, cost, and a lack of time. But one of the most common reasons is the potential threat to bar admission.[18] In many states, bar examiners require applicants to disclose diagnosis of, treatment for, or disciplinary actions related to, an applicant's mental health status and history.[19] These questions are typically part of the "Character and Fitness" questionnaire, which aims to assess whether an applicant "is

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10 *See* Debra Cassens Weiss, *Conventional Wisdom Is Wrong about Lawyers' Mental Health, But Comparative Drinking Rate Is 'Extraordinary,' Study Says*, ABA J. (Feb. 22, 2022).

11 For a useful infographic, see *By the Numbers: The State of Mental Health in the Legal Industry*, LAW.COM (Feb. 19, 2020).

12 It is worth stating that, while some lawyers with mental health conditions identify as disabled, others do not consider a mental health condition to be a disability. *See* JOANNA CRAIG & NIRVANA DOVE, NEURODIVERSITY IN THE LEGAL PROFESSION: PROGRESS IN RECRUITING AND SUPPORT EFFORTS PRESENTS NEW DISCLOSURE QUESTIONS (2023); *cf. also* Katie R. Eyer, *Am I Disabled? Disability Identity and Law Faculty*, 71 J. LEGAL EDUC. 76, 79-80 (2021) (posing questions about disability faced by law faculty).

13 Blaemire, *supra* note 6.

14 Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 128, 137 (2016).

15 *See* Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

16 Organ et al., *supra* note 14, at 140.

17 *Id.*

18 *Id.* at 141 (finding 45% of respondents listed fear of rejection from the bar as a discouragement from seeking treatment).

19 "Mental health" has many definitions. States that ask about mental health have used open-ended—and potentially vague—definitions. As we later discuss, one influential example is the National Conference of Bar Examiners, which asks candidates if they have "any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner." *See Mental Health Character & Fitness Questions for Bar Admission*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/ (last visited August 26, 2024).

capable of performing the duties of a lawyer."[20] States have explained that these questions exist to screen out applicants who are incapable of ethically and competently practicing law.[21] Because mental health issues such as psychological conditions or addiction can adversely affect a lawyer's representation of a client, the thinking goes, bar examiners can and should inquire about these issues.

Yet, for decades, a growing number of scholars, law students, law school leaders, mental-health advocates, and courts from across the partisan and ideological spectrum have criticized these questions as ill-informed, counterproductive, or even illegal.[22] The American Psychological Association (APA) has also called for mental health questions to be removed.[23] As the APA put it in a 2023 resolution that unanimously passed its governing council, "statistical data reveal that there is no connection between bar application questions about mental health and attorney misconduct and that such questions have not been empirically shown to work as a successful screening tool for who can and cannot practice law in a competent manner."[24] Fueled by these concerns, numerous states have abandoned or at least pared back their inquiry in applicants' past mental health challenges. Still, most states continue to ask questions that—though perhaps less intrusive than previous versions—inquire into applicants' mental health or substance use history.

This White Paper addresses the issue in four Parts. Part I offers background information on law students' mental health challenges. Part II presents a history of bar screening practices in the United States, focusing on how states have sought to evaluate applicants' mental health. Part III catalogs common criticisms of these questions. These include legal arguments (that the questions are unlawful), ethical arguments (that the questions undermine professional values), empirical arguments (that there is little evidence of any connection between inquiries into applicants' mental health and consumer harm), and practical arguments (that mental health questions inflict too high a cost to justify their continued use). Finally, Part IV presents a comprehensive compilation of states' current mental health screening practices. This Part

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20 *See, e.g.*, NAT'L CONF. BAR EXAM'RS, NCBE CHARACTER AND FITNESS SAMPLE APPLICATION 20 ("Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?"); *see also id.* ("Are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?"). Fourteen states have adopted at least one of the NCBE questions.

21 Traci Cipriano, *Bar Application Mental Health Questions: Pertinent or Unhelpful and Stigmatizing?*, REUTERS (Aug. 23, 2023); *e.g.*, APPLICATION FOR ADMISSION, MINN. BD. L. EXAM'RS 9 (2020) (explaining the "mental health and chemical dependency questions" are asked because of the Board's "responsibility to protect the public").

22 *E.g.*, Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Allison Wielobob, *Bar Application Mental Health Inquiries: Unwise and Unlawful*, 24 HUM. RIGHTS 12 (1997); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93 (2001); Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123 (2011); Alyssa Dragnich, *Have You Ever . . . ? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677 (2015); Doe v. Sup. Ct. of Ky., 482 F. Supp. 3d 571, 584 (W.D. Ky. 2020) (Walker, J.); SHOSHANA WEISSMANN ET AL., REGUL. TRANSPARENCY PROJECT, FED. SOC'Y, THE WORLD NEEDS MORE LAWYERS 10 (2023).

23 Press Release, Am. Psychiatric Ass'n, APA Calls for Removal of Mental Health Questions on Applications to Practice Law (Aug. 7, 2023).

24 *Id.*

shows that, in recent years, the majority of states have narrowed—but not eliminated—their inquiries into applicants' mental health challenges. And it briefly notes how these changed on-the-ground realities ought to recast the debate.[25]

I. Mental Health Problems in Law School

Mental health problems afflict lawyers at every stage of the profession: from law students struggling through school, to bar applicants navigating their way through the admission process, through full-fledged lawyers deep into their careers. As early as the 1980s, the bar began to address issues of substance abuse and mental health problems within the profession, including on law school campuses.[26] Data from law schools are limited and self-reported, and self-reported data are notoriously subject to response biases that cloud strong empirical inferences.[27] Still, those surveys (blurred as they were) painted a dim portrait.

In 1991, a special committee of the Association of American Law Schools conducted one of the first national surveys of substance abuse among law students. Compiling responses from 3,388 students at 19 law schools for a response rate of roughly 25%, the survey found that about 12% of respondents self-reported abusing alcohol since entering law school, while 22% said they had used an illicit drug in the past year.[28] According to the authors, the results were "extremely disturbing" and "indicative of a continuing problem."[29] The authors criticized, among other things, the uncertainty bar applicants face about what to disclose and how the disclosed information would be used by bar examiners.[30]

In 2014, academics specializing in law and education conducted a large national survey of 3,300 law students at 15 schools, with a response rate of just under 30%.[31] With similarly discouraging results,

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25 As discussed below in Part IV.B, this White Paper relies on outreach to each state, as buttressed by publicly available reports. Still, not all states were responsive to our inquiries, and some states do not post their application questions online. Furthermore, we recognize that even if we correctly categorized each state's approach, in this ever-evolving area, states may change their questions without fanfare—meaning that our chart could quickly become outdated. Given these and other limitations, law students should contact the organization overseeing state bar admissions for the most up-to-date information about the questions they will be asked to answer in a given year.

26 Natalie C. Forner, *Mental Health, Law School, and Bar Admissions: Eliminating Stigma and Fostering a Healthier Profession*, 75 ARK. L. REV. 689, 691-92 (2022).

27 *See* Listokin & Noonan, *supra* note 7, at 7-10 (discussing the methodological problems and limitations of earlier surveys and studies). Self-reported data can be subject to validity issues, as respondents may provide answers that are self-motivated and biased. Delroy L. Paulhus & Simine Vazire, *The Self Report Method*, *in* HANDBOOK OF RESEARCH METHODS IN PERSONALITY PSYCHOLOGY 224, 224-35 (Richard W. Robbins ed., 2007). Respondents may, for instance, be influenced by "social environment instead of internal processing," answering questions in a manner that is socially acceptable. Constantina Demetriou, *Self-Report Questionnaires, in* THE ENCYCLOPEDIA OF CLINICAL PSYCHOLOGY 4 (Robin L. Cautin & Scott O. Lilienfeld eds., 2015). Alternatively, they may have a "response bias," meaning they are more likely to respond "yes" or "no," regardless of the content of the question. *Id.* at 1-2.

28 Robert A. Stein et al., *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 36, 43 (1994).

29 *Id.* at 44.

30 *Id.* at 54, 57.

31 Organ et al., *supra* note 14, at 136-40.

the survey found that more than one-third of students self-reported mild to severe anxiety, a quarter of students were deemed at risk for alcoholism, and 6% reported suicidal thoughts in the last year.[32]

More recent studies have shown even higher rates of mental health challenges among law students. A 2021 survey of students at 39 law schools found that the number of respondents self-reporting a diagnosis of depression at some point in their lives had increased from 18% in 2014 to 33% in 2021, while anxiety diagnoses increased from 21% in 2014 to 40% in 2021.[33] About one-third of respondents indicated they had seriously contemplated suicide in their lifetime, up from one-fifth of respondents in the 2014 survey.[34] Again, if these self-reported data accurately reflect campus culture, they match earlier findings of poor mental health in the legal profession since at least the 1990s.[35] At a minimum, the survey responses indicate that perceptions about mental health issues are widespread.

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32 *Id.*

33 Jerome B. Organ, David B. Jaffe & Katherine M. Bender, *The 2021 Survey of Law Student Well-Being: More Progress Needed in Fostering Help-Seeking among Law Students*, BAR EXAM'R, Summer 2022, at 8.

34 *Id.*

35 *See* Hannah V. Averitt, *A Mental Bar: Should Past Psychological Problems Affect Bar Admission?*, 28 L. & PSYCH. REV. 97, 99 (2004); *see also* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y & ETHICS 357, 359 (2009).

II. The Evolution of Mental Health Screening Practices

Anyone who wants to practice law must obtain a license to do so.[36] The modern licensure process is demanding.[37] In most states, applicants must successfully graduate from an accredited law school, receive a passing score on lengthy written examinations, and pass a probing background check and personal evaluation. This last component, known often as a "Character and Fitness" review, assesses whether the applicant has the capacity and "moral character" to practice law in the state.[38] Bar examiners look for qualities such as honesty, fairness, candor, trustworthiness, respect for the law, and anything else believed to predict competency and ethics.[39] The applicant has the burden to prove good moral character, and doubts about character can harm applicants by delaying their application or, in some cases, resulting in rejection.[40]

Versions of moral character screening for would-be lawyers have existed for centuries.[41] In the United States, moral character screenings rose to prominence in the early 20th century, fueled both by the growing influence of the newly formed American Bar Association (ABA), as well as the legal profession's nativist reaction to an influx of eastern European immigrants.[42] Motivated in part by ethnic prejudices, moral character examinations became convenient means of excluding these immigrants (many of whom were Jewish) from legal practice on the basis that they were "morally weak."[43]

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36 *See generally Lawyer Licensing*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_services/flh-home/flh-lawyer-licensing/ (last visited Aug. 28, 2024).

37 Bar boards are not the only institutions that screen would-be lawyers. Law schools also screen in two ways. First, schools screen lawyers *ex ante* via admissions applications. Later, schools screen *ex post* in deciding whether or not to certify each student to the state bar. In many jurisdictions, the law school certification decision is required by law. *See* Doe v. Bd. of Trustees for Univ. of Arkansas, 2023 WL 8604171, at *2 (W.D. Ark. 2023) ("The [University of Arkansas School of Law] is required to certify to the relevant state bar whether students who apply to take the bar exam have the character and fitness to practice law, including mental and emotional stability. Tiffany Murphy, the Law School's Associate Dean of Academic Affairs, has commented that '[c]ertifying individuals who are not mentally and emotionally stable to the bar would do a great disservice to the public that the School of Law serves. An attorney's mental and emotional instability could manifest itself in a myriad of ways that would be detrimental to their client's representation and to the public.' Accordingly, she says that '[c]ertification decisions are among the most important decisions that a law school can make[.]'") (internal quotations and citations omitted).

38 *See generally* Mary Lynn Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, AM. BAR ASS'N (Dec. 1, 2013), https://www.americanbar.org/groups/law_students/resources/student-lawyer/bar-admissions-and-exam/bar-hurdle-character-fitness-requirement/?login.

39 *See, e.g.*, *Factors and Conduct*, STATE BAR OF CALIF., https://www.calbar.ca.gov/Admissions/Moral-Character/Factors-and-Conduct (last visited Aug. 23, 2024).

40 Dunnewold, *supra* note 38; *e.g.*, VT. SUP. CT., OFF. STATE CT. ADM'R., BD. BAR EXAM'RS, RULES OF ADMISSION TO THE BAR OF THE VERMONT SUPREME COURT § 5(c) ("An Applicant has the burden of establishing that the Applicant possesses good moral character and fitness warranting the Applicant's admission to the bar."); WIS. SUP. CT. R. 40.07 ("The burden of proof shall be on the applicant to establish qualifications . . . . Refusal of an applicant to furnish available information or to answer questions relating to the applicant's qualifications shall be deemed a sufficient basis for denial of the certification for admission.").

41 Rhode, *supra* note 22, at 494-503 (describing practices in England, the English colonies, and the early American states probing, albeit loosely and often arbitrarily, the morality of attorneys).

42 *Id.* at 499-501; *see also* Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character & Fitness Requirements*, 2014 BYU L. REV. 775, 781-82 (2014).

43 Rhode, *supra* note 22, at 500-02.

In the ensuing decades, as scholar Deborah Rhode put it, moral character screening "became increasingly systematic, and definitions of virtue shifted with the national mood."[44] By the mid-1960s, the National Conference of Bar Examiners (NCBE) included questions regarding treatment for alcoholism and drug abuse, and hospitalizations for mental illness, in their handbook of guidance for bar examiners.[45] The NCBE's influence, in part, fostered the rise of mental health questions in the 1970s, when a growing number of states followed the NCBE to require applicants to disclose their mental health status and history.[46]

By the mid-1990s, about three-quarters of states asked some question about outpatient mental health treatment.[47] States offered numerous justifications for such questions: By asking about history of substance abuse or mental health issues, the argument went, the bar prevented bad actors from joining the profession and protected the public from harmful lawyering.[48] As a Florida bar examiner wrote in 1992, "mental illness in a practicing attorney can lead to extremely adverse consequences for the unsuspecting public."[49] Or, as another bar leader has explained: "If the scenario were shifted from the licensing of lawyers to some other line of work, such as first-grade teachers, it is difficult to imagine that anyone seriously would argue that the current mental health of applicants should be placed out of bounds."[50]

But in 1994, spurred by growing criticism (including from disability rights advocates), the ABA passed a resolution recommending that inquiries concerning mental health be narrowly tailored and sensitive to applicants' privacy concerns.[51] The NCBE, in turn, eliminated all questions that requested information regarding applicants' prior health counseling and hospitalizations.[52] Instead, in 1996, the NCBE added a question asking if applicants had, within the previous five years, been "diagnosed with or . . . treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder."[53] It also asked whether the applicant had any condition that "currently affects, or if untreated could affect" their "ability to practice law in a competent and professional manner."[54]

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44 *Id.* at 502.

45 Bauer, *supra* note 22, at 103 n.29.

46 Levin, *supra* note 42; Bauer, *supra* note 22, at 103 & n.29.

47 Bauer, *supra* note 22, 96 n.5.

48 *See* AM. BAR ASS'N COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992); NAT'L TASK FORCE ON LAW. WELL-BEING, AM. BAR ASS'N, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 27 (2017).

49 Thomas A. Pobjecky, *Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask*, BAR EXAM'R, Feb. 1989, at 14.

50 Eric Moeser, *Yes: The Public Has a Right to Know About Instability*, ABA J., Oct. 1994, at 36.

51 Bauer, *supra* note 22, at 97.

52 *Id.*

53 *Id.* at 98 & n.10.

54 *Id.*

Yet, while some applauded these efforts, many dismissed them as insufficient half-measures. Critics continued to voice concern over even the watered-down inclusion of mental health questions on moral character applications. The Department of Justice joined the fray in 2014, writing to Louisiana bar leaders that at least some forms of these questions violated the law by screening out applicants on the basis of "stereotypes and assumptions about their disabilities" that were "not necessary to assess the applicants' fitness to practice law."[55] In a settlement, Louisiana agreed to revise its bar examination questions "so that they focus on applicants' conduct or behavior."[56]

Additional reforms followed. In 2015, after years of debate, the ABA House of Delegates passed a resolution urging bar licensers to "eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner."[57] The resolution's accompanying report stated that, instead of focusing on mental health history, bar examiners should focus on "conduct or behavior" that "in a material way" impairs the actual practice of law.[58]

In 2017, the ABA's National Task Force on Lawyer Well-Being went a step further and recommended several reforms, including transparency around admission denials due to mental health and substance abuse, the adoption of conditional admission policies, and dropping "rigid" admission criteria.[59] In 2018, the ABA passed Resolution 105, backing these recommendations.[60] The report accompanying that resolution was blunt. Declaring the legal profession to be at a "crossroads," the ABA declared: "Our current course, one involving widespread disregard for lawyer well-being and its effects, is not sustainable.… Depression, anxiety, chronic stress, burnout, and substance use disorders exceed those of many other professions. We have ignored this state of affairs long enough."[61]

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55 Letter from Jocelyn Samuels, Acting Ass't Att'y Gen., U.S. Dep't Just., C.R. Div., to Hon. Bernette J. Johnson, C.J. La. Sup. Ct. et al. 18 (Feb. 5, 2014). As recounted in that letter, Louisiana asked questions that broadly asked about diagnosis and treatment history (e.g., "Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?") as well as questions that were more targeted to the applicant's ability to practice law (e.g., "Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?"). *Id.* at 5.

56 Press Release, U.S. Dep't of Just., Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities (Aug. 15, 2014).

57 AM. BAR ASS'N, RESOLUTION 102 (2015).

58 *Id.*

59 NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 48, at 27.

60 AM. BAR ASS'N, RESOLUTION 105 (2018).

61 NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 48, at 47.

In 2019, the Conference of Chief Justices added its voice to the chorus. It passed a resolution urging states and bar authorities to drop questions about mental health history, diagnosis, or treatment. As the resolution stated, "questions about mental health history, diagnoses, or treatment are unduly intrusive, may tend to screen out individuals with disabilities, may violate the Americans with Disabilities Act, and are likely to deter individuals from seeking mental health counseling and treatment."[62] The resolution further declared that inquiries into mental health are appropriate only if an applicant's conduct or behavior raises concerns and mental health has been "offered or shown to be an explanation for such conduct or behavior."[63]

Law students and law schools have also spearheaded reform efforts in particular states. In New York, for instance, the removal of some intrusive bar examination questions in early 2020 was supported by letters from 14 of 15 in-state law school deans to the head of the state court system.[64] Students and lawyers involved in New York's reform then joined forces with students at the University of New Hampshire School of Law and helped the New Hampshire students file their own complaints. This joint effort led the Granite State to remove its mental health questions in late 2020.[65]

As a consequence of the official and grassroots movements outlined above—and also fortified by the litigation efforts described in the discussion that follows—many states have recently modified their mental-health-related questions (including the influential NCBE, whose questions are used in some form by many states) or dropped them altogether.[66] Part IV below documents this altered landscape.

Still, today, public interest and scholarly attention continue to follow the issue.[67] By one scholar's count, scholarship related to lawyers' well-being has grown exponentially over the last quarter-century.[68] In the decade between 2011 and 2021, some 282 academic articles covered lawyer welfare, a seven-fold increase from 2000 to 2010.[69]

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62 Conf. of Chief Justices & Conf. of State Ct. Admin'rs, Resolution 5 Reaffirming the Commitment to Meaningful Access to Justice for All (2019).

63 *Id.*

64 Brendan Kennedy, *New York State Bar Association Succeeds in Getting Mental Health Question Removed from NY Bar Application*, NYSBA (Feb. 26, 2020).

65 Press Release, N.H. Jud. Branch, New Hampshire Removes Questions on Mental Health Conditions from Bar Admissions Applications (June 19, 2020); Kayla Rivas, *New Hampshire Removes Mental Health Questions from Bar Application*, Fox News (June 23, 2020); Mental Health All. at Univ. N.H. Franklin Pierce Sch. of L. (@mha_unhlaw), Twitter (June 20, 2020, 9:52 AM), https://twitter.com/mha_unhlaw/status/1274384750506098688?s=20&t=0mGzVpYRt5SW9qUuIgn5EQ.

66 David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 Pro. Law. 3, 9-10 (2020); *e.g.*, N.Y. State Bar Ass'n, Working Grp. on Att'y Mental Health, The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application 3 (2019) (concluding that "questions related to mental disability should be eliminated from the bar application").

67 *See, e.g.*, *The Character and Fitness Evaluation to Practice Law Is Discriminatory, Advocates Say*, NPR (June 2, 2023).

68 Colin M. Black, *The Rise and Fall of the Mental Health Inquiry for Bar Admission*, 50 Cap. U. L. Rev. 537, 566 (2022).

69 *Id.*

III. Criticisms of Bar Exam Mental Health Screening

As a barrier to bar admission, mental health questions have long been a lightning rod for criticism and controversy. Below, we lump these arguments into four broad categories: (A) legal arguments that some or all mental health questions are unlawful, (B) ethical arguments that mental health questions undermine the norms and values of the legal profession, (C) empirical arguments that any asserted link between inquiries into applicants' mental health and downstream consumer harm is inadequately supported, and (D) practical arguments that mental health questions inflict too high a cost to justify their continued use.

A. LEGAL ARGUMENTS

The Americans with Disabilities Act. Disability rights advocates have long argued that mental health questions amount to unlawful discrimination on the basis of disability.[70] The Americans with Disabilities Act of 1990 (ADA) defines "disability" to include a "mental impairment" that "substantially limits one or more of the major life activities," or a "record of such impairment," or "being regarded as having such an impairment."[71] ADA regulations state that major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each "substantially limits brain function."[72] Other conditions, such as drug addiction and anxiety, may also qualify.[73]

Under federal law, the ADA permits evaluations of an applicant's disability only if the evaluation criteria can be shown to be "necessary for the provision of the service, program, or activity."[74] Disability advocates have long argued that mental health inquiries are not necessary to practice law or to protect the public.[75] For these advocates, focusing on the existence of a diagnosis is divorced from any showing that the diagnosed condition impacts an individual's ability to provide legal services. As Professor Alyssa Dragnich puts it, "[g]eneral classifications by diagnosis are wholly ineffective at predicting if someone might be an unfit attorney in the future."[76] Thus, asking only whether an applicant has a diagnosis, in many experts' view, violates the ADA.[77]

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70 *See generally* Bauer, *supra* note 22, at 98, 129-37; Dragnich, *supra* note 22, at 678; John D. McKenna, *Is the Mental Health History of an Applicant a Legitimate Concern of State Professional Licensing Boards? The Americans with Disabilities Act vs. State Professional Licensing Boards*, 12 HOFSTRA LAB. L.J. 335, 344 (1995).

71 42 U.S.C. § 12102(2).

72 28 C.F.R. § 35.108.

73 *Id.*; *see also Anxiety Disorder*, JAN, https://askjan.org/disabilities/Anxiety-Disorder.cfm (last visited Aug. 9, 2024).

74 28 C.F.R. § 35.130.

75 *E.g.*, Wielobob, *supra* note 22, at 14.

76 *See, e.g.*, Dragnich, *supra* note 22, at 706; Bauer, *supra* note 22, at 129-37.

77 *Id.*

The federal government has given force to some of these arguments. As previously mentioned, the U.S. Department of Justice (DOJ) launched an investigation into Louisiana's bar admissions practices in 2011, after the Bazelon Center for Mental Health Law filed a complaint under Title II of the ADA alleging discrimination against a bar applicant due to a mental health diagnosis.[78] The DOJ concluded in 2014 that several of Louisiana's bar admissions practices—including character-and-fitness questions related to mental health—violated the ADA by burdening individuals with disabilities "based on stereotypes and assumptions about their disabilities" in a way "not necessary to assess the applicants' fitness to practice law."[79] In a victory for critics of the questions, DOJ announced a consent decree with the Louisiana Supreme Court eliminating questions about diagnosis and treatment that "did not effectively predict future misconduct as an attorney."[80] The decree, which resulted from a multi-year investigation into Louisiana bar admissions policy, urged states to "safeguard the administration of justice" by asking questions related to the conduct or behavior of applicants, as opposed to questions that focused solely on whether the applicant had a mental health diagnosis.[81]

Even before the DOJ's Louisiana investigation, plaintiffs filed lawsuits challenging the inclusion of mental health questions on moral character applications.[82] In some of those cases (many of which were filed in the 1990s), courts found questions asking only whether an individual had received a particular diagnosis to be overly broad and to violate the ADA.[83] But challenges to questions about an attorney's "conduct" or "abilities" in light of a mental illness—challenges sometimes brought in the same suit challenging questions regarding specific diagnoses—were met with less success.[84] In *ACLU of Indiana*, for instance, the court considered whether bar examiners could ask: "Do you have any condition or impairment (including, but

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78 *See* Letter from Jocelyn Samuels, *supra* note 55, at 2-3; *Current Litigation: Louisiana Bar Conditional Admissions,* BAZELON CTR. MENTAL HEALTH L., https://www.bazelon.org/louisiana-bar-conditional-admissions/ (last visited Aug. 23, 2024).

79 *Id.* at 18. The DOJ's investigation zeroed in on four questions asked in several states, including Louisiana. Question 25 asked: "Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?" Question 26: "Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?" A follow-up question asked whether "the limitations caused by your mental health condition . . . are reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?" Question 27 then asked: "Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?" *Id.* at 5.

80 Press Release, U.S. Dep't Just., Department of Justice Reaches Agreement with the Louisiana Supreme Court to Protect Bar Candidates with Disabilities (Aug. 15, 2014).

81 LA. SUP. CT., SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE LOUISIANA SUPREME COURT UNDER THE AMERICANS WITH DISABILITIES ACT ¶¶ 8, 13 (2014), *available at* https://archive.ada.gov/louisiana-supreme-court_sa.htm.

82 *Doe*, 482 F. Supp. 3d at 584.

83 *See, e.g.*, *In re* Application of Underwood, 1993 WL 649283 (Me. 1993); Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 431 (E.D. Va. 1995); *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996). *But see* O'Brien v. Va. Bd. of Bar Exam'rs, 1998 WL 391019 (E.D. Va. 1998) (finding that questions asking about specific diagnoses did not violate the ADA).

84 *See, e.g.*, ACLU of Ind. v. Ind. State Bd. of Law Exam'rs, 2011 WL 4387470, at *1 (S.D. Ind. 2011) (finding that questions requiring information about "any" disorders violated the ADA, but that questions that asked about the impact of a disability on the applicant's ability to practice law were permissible); *In re Petition & Questionnaire for Admission to the R.I. Bar*, 683 A.2d at 1336 (allowing bar examiners to ask "[a]re you currently suffering from any disorder that impairs your judgment or that would otherwise adversely affect your ability to practice law?").

not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?"[85] The court found that question complied with the ADA, commenting that such questions were "permissible under the ADA . . . because [they] appropriately bear on the applicant's *current* ability to practice law."[86]

Additional challenges to mental health questions have failed on other grounds. Courts have, for instance, upheld mental screening questions on the basis that bar applicants do not have a constitutional right to gain admission to the bar or to practice law.[87] Courts have also rebuffed challengers' ADA claims, citing the fact that federal regulations implementing the ADA permit an exception of "necessity."[88] As one federal judge in Texas put it: "The rigorous application procedure, including investigating whether an applicant has been diagnosed or treated for certain serious mental illnesses, is indeed necessary to ensure that Texas' lawyers are capable, morally and mentally, to provide these important services."[89]

Privacy Concerns. Many have also argued that the compelled disclosure of mental health status or treatment amounts to a privacy violation, since these applicants are forced to reveal personal and sensitive medical information and that Congress tried to prohibit such privacy intrusions in passing the ADA.[90] The U.S. Supreme Court and several lower courts have long recognized an interest in nondisclosure of private medical information.[91] Indeed, as early as 1994, the ABA has recognized that questions related to mental health may hamper "the privacy interests of applicants."[92] Some have also argued that requests to produce documents and explanations relevant to an applicant's health history or status compel the breach of doctor-patient confidentiality in violation of federal law.[93]

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85 *ACLU of Ind.*, 2001 WL 4387470 at *10.

86 *Id.*

87 Jennifer McPherson Hughes, *Suffering in Silence: Questions Regarding an Applicant's Mental Health on Bar Applications and Their Effect on Law Students Needing Treatment*, 28 J. LEGAL PRO. 187, 193 (2004) (citing *Fla. Bd of Exam'rs Re: Applicant*, 443 So. 2d 71, 74 (Fla. 1984). *In re Petition and Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1333.

88 28 C.F.R. § 35.130 (prohibiting discriminatory criteria "unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered"); *see* Brewer v. Wis. Bd. of Bar Exam'rs, 2006 WL 3469598, at *11-12 (E.D. Wis. 2006) (discussing the possibility of a necessity exception).

89 Applicants v. Tex. State Bd. of L. Exam'rs, 1994 WL 923404, at *8 (W.D. Tex. 1994).

90 Bauer, *supra* note 22, at 130, 132 & n.115.

91 *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 600 (1977); F.E.R. v. Valdez, 58 F.3d 1530, 1535 (10th Cir. 1995).

92 AM. BAR ASS'N, RESOLUTION 110 (Aug. 1994).

93 Stanley S. Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635, 676 & n.182 (1997) (noting that federal law protects patient-doctor confidentiality, and exceptions are "very narrowly drawn").

B. ETHICAL ARGUMENTS

Second, critics have long attacked these questions on ethics grounds, arguing that mental health questions shame and embarrass applicants and even tempt some to lie. Would-be lawyers must fill out long forms attesting to their medical history and, if certain diagnoses need to be disclosed or bar examiners have questions, an applicant may be forced to undergo a psychological examination, submit medical records, or attend a hearing before examiners in which they will be grilled with questions.[94]

Many applicants believe the questions label their condition as a stain on their abilities and reputation, marking them "unfit" for the profession.[95] In so doing, critics charge, these questions impair professional norms and societal values by exacerbating stigmas against those presently or previously suffering from mental health problems.

Questions about mental health may also lead to delays on the application decision, inhibiting the would-be attorney's career and possibly labeling them with a scarlet letter.[96] Likewise, critics worry that the questions lead some applicants to lie about their health. There is some evidence for this claim: Limited data from a number of states suggest a suspiciously small number of applicants disclose mental health problems.[97] Bar admission is high-stakes, and applicants fear both outright rejection and the rigmarole of a painful, confusing, and drawn-out process involving people and investigations beyond their control. Moreover, there is at least anecdotal evidence that prospective law students and applicants are *encouraged* not to disclose, or even to lie, by attorneys.[98] As Professor Dragnich has argued, honesty is surely "a more important characteristic for an attorney than the presence or absence of a particular mental health diagnosis."[99]

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94 *See, e.g.*, *In re* Petition & Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333-34 (R.I. 1996).

95 *See* Shira Feder, *Law Students Say They Avoid Therapy Because They Worry It Could Affect Their Job Prospects*, BUS. INSIDER (Feb. 25, 2020) ("[A] report also found the questions ineffective in identifying unfit candidates, and an invasion of people's privacy, as well as a way of stigmatizing people with disabilities based on stereotypes."); Cipriano, *supra* note 21 ("Tying mental health de facto to fitness to practice law reflects stigmatizing beliefs around mental health issues and their relationship to competence. . . . Mental health stigma is wrapped in a cloak of suggestion that mental health issues reflect weakness, laziness, or even worse, moral or character failings, or a lack of competence. . . . Bar application character and fitness questions both reflect stigma as well as perpetuate it. By stigmatizing and discouraging early help-seeking, bar application questions related to mental health can create a barrier to treatment and set up law students and lawyers for bigger mental health issues down the road.").

96 *See* Organ et al., *supra* note 14, at 8 (sharing anecdotal evidence from conversations with bar examiners who maintain that the bar denies few applicants admission on the basis of mental health issues).

97 *Clark*, 880 F. Supp. at 437 (noting that less than 1% of respondents affirmatively disclosed mental health history on the Virginia bar exam); *Tex. State Bd. L. Exam'rs*, 1994 WL 923404, at *4 (finding just 30 applicants between 1987 and 1994 disclosed mental health issues in Texas); Barbara Hagenbaugh, *Saying No to Mental Health Inquiries*, HUM. RTS., Summer 1995, at 30 (discussing a pair of studies finding that about a quarter of Connecticut law students *should* answer "yes" to mental health bar questions, but only about 4% of applicants in Connecticut do so).

98 *See* Organ et al., *supra* note 14, at 8 ("[M]any law students are sensitized, even before getting to law school, to think carefully about disclosing information and to be wary of how disclosure might be perceived by law schools or by state boards of law examiners."). There is likely a discrepancy here between self-reported surveys (in which lawyers or law students might over-report mental health challenges), *see, e.g.*, *supra* note 6, and self-reporting on bar questionnaires (in which applicants might be under-reporting mental health challenges).

99 Dragnich, *supra* note 22, at 685.

C. EMPIRICAL ARGUMENTS

Third, critics raise objections on empirical grounds, questioning the existence of any empirical link between mental health problems and attorney misconduct or client harm. As Professor Dragnich has summarized, research and data suggest "there is no connection between asking about mental health on a bar application and future rates of attorney misconduct."[100] Critics insist that predicting which applicants might commit misconduct based on their health history is an "impossible task" that lacks a basis in sound empirical evidence.[101] One study found, for example, that individuals who self-reported a mental health diagnosis or treatment were "still overwhelmingly unlikely to be disciplined: The baseline probability of discipline for someone with no reported mental health problems is only about 2.5%, so having such problems only raises the probability of discipline to about 6%."[102] As stated by DOJ in its investigation of Louisiana bar admissions, "a history of mental health diagnosis or treatment does not provide an accurate basis for predicting future misconduct."[103]

Indeed, even if there is a link between attorney mental health and client welfare, the link is too flimsy to justify the inquiry into an applicant's sensitive health information. As put by Professor Frederick Vars, "It is of course true that a mental health crisis can lead to an ethical violation. But so can one thousand other causes. The mental health cases may be more salient, but they do not occur at a higher rate."[104] Moreover, even if an individual discloses a mental health issue, some argue that bar examiners are ill-prepared to evaluate this information. Bar examiners are not trained in psychiatry or medicine. To the extent mental health evaluations require medical judgment, evaluations require a degree of medical expertise that bar examiners lack.[105]

There are some studies that purport to find a link between attorney mental health and client welfare, but critics question the reliability of that evidence. For instance, in 1991, the ABA Commission on Legal Assistance Programs notoriously found that between 40-75% of all disciplinary complaints result from

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100 *Id.* at 678; *see also* Bauer, *supra* note 22, at 141 ("[T]here is simply no empirical evidence that applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney.").

101 *See* Dragnich, *supra* note 22, at 717; *In re* Petition & Questionnaire for Admission to Rhode Island Bar, 683 A.2d 1333, 1336 (R.I. 1996) ("Research has failed to establish that a history of previous psychiatric treatment can be correlated with an individual's capacity to function effectively in the workplace. . . . [T]here is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action by the bar or by any other regulatory body in comparison with those who have not had such treatment."); *see also* Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 ABA J. 815, 819 (1972) ("[A]ny attempt to predict attorney misconduct, whether among first-year law students or law school applicants, is necessarily doomed to failure.").

102 Leslie C. Levin, *Rethinking the Character and Fitness Inquiry*, 22 PRO. LAW. 19, 22 (2014).

103 Letter from Jocelyn Samuels, *supra* note 55, at 23.

104 Frederick E. Vars, *Dangerous and Discriminatory: Mental Health Questions on Bar Applications*, JURIST (Sept. 9, 2022).

105 In 1996, these arguments found purchase in Rhode Island. Recognizing the lack of empirical evidence connecting mental health treatment to later bar disciplinary action, the Rhode Island Supreme Court put the burden on "those who propose to ask the questions" to show that applicants with mental health or substance treatment histories "*actually* pose an increased risk to the public." *In re Petition & Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1336. Today, Rhode Island uses the standard NCBE questions pertaining to mental health, which ask about conduct or behavior and "any condition or impairment" that affects or "that could call into question" the applicant's ability to practice law "in a competent, ethical, and professional manner." *See* Appendix A.

alcohol abuse or mental illness.[106] But, as many have noted, that arresting statistic came from a report without a published methodology.[107]

D. HARM-BASED ARGUMENTS

Finally, many insist that mental health inquiries inflict tangible harm. Most obviously, the inquiry may deter some folks who need help from seeking it. Since the 1990s, advocates, law school leaders, and professionals themselves have argued that law students who need help do not seek it when the bar penalizes disclosures of help-seeking.[108] Courts, too, have stating that tying bar admission to answering questions about mental health "causes many law students not to seek necessary counseling."[109] The Department of Justice acknowledged this potential harm in its communications with Louisiana officials, noting that questions about mental health diagnoses or treatment "are likely to deter applicants from seeking counseling and treatment for mental health concerns."[110] And ample anecdotal evidence suggests that mental health questions can be invasive and embarrassing for an applicant.[111]

Some empirical evidence supports these claims. The 2014 survey of law students, which relied on self-reported data, found that 42% of respondents thought they needed help for emotional or mental health problems in the past year, but only half of those who thought they needed help actually received help.[112] The law students also identified their own reasons for why they did not receive help. According to the

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106 AM. BAR ASS'N, COMM'N ON LAWYER ASSISTANCE PROGRAMS, AN OVERVIEW OF LAWYER ASSISTANCE PROGRAMS IN THE UNITED STATES 1 (1991); *see also* Amiram Elwork & G. Andrew H. Benjamin, *Lawyers in Distress*, 23 J. PSYCHIATRY & L. 205, 216 (1995) (citing the 1991 ABA report for the notion that "60% of the recently taken disciplinary actions against lawyers in California and Oregon involved chemical dependency or stress-related mental illness" and that because "many impaired attorneys are either not identified by their clients or colleagues or formally charged with any infractions, the actual magnitude of the problem is larger than measured"); NAT'L TASK FORCE ON LAW. WELL-BEING, *supra* note 48, at 8 (citing Douglas B. Marlowe, *Alcoholism: Symptoms, Causes & Treatments*, *in* SUBSTANCE ABUSE, STRESS, MENTAL HEALTH AND THE LEGAL PROFESSION 2 (Marjorie A. Silver ed., 2004)) (repeating the 40-70% estimate but failing to cite a source or explain a methodology); *cf.* Martha Middleton, *Substance Abuse and Mental Health Issues Are a Growing Problem for the Legal Profession, Say Experts*, ABA J. (Dec. 1, 2015) (citing the director of the Hazelden Betty Ford Foundation's legal professionals program for the idea that substance abuse, rather than substance abuse and separate mental health issues, "plays a role in 40 percent to 70 percent of all disciplinary proceedings and malpractice actions against lawyers").

107 *See* Bauer, *supra* note 22, at 177 n.289; Nicholas D. Lawson, *"To Be a Good Lawyer, One Has to Be a Healthy Lawyer": Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 82 (2021).

108 *See* Hagenbaugh, *supra* note 97, at 14-15, 30.

109 *In re* Petition of Frickey, 515 N.W.2d 741 (Minn. 1994); *In re Petition & Questionnaire for Admission to R.I. Bar*, 683 A.2d at 1336 (stating that mental health questions discourage help-seeking); *In re* Bar Application of Stevens, 519 P.3d 208, 223 (Wash. 2022) ("[F]alsely equating [an applicant's] mental health history with his current moral character and fitness to practice law . . . strongly discourages current and future attorneys, and judges from disclosing and seeking treatment for mental health issues, putting them at increased risk for harmful behaviors that are known to plague the legal profession. . . .").

110 Letter from Jocelyn Samuels, *supra* note 55, at 23-24.

111 Bauer, *supra* note 22, at 114 (reporting a bar applicant who was questioned and "expected that these interviews would be conducted in an extremely discreet and confidential manner. I was shocked to see that this would not be the case"); *id.* at 210 ("The inherently stigmatizing disclosure of mental illness or addiction is made more humiliating when the details of personal relationships and traumas are subjected to the gaze of the lawyers and judges of an admissions board (and those beyond) who may get access to the information."); *Doe*, 482 F. Supp. 3d at 576-79 (detailing the indignities of "the Bar Bureaucracy" and what the court called its "medieval approach to mental health that is as cruel as it is counterproductive").

112 Organ et al., *supra* note 14, at 140.

survey, which received a roughly 30% response from students at 15 law schools, those discouraged from receiving treatment for alcohol and drugs said their *number-one reason* for not doing so was potential threat to bar admission (63%).[113] For those discouraged from seeking treatment for mental health, students again identified threat to bar admission as a key deterrent (45%), as well as potential threat to job or academic status (48%), social stigma (47%), and financial reasons (47%).[114]

Later research paints a similar portrait. The most recent national study of law students, conducted in 2021 by the same team of researchers as the 2014 study, used a modified version of the same survey instrument used in 2014.[115] The 2021 study surveyed 5,400 law students at 39 law schools and found that 44% of law student respondents reported that the potential threat to bar admission discouraged them from seeking help with a mental health issue, while 60% reported discouragement with respect to substance abuse.[116] Assessing this evidence, Bree Buchanan, director of the Texas State Bar's Lawyer Assistance Program and a co-chair of the National Task Force on Lawyer Well-Being, explained: Law students do not ask for help because "they are terrified of somebody finding out that they have a problem, which will result in their not being admitted to the bar or not being able to get a job."[117] As the authors of the 2021 survey of law students concluded, the data are "very worrisome."[118]

Studies of law's sister profession, medicine, offer additional support for the notion that mental health screening in licensure inquiries can have a chilling effect.[119] One 2017 study of physicians—who are subject to similar mental health licensure screening—found that nearly 40% of respondents indicated that they would be reluctant to seek formal medical care for treatment of a mental health condition because of concerns about repercussions to their medical licensure.[120] A 2016 study of female physicians bore similar results: 44% of respondents who felt they met the criteria for a mental health disorder stated that they did not seek treatment because they did not want to report their illness to a medical board or hospital.[121]

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113 *Id.* at 124, 141. Other common culprits included potential threat to job or academic status (62%), social stigma (43%), concerns about privacy (43%), and financial reasons (41%).

114 *Id.*

115 David Jaffe, Katherine M. Bender & Jerome Organ, "*It Is Okay to Not Be Okay": The 2021 Survey of Law Student Well-Being*, 60 U. LOUISVILLE L. REV. 439, 449-51 (2022). The total response rate was almost 23%. *Id.* at 451.

116 *Id.* at 468. The authors of this study once again acknowledged inherent shortcomings in self-reported data. On the one hand, students with substance or mental health issues might have been disproportionately inclined to respond to the survey "given that it inquired about topics that might have been of particular interest to such respondents" (and possibly skewing the data higher). *Id.* On the other hand, students with these issues might have been disproportionately inclined *not* to respond, since the survey "asked several intrusive questions, some of which involved illegal conduct" (and possibly skewing the data lower). *Id.*

117 AM BAR ASS'N, *New Study on Lawyer Well-Being Reveals Serious Concerns for Legal Profession*, YOURABA (Dec. 2017).

118 *See* Organ et al., *supra* note 33, at 14.

119 Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977) (dubbing medicine the "sister profession" of law).

120 Liselotte N. Dyrbye et al., *Medical Licensure Questions and Physician Reluctance to Seek Care for Mental Health Conditions*, 92 MAYO CLINIC PROC. 1486 (2017).

121 Katherine J. Gold, Louise B. Andrew, Edward B. Goldman & Thomas L. Schwenk, *"I Would Never Want to Have a Mental Health Diagnosis on My Record": A Survey of Female Physicians on Mental Health Diagnosis, Treatment, and Reporting*, 43 GEN. HOSP. PSYCHIATRY 51, 53-54 (2016).

What can be gleaned from various surveys is the following: Stigma and fear of consequences for licensure discourage at least some (and perhaps significant) mental health treatment.

IV. Current Bar Screening Practices

To evaluate current bar screening practices, we turn first to the sample questionnaire promulgated by the NCBE, and then survey individual states' questioning practices.

A. CURRENT NCBE PRACTICES

Today, many states continue to use—or at least draw from—the NCBE's exemplar moral character questionnaire.[122] This moral character questionnaire includes three questions that implicate an applicant's mental health or substance use.[123]

- **QUESTION 29 ("Conduct or Behavior")** states the following:
  Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

- **QUESTION 30 ("Self-Evaluation of Condition")** states the following:
  The purpose of this inquiry is to allow jurisdictions to determine the current fitness of an applicant to practice law. The mere fact of treatment, monitoring, or participation in a support group is not, in itself, a basis on which admission is denied; jurisdictions' bar admission agencies routinely certify for admission individuals who demonstrate personal responsibility and maturity in dealing with fitness issues. The National Conference of Bar Examiners encourages applicants who may benefit from assistance to seek it.

  Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

  Note: In this context, "currently" means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.

If applicants answer "Yes," they are then asked if "the limitations caused by your condition or impairment

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122 Bauer, *supra* note 22, at 97 & n.9 (commenting that many states "look to the NCBE questionnaire as a model").

123 The following questions are excerpted from the NCBE's sample character and fitness application. Judging by the text in the URL (https://www.ncbex.org/sites/default/files/2023-02/NCBE-Character-and-Fitness-Sample-Application-4.pdf), the questionnaire appears to have been adopted in February 2023. Nat'l Conf. Bar Exam'rs, NCBE Character and Fitness Questionnaire (last visited Aug. 23, 2024).

reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?" Applicants are also asked to "[d]escribe the condition," "[d]escribe any treatment, or any program that includes monitoring or support," and to provide name and contract information for their attending physician, counselor, hospital, or institution.

- **QUESTION 31 ("Asserted as Defense")** states the following:

  The purpose of this inquiry is to allow jurisdictions to determine the current fitness of an applicant to practice law. The mere fact of treatment, monitoring, or participation in a support group is not, in itself, a basis on which admission is denied; jurisdictions' bar admission agencies routinely certify for admission individuals who demonstrate personal responsibility and maturity in dealing with fitness issues. The National Conference of Bar Examiners encourages applicants who may benefit from assistance to seek it.

  Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?

If an applicant answers "Yes," they are asked to provide the name and contact information for the entity before which the issue was raised, the nature of the proceedings, the date of the proceedings, the proceedings' disposition, and an explanation.

B. CURRENT STATE PRACTICES

States, of course, are free to adapt or disregard the NCBE's sample questions. Accordingly, in order to get an accurate snapshot of how states currently inquire (or resist inquiring) into applicants' mental health and substance abuse, we conducted a detailed 50-state survey of individual states' questioning practices. In so doing, we reached out to states to obtain a sample application and supplemented this outreach by searching online for publicly available applications. We also collected some states' applications that were made available through the NCBE's centralized bar application portal. Ultimately, through these efforts, we collected bar application questionnaires from all 50 states and the District of Columbia.[124]

This original research was needed because few sources purport to compile states' mental health-related questions, and our research revealed that existing compilations have various gaps and deficiencies. Most

124 Those questionnaires are available at the hyperlinks provided in Appendix A. Note that the entries in Appendix A are limited to stand-alone questions regarding mental health or substance use. Follow-up questions are not included although these questions can be accessed at the hyperlinked questionnaires.

prominently, the ABA has created a centralized website listing the questions asked by states.[125] However, in our own outreach to states, we found numerous discrepancies between the questions listed on the ABA website and what the states are currently asking on their forms, suggesting that the ABA's compilation is outdated and thus inaccurate.[126]

A word of caution, however: While, as noted above, we took pains to ensure the accuracy of the information we present here, states continually update their bar applications, including questions related to mental health—and they sometimes change application information with little fanfare. It is important to exercise care in reading the questions and analyses relayed in this White Paper, as we cannot verify that the questionnaires we have compiled are, or will remain, the most current version offered by a given state.

1. Question Types

As illustrated in Appendix A, current questions about mental health vary, and many states ask more than one question that implicates a prospective attorney's mental health or substance use issues. Most states adopt some version of the NCBE's questions 29-31, which, as previewed above, we refer to as (1) "Conduct or Behavior" questions; (2) "Self-Evaluation of Condition" questions; and (3) "Asserted as a Defense" questions. In addition, a number of states continue to ask whether applicants suffer from a specific mental health disorder or from substance abuse issues.[127]

Importantly, too, many states ask some combination of Conduct or Behavior, Self-Evaluation of Condition, and Asserted as Defense questions. New York asks both an Asserted as a Defense question and a Self-Evaluation of Condition question. Indeed, numerous states, including Alabama, Georgia, Michigan, and Montana (among others) have adopted all three of the NCBE's questions in their own state-specific questionnaires.

Conduct or Behavior. In many states, bar examiners ask about conduct or behavior without express reference to the applicant's mental health. The most common formulation of this question is: "Within the

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125 *See Mental Health Character & Fitness Questions for Bar Admission*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disability-rights/resources/character-and-fitness-mh (last visited Aug. 28, 2024).

126 A few scholars have conducted more limited studies of several states' questioning practices. *See, e.g.*, Lydia Nagelhout, Note, *Evaluating Conduct and Behavior Questions as Replacements for Specific Mental Health Inquiries on Bar Applications: Assessing the ADA Compliance of the New Questions*, 35 GEO. J. LEGAL ETHICS 973, 975-78 (2023) (gathering questionnaires from several states). Additionally, we found a 2019 compilation of questionnaires compiled by The Bazelon Center for Mental Health Law, but our research revealed that numerous states had updated their questionnaires in the ensuing years. BAZELON CTR. FOR MENTAL HEALTH L., BAR ADMISSIONS QUESTIONS PERTAINING TO MENTAL HEALTH, SCHOOL/CRIMINAL HISTORY, AND FINANCIAL ISSUES (last updated Feb. 2019), https://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf. We also found a fifty-state survey published by the Institute for Well-Being in Law, but similarly found discrepancies between that compilation and the questionnaires we compiled. INST. FOR WELL-BEING IN L., 50 STATE SURVEY – BAR APPLICATION – MENTAL HEALTH (last updated Dec. 2, 2022), https://lawyerwellbeing.net/wp-content/uploads/2023/01/50-State-Survey-Bar-Application-Mental-Health-Substance-Use-Questions-12.2.2022.pdf.

127 Unless otherwise noted, all excerpts in the following section are excerpted from the questionnaires compiled in Appendix A, which are cited and linked therein.

past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"[128]

Other examples of "Conduct or Behavior" questions include the following:

STATE Rhode Island	**QUESTION** *Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?*
STATE Minnesota	**QUESTION** *In the last two years, have you demonstrated any conduct or behavior that raises concerns, or been advised that your conduct or behavior raises concerns, about your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical, or professional manner?*
STATE Michigan	**QUESTION** *Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?*

Self-Evaluation of Condition. About half the states adopt a version of NCBE Question 30, requiring applicants to self-evaluate whether they live with any "impairment" or "conditions"—often defined to include both mental health and substance abuse issues—that have the potential to impact their practice of law.[129]

Hawaii, for example, uses a version of the standard NCBE question, asking: "Do you currently have any condition(s) that would impair your ability to obey the law, to competently practice law, or to carry out fiduciary duties and ethical responsibilities to clients or as an officer of the court?" Nebraska is similar. It asks: "Do you have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that currently impairs your ability to exercise such responsibilities as being candid and truthful, handling funds, meeting deadlines, or otherwise representing the interest of others?"

Florida asks a more specific question, requiring applicants to identify whether they suffer from specific disorders that could impair their ability to practice law. Specifically, the question asks whether "within

128 Notably, a number of states ask open-ended questions, requesting that applicants provide any additional "information" that may be relevant to their ability to practice law. Arkansas, for instance, asks: "Are there any facts not disclosed by your answers concerning your background, history, experience, or activities which may cause one to question your character, fitness, or ability to practice law?" Because those questions do not specifically implicate an individual's "behavior"—which has a clearer connection to an individual's mental health or substance use—those questions are not included here.

129 *See Jurisdiction Information*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/jurisdictions (last visited Aug. 23, 2024).

the past 5 years," applicants have been "treated for, or experienced a recurrence of, schizophrenia or any other psychotic disorder, a bipolar disorder, or major depressive disorder, that has impaired or could impair your ability to practice law?"[130]

In some instances, like the NCBE, states not only request information about an applicant's mental health, but also request information about whether the applicant has received treatment for the condition. For example, in North Carolina, applicants who answer "Yes" to having a condition or impairment that may affect their ability to practice law must then answer whether "the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program." Applicants then must provide details and a description of the condition, treatment program, and attending medical personnel as well as an authorization to release personal medical records.[131] Georgia expressly flags that applicants "may be asked to contact your treating physician, counselor and/or hospital and request that your records and/or a summary of your treatment be sent to the Office of Bar Admissions" and provides space for a summary of the treatment, the conduct that led to treatment, and symptoms.[132]

The temporal scope of mental health questions also varies. Some states ask whether an applicant "currently" has a condition, disorder, or pattern of suspect conduct. For example, like many states that ask such a question, Kentucky clarifies that "currently" means "recently enough that the condition or diagnosis may have an ongoing impact on your ability to practice law."[133] Others ask whether the applicant has faced such an impairment in the past two to seven years.[134]

Like the NCBE, many states also append clarifying statements to mental health-related questions, encouraging mental health treatment or downplaying the likelihood that mental health problems will lead to bar denial. In Georgia, for instance, a preamble notes that the information is kept confidential and that:

> The vast majority of applicants are certified as fit to practice law; the Board on very rare occasion denies certification to applicants whose current ability to function is significantly impaired in a manner relevant to the practice of law or to applicants

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130 Following the publication of this report, the authors learned that, in late 2024, Florida revised its character and fitness questionnaire to omit this question. In its place, Florida now asks whether applicants have, "been treated for, or had a recurrence of, a substance-related disorder that has impaired or could impair your ability to practice law," and whether they have asserted a "mental health or substance-related condition" as a defense in any proceedings or investigations. A link to the updated questionnaire can be accessed in Appendix A.

131 *Character & Fitness*, BD. L. EXAM'RS OF THE STATE OF N.C., https://www.ncble.org/browseform.action?formId=200&sid=122410001&ssid=347910001&applicationId=1 (last visited Aug. 23, 2024).

132 *Character & Fitness Questionnaire: General Questions*, OFF. BAR ADMISSIONS, SUP. CT. GA., https://www.gabaradmissions.org/browseform.action?formId=1&sid=132103001&ssid=135403001&applicationId=2 (last visited Aug. 23, 2024) (adding that "the Board to Determine Fitness of Bar Applicants is aware of HIPAA requirements").

133 *See* Appendix A (entry for Kentucky).

134 *See id.* (listing Georgia at two years and New York at seven years). Following the NCBE's model questions, many states seek information for the past 5 years. *Id.*

who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the Board's responsibilities. Conversely, the Board does not deny certification to applicants based on their decision to seek treatment or support for a mental health condition. In fact, the Board encourages applicants to seek treatment if needed and believes that an applicant's decision to obtain necessary treatment is indicative of a person who possesses the character and fitness requisite to be a member of the Bar of Georgia.[135]

Other examples of "Self-Evaluation of Condition" questions include the following:

STATE Alabama	**QUESTION** *Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?* **NOTE:** *As used in this question, "currently" means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.*
STATE California	**QUESTION** *Do you have any chemical dependency issue that would currently interfere with your ability to practice law?*
STATE South Dakota	**QUESTION** *Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?* **NOTE:** *In this context, "currently" means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.*

Asserted as a Defense. Still other states inquire about the information indirectly, asking whether the applicant has asserted their mental health or substance abuse issues as a defense in a judicial or administrative proceeding.

Michigan, for instance, asks whether, "within the past 5 years," the applicant has "asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?" Wisconsin, for its part, asks if, within the past five years, the applicant has "ever cited physical or mental illness, or an emotional, nervous or behavioral disorder as an

135 *Character & Fitness Questionnaire: General Questions*, OFF. BAR ADMISSIONS, SUP. CT. GA., https://www.gabaradmissions.org/browseform.action?formId=1&sid=132103001&ssid=132203001&applicationId=1 (last visited Aug. 23, 2024).

explanation for your poor academic or professional performance?"

Other examples of "Asserted as a Defense" questions include the following:

STATE Wisconsin	**QUESTION** *Within the past five years have you ever cited physical or mental illness, or an emotional, nervous or behavioral disorder in the course of any inquiry or investigation, administrative or judicial proceeding, or proposed termination or other disciplinary action as an explanation for your failure to meet a deadline or as a defense, mitigation or explanation of those matters?*
STATE Nebraska	**QUESTION** *Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry or investigation by an educational institution, government agency, professional organization, or licensing authority; in any administrative or judicial proceeding; or in connection with an employment matter or termination procedure?* **If yes:** *Please enter a detailed explanation in the space provided below.*

Specific Disorders/Substance Abuse. Other states are more direct, asking whether applicants have suffered specific mental health or substance abuse issues.

Nevada, for instance, asks "[a]re you now or have you ever been dependent upon, an abuser of, or treated for any condition involving your use of any drug, chemical, narcotic, hypnotic or hallucinatory, or other illegal or controlled substance or alcohol?" Ohio requests that applicants identify whether they have "suffered from, been diagnosed with, or been treated for kleptomania, compulsive gambling, pedophilia, exhibitionism, or voyeurism?"

Other examples of "Specific Disorders/Substance Abuse" questions include the following:

STATE Minnesota	**QUESTION** *Within the past 10 years or since the age of 18, whichever period is shorter, have you been engaged in conduct or behavior that led to the diagnosis of and/or received treatment for pedophilia, exhibitionism, voyeurism, kleptomania, pyromania, or compulsive gambling?*
STATE Pennsylvania	**QUESTION** *Are you currently addicted to, or dependent upon narcotics, intoxicating liquors, or other substances?* **If yes:** *Please provide a separate explanation of the current status of each addiction or dependency and how or if each relates to your ability to practice law.*
STATE Wisconsin	**QUESTION** *Within the past five years have you been treated for a dependency on any drug, including alcohol, or been compelled to submit to an assessment for the same?*

2. Observations

Below, we tally the approaches of the 50 states plus the District of Columbia. As noted, many states ask more than one kind of question, and so this tally exceeds 51. Then, we supply maps which offer a graphic snapshot of the results of our comprehensive survey.

FREQUENCY OF QUESTION TYPE

Conduct or Behavior: 34 States

Asserted as a Defense: 26 States

Self-Evaluation of Condition: 26 States

Specific Disorder/Substance Abuse: 6 States

None: 7 States

FIGURE 1

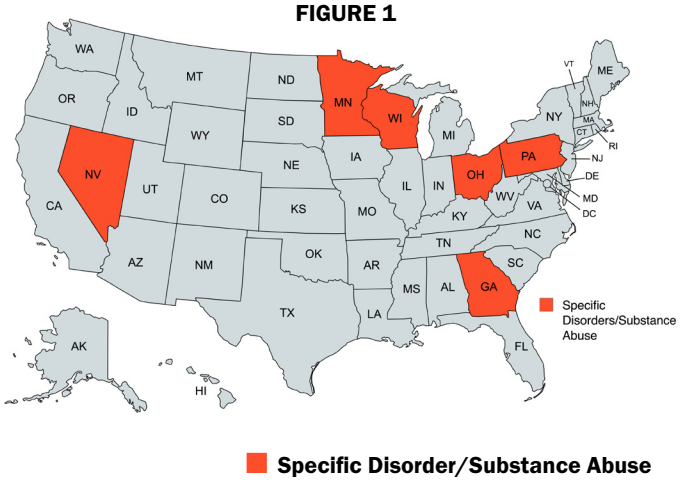

FIGURE 1: States that Ask Specific Disorder/ Substance Abuse Questions

As Table 1 and Figure 1 demonstrate, 6 of the 50 states ask whether an applicant has suffered from specific mental illnesses or has had substance abuse issues. Minnesota and Ohio continue to ask whether applicants have received specific mental health diagnoses or treatment for pedophilia, exhibitionism, voyeurism, kleptomania, pyromania, or compulsive gambling.[136] Georgia, Nevada, Pennsylvania, and Wisconsin, for their part, ask whether applicants are addicted to, or have received treatment for, drug or alcohol addictions.[137] These questions continue to defy advocacy by reformists, including the APA's call for the "removal of remaining questions about diagnosis and treatment history."[138]

Notably, however, there has been a precipitous drop in the number of states asking diagnoses- and treatment-based questions since the mid-1990s, when more than three-quarters of states asked such questions.[139] Indeed, the number of states asking these questions appears to have fallen considerably in only the past *five years*. According to the Bazelon Center, in 2019, 13 states, including the 6 identified above, asked broad, diagnosis-based questions.[140] Since then, 7 states—Florida, Kentucky, Michigan, Missouri, Texas, Utah, and Virginia—appear to have eliminated those intrusive questions in favor of a more targeted inquiry.[141]

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136 *See* Appendix A, entries for Ohio and Minnesota.

137 *See id.*, entries for Georgia, Nevada, Pennsylvania, and Wisconsin.

138 AM. PSYCHIATRIC ASS'N, *supra* note 23.

139 Bauer, *supra* note 22, 96 n.5.

140 BAZELON CTR., *supra* note 126, entries for Florida, Georgia, Kentucky, Michigan, Minnesota, Missouri, Nevada, Ohio, Pennsylvania, Texas, Utah, Virginia, and Wisconsin. Of course, we cannot guarantee the accuracy of the Bazelon Center's compilation. Further, the Bazelon Center included questions regarding legal competency proceedings when coding for mental health or substance abuse questions, while we have not.

141 *Compare id. and* Appendix A entries for Florida, Kentucky, Michigan, Missouri, Oregon, Texas, Utah, and Virginia.

FIGURE 2

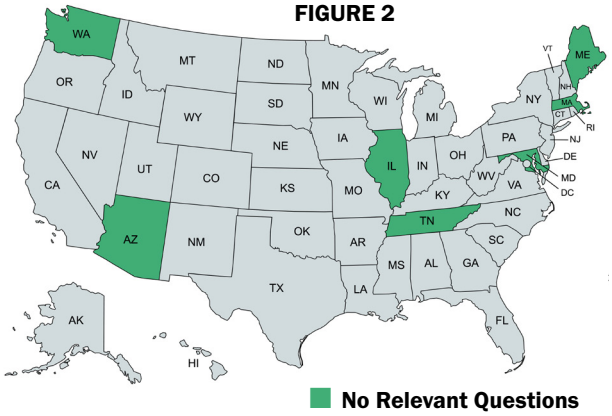


FIGURE 2: States that Refrain from Mental Health Screening

Currently, however, only seven states (Arizona, Illinois, Maine, Maryland, Massachusetts, Tennessee, and Washington) refrain *entirely* from asking questions that implicate an individual's mental health. Here too, the Bazelon Center's 2019 compilation outlines the changing tide. In the past five years, Maine and Tennessee, which previously asked more targeted mental health questions, have joined the other states in this group to drop mental health screening questions altogether.[142]

FIGURE 3

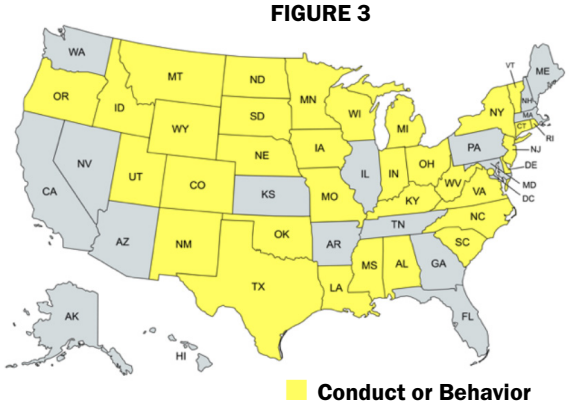
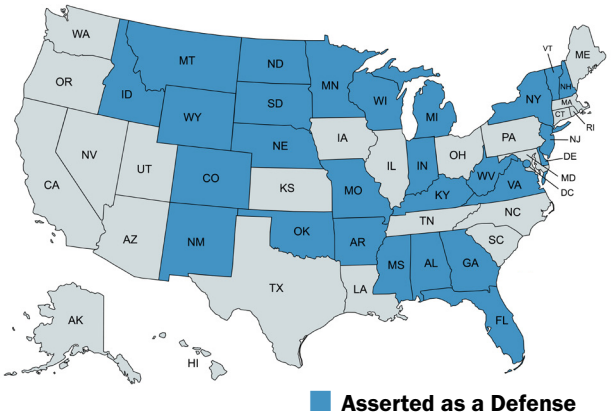
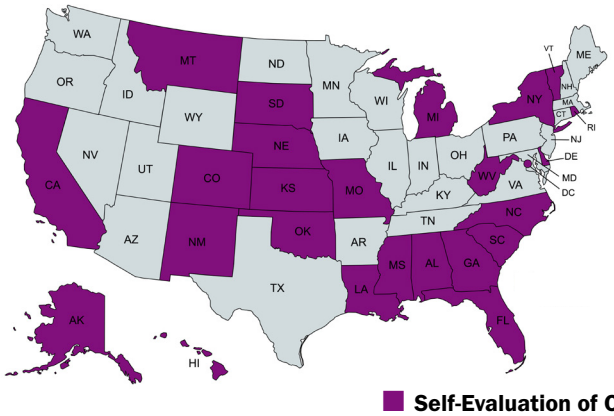


FIGURE 3. States that Ask Targeted Mental Health Questions

Note, however, that the majority of states (34) neither ask specific, diagnoses-based questions, nor have omitted all mental health screening. Instead, they take a middle path, either (a) requiring the applicant to self-identify "impairments," "conditions," or "conduct or behavior" that implicate their ability to practice law; or (b) indirectly requesting information about an applicant's mental health by asking if the applicant has cited their mental health in judicial or administrative proceedings.[143]





142 *Id.*

143 *Id.*

TABLE 2: Changes in States' Questioning Practices: 2019 to 2024

QUESTIONING TYPE	2019	2024	CHANGE
Diagnoses/Treatment-Based Questions	13 States	6 States	**-7 States**
No Screening Questions	5 States	7 States	**+2 States**

As illustrated in Table 2, the last five years have seen ten states reform their mental health screening processes. This change was in large part driven by the seven states that chose to eliminate intrusive diagnoses- and treatment-based questions. Notably, however, none of these states now omit mental health screening altogether; instead, they replaced diagnoses- and treatment-based questions with more targeted inquiries.[144] In addition, two other states (Maine and Tennessee) omitted mental health screening entirely.

Thus, as it stands, the vast majority of states conduct targeted mental health screening. These states, it appears, have aligned their practices with the ABA's 2015 resolution recommending that mental health screening be narrowly tailored to "conduct or behavior" that "in a material way" impairs the actual practice of law.[145]

Yet questions remain. A key question that we—and other researchers—have yet to answer is whether and how bar examiners utilize the mental health and substance use information they obtain in making their admission decisions. Today, no one seems to know whether or to what extent bar applicants get denied or penalized for their responses to mental health questions, as there is little, if any, publicly available data outlining how state bar administrators actually evaluate applicants' mental health and substance use information.[146] Anecdotally, at least some jurisdictions maintain that "very few applicants actually are denied admission" because of substance abuse or mental health issues and "few applicants even experience delays in admission."[147] At minimum, the bar admissions process suffers from a black box problem. As Professor Leslie Levin puts it, "the confidentiality of character committees' activities and their failure to report on their work make it virtually impossible to determine what is really happening."[148]

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144 *Compare id. and* Appendix A entries for Florida, Kentucky, Michigan, Missouri, Oregon, Texas, Utah, and Virginia.

145 *See supra* note 57.

146 Leslie C. Levin, *Rhode Was Right (About Character and Fitness)*, 91 FORDHAM L. REV. 1311, 1318-19 (2023) ("Unfortunately, the confidentiality of character committees' activities and their failure to report on their work make it virtually impossible to determine what is really happening.").

147 *See* Organ et al., *supra* note 14; *see also* NAT'L CONF. BAR EXAM'RS, REQUEST FOR PREPARATION OF A CHARACTER REPORT 12 (1997) ("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 . . . .").

148 Levin, *supra* note 145, at 1318.

3. Implications

Our 50-state survey indicates that, in most states, reform efforts have paid partial dividends. In the past, many states asked extraordinarily intrusive questions about each applicant's diagnoses and treatment history.[149] Today, thanks to reformers' efforts, these types of questions have mostly disappeared. Yet, this erasure has not meant the wholesale elimination of inquiry into applicants' mental health. Instead, states today tend to take a middle track: They omit broad inquiry into an applicant's diagnoses and substance use and instead ask more targeted, less overtly intrusive mental health questions. As noted above, these compromise questions tend to require the applicant to self-identify "impairments," "conditions," or "conduct or behavior" that implicate their ability to practice law or ask if the applicant has cited their mental health in any "inquiry or investigation."

Interestingly, though, some stakeholders and commentators seem to be stuck in a time warp, fighting the last battle—focusing on the undeniably intrusive questions of old, without grappling with potential issues raised by what we'll call the "Targeted Inquiry 2.0."[150] The APA's 2023 resolution reflects this dynamic.[151] Recall, it called for the "removal of remaining questions about diagnosis and treatment history."[152] In doing so, the APA did not *mention* more targeted questions, such as those formulated in terms of an individual's "ability to practice law"—even though, as of 2023, states that used these formulations substantially outnumbered those that utilized more intrusive questions.[153]

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149 *See, e.g.*, Bauer, *supra* note 22, at 116–17 (recounting Connecticut's 1999 screening question: "Have you ever been voluntarily or involuntarily committed to an institution for mental, emotional or nervous disorders?"); Dragnich, *supra* note 22, at 689 (listing two questions that Maine asked in the 1990s: "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?").

150 *See, e.g.*, Press Release, N.J. Cts., Supreme Court Revises Mental Health Question for Bar Applicants (Sept. 21, 2023) (including comment from Justice Stuart Rabner that the elimination of broad questions about mental health diagnoses would "enable [lawyers] to become better lawyers and serve the public well" but noting, without comment, that "[c]andidates are required, however, to disclose the use of any condition or impairment as a defense to an inquiry, investigation, or administrative or judicial proceeding"); *Chief Judge DiFiore Announces New York Will Eliminate Mental Health Question in Bar Application*, N.Y. L.J. (Feb. 26, 2020) (reflecting praise by New York State Bar Association President Henry Greenberg for New York's decision to eliminate questions seeking information about any previous mental health diagnoses, but separately noting that applicants would still be required to answer an "Asserted as a Defense" question); Cipriano, *supra* note 21 (discussing intrusive mental health screening practices without addressing more current formulations).

151 AM. PSYCHIATRIC ASS'N, *supra* note 23.

152 *Id.* The question formulations cited in the APA's resolution as examples including the following:

> In the past 10 years, have you been diagnosed with, been treated or sought counseling for bi-polar disorder, schizophrenia, paranoia, or any other psychiatric disorder, or have you ever been committed to any institution for the treatment of any such condition?
>
> [Asking] [w]hether an applicant has "a current condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which affects your conduct that has not been or is not currently being treated effectively or for which the treatment is unstable."
>
> [Asking] [w]hether an applicant has sought treatment in the past five years for their "conduct or behavior."

153 *Id.* Because our 50-state survey compiles *current* bar questionnaires, we cannot determine the precise number of states that asked diagnoses-based questions back in August 2023, when the APA passed its resolution. It's possible that states have updated their questionnaires in the interim.But available data indicate that, as of 2023, the number of states asking targeted questions significantly eclipsed those that asked intrusive, diagnoses- and treatment-based questions. *See* BAZELON CTR., *supra* note 126 (reporting that, in 2019, 32 states asked more targeted questions, while 14 asked diagnoses- and treatment-based questions); *supra* Part IV (detailing significant post-2019 reform activity).

Still, some have turned their attention to newer, more targeted formulations. And, for at least a few of these commentators, the Targeted Inquiry 2.0 continues to be deficient. Some commentators believe that states should eliminate *all* mental health screening, not merely tone down their more offensive previous inquiries.

Taking this tack, Professors David Jaffe and Janet Stearns insist that "all questions related to mental health" be removed from bar applications.[154] They illustrate their point with a letter grading system. States that have eliminated *all* mental health questions, focusing only on issues like arrests and financial management without reference to mental health, receive an "A" grade.[155] By contrast, questions that continue to focus on specific mental health diagnoses are given an "F."[156] But the vast majority of states fall somewhere in between: States that adopt "Conduct or Behavior" or "Asserted as a Defense" questions are given a "B."[157] The NCBE's questions, in turn, are given a "C" grade, including because the NCBE's follow-up requests for detailed medical information and medical provider contact information are, in Professors Jaffe and Stearns' view, "incredibly invasive and will inevitably lead to the potential for significant inquiry into private health information that may have no relevance to the ability to practice law."[158] These questions, they say, continue to "present[] challenges for applicants," in part because they deter students from seeking necessary treatment.[159]

Professor Frederick Vars has voiced similar opinions, arguing that newer formulations continue to violate the ADA. He has forcefully stated that nearly every psychiatric diagnosis "could 'in some way' affect one's ability to practice law."[160] "Self-Evaluation of Condition" questions, he thus believes, continue to discriminate based on a mental health diagnosis and are "no improvement over previous iterations that have already been found to violate the ADA."[161]

And, many recognize that, even if strides have been made, there is *still* no reliable, empirical, public data linking any mental health screening question to attorney quality, or to rates of attorney discipline.[162] Instead, the data that does exist suggests a lack of any connection.[163] Unable to rely on data-driven

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154 David Jaffe & Janet Stearns, *Fixing a Broken Character Evaluation Process*, L. PRAC. TODAY (May 9, 2023).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 Vars, *supra* note 104.

161 *Id.*; *see also* Bauer, *supra* note 22, at 158-81 (arguing that even some tailored questions likely violate the ADA). *But see* Dragnich, *supra* note 22, at 737 (noting that questions that focus on behavior and conduct are "legal under the ADA").

162 *See* Part III.C.

163 *Id.*

justifications for mental health screenings, states continue to justify them on the basis that these questions are necessary to protect the profession from incompetent or dangerous attorneys.[164]

This ongoing debate around the inclusion of mental health screening questions in bar applications underscores the complexity of balancing the need to protect the public and the integrity of the legal profession with the rights and well-being of applicants. For many, the shift away from broad, intrusive questions and to Targeted Inquiry 2.0 represents a significant step forward. Still, the absence of empirical evidence supporting the effectiveness of any moral screening questions raises concerns regarding whether the inquiry, even if limited, is justified. Without transparency and data concerning how these questions affect bar admission decisions, it is challenging to assess whether current questions serve their intended purpose, or if they merely perpetuate barriers for individuals managing mental health conditions. As the legal profession continues to evolve and grapple with societal mental health issues, there may be a need for further refinement of these questions—or perhaps a more radical rethinking of their necessity altogether—in order to ensure that the bar admission process is both fair and effective.

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164 *Working Group on Attorney Mental Health*, N.Y. ST. BAR ASS'N, https://nysba.org/committees/working-group-on-attorney-mental-health/ (last visited Aug. 23, 2024) ("The Working Group of Attorney Mental Health recognizes the importance of focusing on a bar candidate's behavior and conduct to evaluate fitness to practice law and expects that to continue to be the focus of determining an applicant's fitness to practice law."); NAT'L CONF. BAR EXAM'S & AM. BAR ASS'N SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 2014, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS viii (2014) ("The primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice. The lawyer licensing process is incomplete if only testing for minimal competence is undertaken. The public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law.").