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The Kentucky Board of Bar Examiners' Character and Fitness Certification Questionnaire: Are Mental Health Inquiries a Violation of the Americans with Disabilities Act?

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The Kentucky Board of Bar Examiners’ Character and Fitness Certification Questionnaire: Are Mental Health Inquiries a Violation of the Americans with Disabilities Act?

INTRODUCTION

The Americans with Disabilities Act ("ADA")\(^1\) was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."\(^2\) While the most visible effect of the ADA to the general public has been the noticeable increase in the number of wheelchair ramps in public areas,\(^3\) protections under the ADA include mental as well as physical disabilities.\(^4\)

The Kentucky Board of Bar Examiners ("KBE") is charged by the Kentucky Supreme Court to regulate Kentucky Bar admissions, including a determination of the "character and fitness" of each applicant.\(^5\) On its character and fitness questionnaire, the KBE makes a broad-based inquiry regarding the applicant’s past mental health history\(^6\) Kentucky, like many other jurisdictions, has recently modified its questions in response to the ADA.\(^7\) While it is far from clear specifically which inquiries will

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\(^2\) Id. § 12101(b)(1) (Supp. 1993).
\(^3\) See Lori Crouch, Museums Working to Improve Access for Disabled Visitors, SUN-SENTINEL (Fort Lauderdale), Mar. 8, 1996, at B1 (discussing how public places in Florida have improved accessibility for handicapped persons in response to the ADA).
\(^5\) KY. SUP. CT. R. 2.040.
\(^6\) For examples of the types of questions the KBE asks, see infra notes 22-23 and accompanying text.
\(^7\) Telephone Interview with Pat Gill, Executive Assistant, KBE (Nov 17, 1995) [hereinafter Gill Interview].
be allowed under the ADA, it does appear that the KBE’s modifications fail to meet the standard modern courts have set for compliance with the ADA.  

It is not immediately clear what the practical impact of the ADA will be on those to whom the statute applies. If past sweeping civil rights legislation is any guide, then years of litigation will be required to define the ever-changing parameters. As government agencies and private businesses struggle to determine specifically how they must change their practices to conform to the new law, cases interpreting the ADA trickle through the court system, slowly outlining the specific behavior deemed necessary under the law.

One issue currently facing state boards of bar examiners is whether or to what extent mental health inquiries of bar applicants are allowed under the ADA. To date, the trend has been toward allowing inquiries into specific, current impairments that the board has determined would have an effect on an applicant’s ability to practice law. However, while some state supreme courts have addressed the issue, no guidance has been offered from the federal system beyond the district court level.

There are advocates both for and against the inclusion of such questions on bar applications. Opponents often condemn such inquiries as discriminatory and violative of the ADA, while proponents

8 See infra notes 80-128 and accompanying text.
9 The ADA applies to the areas of employment, public services, public accommodations and services operated by private entities. See infra notes 40-42 and accompanying text.
11 See Minding Your Business, SACRAMENTO BEE, Mar. 18, 1996, at E1 (answering reader’s questions about conforming with the ADA); Aiding the Disabled, SAN DIEGO UNION-TRIBUNE, Mar. 11, 1996, at C1 (discussing the economic benefits of complying with the ADA).
12 See infra notes 80-128 and accompanying text; see also LAURA F. ROTHSTEIN, DISABILITY LAW 321 (1995). For example, mental health questions on the Texas bar application are limited to specific mental disorders affecting performance, rather than general questions regarding prior mental health treatment. Id. at 321.
13 See infra notes 80-128 and accompanying text.
14 See Phyllis Coleman & Ronald A. Shellow, Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply
emphasize the need of bar examiners to protect the public and argue that the questions are legal under the ADA. An opponent of mental health inquiries has argued that “[s]tate bars should devote energy to disciplining unethical conduct, not prognosticating failure for those applicants who have had the courage and foresight to seek professional help.” On the other hand, an official for the ABA Section of Legal Education and Admissions to the Bar disagrees, calling assertions that the ADA bars all inquiry into an applicant’s mental health an “unfortunate detour” in the approach to dealing with mental illness in the area of legal practice. She concludes that “[t]his is a misuse of a watershed of civil rights legislation.”

Courts have recently enjoined boards of bar examiners in two states from using general mental health questions, and a number of states have changed their questions in response to, or under the threat of, such a suit. Moreover, the National Conference of Bar Examiners has narrowed the scope of its recommended mental health inquiries, and the American Bar Association has adopted a resolution recommending that mental health questions be drafted narrowly to “elicit information about


16 Pugh, supra note 14, at 37.

17 Moeser, supra note 15, at 36. At the time her article was published, Ms. Moeser was Chairperson-elect of the ABA Section of Legal Education and Admissions to the Bar. Id.

18 Id.


20 Ellen S. v. Florida Bd. of Bar Examiners, 859 F.Supp. 1489 (S.D. Fla. 1994); Reischel, supra note 15 (discussing the District of Columbia’s modification of its mental health inquiries under threat of an ADA suit); infra notes 100-02 and accompanying text.
current fitness to practice law, and take steps to ensure that their
processes do not discourage those who would benefit from seeking
professional assistance with personal problems and issues of mental health
from doing so."\(^{21}\)

The KBE’s Application for Kentucky Bar Examination and
Questionnaire for Certification of Character and Fitness question twenty-
eight asks applicants: “Have you been diagnosed or received regular
regular treatment for amnesia, emotional disturbance, nervous or mental disorder
within the last five (5) years?”\(^{22}\) If the applicant replies “yes,” she must
sign a form authorizing the release of the applicant’s medical records.\(^{23}\)

This Note neither advocates nor opposes eliminating all mental health
inquiries by bar examiners, and will leave the debate over the merits of
such mental health inquiries in predicting professional behavior to those
trained in psychology. This Note will merely demonstrate that the KBE’s
inquiry remains broader than the trend of state boards across the nation
to reform their mental health inquiries to conform to the ADA, and that
it is doubtful that the KBE’s question would be upheld under the
standards established by the courts which have addressed this issue to
date.\(^{24}\)

Part I of this Note shows that the ADA applies to the KBE.\(^{25}\) Part
II discusses what practices constitute illegal discrimination under the
ADA.\(^{26}\) Part III examines how courts in other jurisdictions have ruled
on this issue and applies their rationales to the KBE’s current inquiry.\(^{27}\)

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\(^{21}\) ABA Resolution adopted at meeting of August 9-10, 1994. Text was
taken from materials distributed at the Joint Conference on Disability Issues,
Hyatt Regency, St. Louis, Mo. 74 (Apr. 6-8, 1995).

\(^{22}\) KENTUCKY BOARD OF BAR EXAMINERS, QUESTIONNAIRE FOR
CERTIFICATION OF CHARACTER & FITNESS 6, question 28 (revised Dec. 1995)
[hereinafter QUESTIONNAIRE FOR CERTIFICATION].

The KBE is again reviewing the questionnaire for revision, but as of
November 17, 1995, question 28 is not one of the questions being considered for
revision. Gill Interview, supra note 7.

\(^{23}\) QUESTIONNAIRE FOR CERTIFICATION, supra note 22.

\(^{24}\) See infra notes 160-64 and accompanying text. This Note does not address
the similar issue of whether questions regarding drug or alcohol addiction by bar
examiners violate the ADA. Kentucky question 26 asks: “Within the last five (5)
years, have you been, addicted to, or have you undergone treatment for the use
of narcotics, drugs, prescription drugs or the excessive use of intoxicating
liquor?” QUESTIONNAIRE FOR CERTIFICATION, supra note 22, at 6.

\(^{25}\) See infra notes 29-51 and accompanying text.

\(^{26}\) See infra notes 52-79 and accompanying text.

\(^{27}\) See infra notes 80-135 and accompanying text. The author did not
Finally, in Part IV, this Note addresses the circumstances under which the Kentucky inquiries can be challenged under the ADA.28

I. THE ADA APPLIES TO THE KBE

A. The KBE

In Kentucky, the state constitution vests regulation of the bar in the Kentucky Supreme Court. Section 116 of the Kentucky Constitution states: "The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar."29 The current language of § 116 is the result of an amendment in 1975 that "extended the judicial function to include the administration of the business affairs of the judicial branch of the government," removing such administration from the jurisdiction of the legislative branch.30 Consequently, regulation of the Kentucky Bar has been found to be a judicial determination rather than an administrative function.31

Kentucky Supreme Court Rule 2.000 created the KBE and charged it with "the responsibility of administering the bar examination to qualified applicants for admission to the bar of the Commonwealth."32 Rule 2.040 created the Committee on Character and Fitness.33 These rules require the KBE and its committees to act on behalf of the

cconduct a comprehensive poll of every state board of bar examiners' mental health inquiry, and has relied on published court cases and articles on the subject for examples of the various questions to compare to the KBE's questions. The United States District Court for the Eastern District of Virginia did include such a comprehensive breakdown of questions in Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 438-40 nn.14-19 (E.D. Va. 1995). See infra notes 83-99. This author did not rely on this list given the rapid developments in this area. For example, the KBE modified its mental health question following the Clark decision. See supra note 22.

28 See infra notes 136-62 and accompanying text.
29 Ky. Const. § 116.
30 Ex parte Auditor of Pub. Accounts, 609 S.W.2d 682, 687 (Ky. 1980).
32 Ky. Sup. Ct. R. 2.000. The rule requires the Board to be composed of seven attorneys appointed by the Kentucky Supreme Court for terms of three years. Id.
33 Id. 2.040. The Committee is comprised of three attorneys appointed by the Supreme Court to serve three year terms. Id.
Kentucky Supreme Court in administering procedures for admission to the Kentucky Bar and in determining the "character and fitness" of applicants as a condition precedent to admission.\(^4\)

While the Kentucky Supreme Court delegated its constitutional authority to regulate the "character and fitness" of bar applicants, it provided broad parameters as to how the Committee was to establish such "fitness."\(^5\) Kentucky Supreme Court Rule 2.012 defines "fitness" as "the assessment of mental and emotional health as it affects the competence of a prospective lawyer."\(^6\) The purpose of this requirement is "to exclude from the practice of law any person having a mental or emotional illness or condition which would be likely to prevent the person from carrying out duties to clients, courts or the profession."\(^7\) The rules clarify that the supreme court is interested in "present fitness."\(^8\) Therefore, "prior mental or emotional illness or conditions are relevant only so far as they indicate the existence of a present lack of fitness."\(^9\)

\(B.\ \textit{Application of the ADA to the KBE}\)

The ADA focuses on discrimination in three broad areas: employment (Title I),\(^10\) public services (Title II),\(^11\) and public accommodations and services operated by private entities (Title III).\(^12\) While it has been argued that Title I of the ADA should apply to state boards of bar examiners because of the analogies between professional licensing bodies and employers,\(^13\) all court action applying the ADA to bar admission to date has focused on the application of Title II (Public Services).\(^14\)

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\(^34\) \textit{Id.}\n\(^35\) \textit{Id. 2.012.}\n\(^36\) \textit{Id.}\n\(^37\) \textit{Id.}\n\(^38\) \textit{Id.}\n\(^39\) \textit{Id.}\n\(^40\) 42 U.S.C. §§ 12111-12117 (Supp. 1993). \textit{See infra} notes 53-65 and accompanying text.\n\(^41\) \textit{Id.} §§ 12131-12165. \textit{See infra} notes 66-79 and accompanying text.\n\(^42\) \textit{Id.} §§ 12181-12289.\n\(^43\) "Unless admitted to the bar, a law school graduate cannot work as an attorney. . . . Licensing is merely one step removed from employment and is an essential condition to practice." Coleman & Shellow, \textit{supra} note 14, at 176.\n\(^44\) \textit{See infra} notes 66-79 and accompanying text.
Title II defines “public entity” as “any . . . instrumentality of a State.”

Official comments to Department of Justice regulations clarify that “Title II coverage . . . includes activities of the legislative and judicial branches of [s]tate and local governments. All governmental activities of public entities are covered . . . .”

The Kentucky Supreme Court has recognized that “[t]he root source of all power validly exercised by any officer or agency of the state government is, of course, its Constitution.” The court has also stressed that the Kentucky Bar Association “does not exist for the private benefit of the legal community.” Further, in order to carry out its mission, the Association must “maintain a proper discipline of the bar, . . . initiate and supervise appropriate means to insure a high standard of professional competence, and . . . bear a substantial responsibility for promoting the efficiency and improvement of the judicial system itself.” Since the power of the supreme court to regulate admissions to the Kentucky Bar stems directly from the Kentucky Constitution, and exists to benefit the public interest, the board, created to regulate bar admissions, clearly constitutes a “public entity,” as defined in the ADA. Therefore, Title II of the ADA applies to the KBE.

II. PROHIBITION OF DISCRIMINATION UNDER THE ADA

In general, the ADA defines an individual with a disability as someone who has “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) is regarded as having such an impairment.” Application of this definition to those covered by the act is further defined in Title I (employment), Title II (public entities) and Title III (public accommodations).

48 Id. at 689 (holding that the Kentucky Auditor has no legal authority with respect to the Kentucky Bar Association, as the Association is solely under the control of the Judicial branch).
49 “The mission of the Association is to see to it that this trust is performed with fidelity to the high principles of their calling.” Id.
50 Id.
51 KY. CONST. § 116.
A. Title I (Employment)

If Title I applied to the practices of the KBE in regulating admission to the Kentucky Bar, the KBE's current broad mental health inquiries would be barred for all practical purposes. Title I prohibits discrimination by an employer against an otherwise qualified individual because of disability. "An otherwise qualified individual" is defined as a disabled person who, "with or without reasonable accommodation, can perform the essential functions of the employment position." Discrimination is defined as "limiting, segregating, or classifying a disabled applicant so as to adversely affect his status or opportunity based on his disability." This also includes "utilizing standards [or] criteria . . . that have the effect of discrimination."

Department of Justice regulations directly prohibit employers from conducting "a medical examination of an applicant or making inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability." However, employers may ask questions that relate to the applicant's ability "to perform job-related functions, and/or may ask the applicant to describe or demonstrate how with or without reasonable accommodation the applicant will be able to perform job-related functions." Official comments to the regulations clarify that such inquiries must be "narrowly tailored."

But see Reischel, supra note 15, at 24 n.19, which argues that broad mental health inquiries by bar examiners do conform to what Title I requires of employers, because information on the application is not used to prevent any applicant from sitting for the examination. Mental health information is only examined after qualifications have been demonstrated, and only as the last step before admission. Furthermore, all applicants who qualify are scrutinized for mental health information. Arguably, this comports with the basic process mandated by Title I; that mental health scrutiny not be done until qualifications are first established, and that, if such an examination is done, it is done for everyone.

Id.


Id. § 12111(8).

Id. § 12112(b).

Id. § 12112(b)(3)(A).


Id. § 1630.14.

DEPARTMENT OF JUSTICE ADA HANDBOOK, INTERPRETIVE GUIDANCE TO
Based on these definitions, if a law firm asked the same mental health questions asked by the KBE as part of a regular hiring practice, it would clearly violate the Department of Justice's regulations under Title I. In fact, the official comments to Equal Employment Opportunity Commission ("EEOC") regulations issued under Title I use as an example that "a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness."61

Official comments to the Department of Justice's regulations clarify that "[t]he employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation."62 Advocates for behavior-based questions over general mental health inquiries have proposed the following questions to determine "mental health" in the context of fitness to practice law:

1. Have you ever been expelled, suspended from, or had disciplinary action taken against you by any educational institution? If so, explain the circumstances.

2. Has your grade point average ever varied by half a letter grade or more between two terms? If so, explain the circumstances.

3. Have you ever been absent from school or a job for more than [thirty] consecutive days? If so, explain the circumstances.

4. Have you ever been fired from, asked to leave, or had disciplinary action taken against you in any job? If so, explain the circumstances.

5. Have you ever been evicted or asked to vacate a place in which you lived? If so, explain the circumstances.

6. Have you ever been arrested for D.U.I. [Driving Under the Influence]? If so, explain the circumstances, including the outcome of the incident.63

While analogies can be made between professional licensing associations and employers, a bar association does not qualify as an


62 DEPARTMENT OF JUSTICE ADA HANDBOOK, supra note 60, at I-71.

63 Coleman & Shellow, supra note 14, at 177.
employer of members of the bar. Therefore, Title I definitions will probably only come into play if courts infer Title I protections in Title II. It remains unclear, however, whether courts will make such an inference.

B. Title II (Public Entities)

The definition of "discrimination" in Title II does not include the specific prohibitions included in Title I. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." Department of Justice regulations under Title II directly apply the title's provisions to state sponsored professional licensing: "A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of a disability." Given the broad statutory language, it is doubtful that a successful challenge to the Department of Justice's inclusion of professional licensing under Title II coverage could be launched. This is especially true in Kentucky, where


65 See Reischel, supra note 15, at 18 ("The operative provision of Title II [the general prohibition of discrimination found at 42 U.S.C. § 12132] does not contain language similar to that in Title I barring inquiries into disabilities. Nor, despite a phrase in the statute and some legislative history which might be used to argue to the contrary, does it appear that this particular prophylactic provision in Title I is imported into Title II."). But see Coleman & Shellow, supra note 14, at 174 (relying on 28 C.F.R. § 35.103(a) and Judiciary Committee Report, H.R. Rep. No. 485, 101st Cong. 2d Sess., pt. 2, at 84 (1990) to conclude: "Title I provisions are applicable to Title II.").


68 At least two courts have accepted the argument that the Department of Justice regulations are not too specific given the broad statutory language. See
it can be inferred that the Kentucky Supreme Court has recognized the KBE as a public entity. Therefore, the question becomes whether the KBE's practices violate the language of Title II, or, in other words, whether the mental health inquiries "subject qualified individuals with disabilities to discrimination." Critics of general mental health inquiries claim that such inquiries are irrelevant to the determination of an applicant's "character and fitness." It has been argued that "[t]he mere presence of mental illness or substance abuse no more impacts on an individual's character [and fitness] than the existence of coronary artery disease or cancer." Ironically, commentators point out that the failure to inquire about physical illness "demonstrates prejudice against mental disorders and a basic misunderstanding of mental illness... By asking only about mental or emotional problems, rather than any illness, licensing boards invidiously discriminate against a particular group." It is doubtful, however, that these commentators would find the mere addition of increased health inquiries to be the solution under the ADA.

Regardless of whether the specific prohibitions found in Title I apply to Title II, the broad prohibitions found in Title II could restrict the inquiries. Title II places the burden on bar associations to demonstrate

Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1493 n.6 (So. Dist. Fla. 1994) (stating that Title II governs the licensing and regulation of attorneys "if the broad anti-discriminatory language of Title II is read in conjunction with the regulations promulgated by the Department of Justice . . . ."); Kinney v. Yerusalam, 812 F. Supp. 547, 548 (E.D. Pa.) ("Rather than outline the specific obligations of public entities under [Title II], the ADA directed the Department of Justice to promulgate regulations . . . ."), aff'd, 9 F.3d 1067 (3d Cir. 1993), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994).

See supra notes 40-51 and accompanying text.

See supra note 67.

See Coleman & Shellow, supra note 14, at 151.

Id.

Id. at 157.

Again, this Note will not fully discuss the relevance of such mental health inquiries. For a full discussion of this issue, see id.

See supra note 65 and accompanying text.

See supra note 68; see also Reischel, supra note 15, at 19.

[T]he language of Title II does not specify a "no inquiry" requirement; the legislative history does not require that one be read into Title II; the Title II regulations have not done so; and the reasons which prompted the prophylactic requirement in Title I do not exist with respect to bar admissions.

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the clear need for such inquiries to protect the public. As one commentator noted, "The ADA clearly places the burden of justifying a discriminatory practice on the entity employing it."\footnote{Id. at 22, 24 n.27 (citing 29 C.F.R. § 35.103(b)(7) (1991), which states that a public entity must modify discriminatory practices "unless the public entity can demonstrate" that doing so would fundamentally alter the program); 29 C.F.R. § 35.103(b)(8) (1991) (public entity shall not employ practices with discriminatory effect "unless such . . . can be shown to be necessary for the . . . program . . . .").} It is up to the courts, however, to determine whether broad based mental health inquiries constitute a discriminatory practice.\footnote{See infra notes 80-128 and accompanying text.} Therefore, since an applicant who must make an affirmative response to the KBE's mental health inquiries constitutes a "qualified person" with a disability under the ADA, the burden is on the KBE to justify its practice of requiring disclosure of this information.\footnote{See supra notes 14, 16 and accompanying text.}

III. THE KBE'S QUESTION DOES NOT REFLECT THE CURRENT TREND TOWARD NARROW MENTAL HEALTH INQUIRIES AND WOULD NOT STAND UNDER ANY STANDARD DEVELOPED IN THE COURTS TO DATE

A. Procedures and Questions Struck Down

It has been argued that the ADA does not allow any mental health inquiries by boards of bar examiners.\footnote{See supra notes 14, 16 and accompanying text.} The Department of Justice has taken this position and stated in an amicus curiae brief that any mental health classifications are unnecessary and, therefore, discriminatory under the ADA.\footnote{See Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 444 n.25 (E.D. Va. 1995).} However, courts which have stricken specific mental health questions have not adopted the Department's position on this issue and,
thus, have not closed the door on all inquiries of this kind. To date, no jurisdiction has upheld a mental health inquiry as broad as Kentucky's under the ADA; however, some that have been stricken were even broader than that of Kentucky.\textsuperscript{82}

1. \textit{Virginia}

The KBE's question twenty-eight is nearly identical to the question struck down by the United States District Court for the Eastern District of Virginia in \textit{Clark v. Virginia Board of Bar Examiners}.\textsuperscript{83}\textsuperscript{84} The Virginia application asked: "Have you within the past five (5) years, been treated or counselled for a mental, emotional or nervous disorders [sic]?"\textsuperscript{84} The court analyzed the question under Title II of the ADA (Public Entities)\textsuperscript{85} and did not address whether the Title I (Employment)\textsuperscript{86} definitions were relevant.\textsuperscript{87} Therefore, the decision revolved around whether the Virginia Board's question subjected "persons with disabilities to discrimination on the basis of their disability."\textsuperscript{88}

The court found that "an attorney's uncontrolled and untreated mental or emotional illness may result in injury to clients and the public"\textsuperscript{89} and accepted the underlying assumption that, at some stage of the application process, some form of mental health inquiry was appropriate.\textsuperscript{90} However, the \textit{Clark} court held that the Virginia Board failed to show that its question was "necessary to the performance of its duty to license only fit bar applicants."\textsuperscript{91} The court reasoned that Virginia's question "discriminate[d] against disabled applicants by imposing additional eligibility criteria."\textsuperscript{92}

\textsuperscript{82} See infra notes 83-122 and accompanying text.
\textsuperscript{83} \textit{Clark}, 880 F. Supp. at 433.
\textsuperscript{84} \textit{Id}.
\textsuperscript{87} \textit{Clark}, 880 F. Supp. at 441.
\textsuperscript{88} \textit{Id} at 442.
\textsuperscript{89} \textit{Id} at 436.
\textsuperscript{90} \textit{Id}.
\textsuperscript{91} \textit{Id} at 446.
\textsuperscript{92} \textit{Id}. The court went on to state that "While certain severe mental or emotional disorders may pose a direct threat to public safety, the Board has made no individualized finding that obtaining evidence of mental health counseling or treatment is effective in guarding against this threat." \textit{Id}.
The court offered little guidance as to what type mental health inquiry it would allow under the ADA, stating that its job was to "decide whether the current question complied with the ADA." Therefore, the court concluded that it should "refrain from offering any dictum guidance." 

The KBE’s question asks: “Have you been diagnosed or received regular treatment for amnesia, emotional disturbance, nervous or mental disorder within the last five (5) years?” If the answer is affirmative, the applicant must complete a medical waiver which allows the release of the applicant’s medical records regarding the diagnosis or treatment. Similar to the disclaimer accompanying the stricken Virginia Board’s question, the KBE includes a prominent disclaimer to question twenty-eight which states: “THIS QUESTION IS NOT INTENDED TO APPLY TO ISOLATED INSTANCES OF CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS.” The stricken Virginia language did not allow nondisclosure of “isolated instances of consultation for conditions of emotional distress” but merely indicated that such disclosures would not affect the applicant’s bar admission. Therefore, the Kentucky language appears to lessen one of the primary concerns of mental health inquiry opponents — that law students will avoid potentially helpful counselling in times of stress if they must include it in their bar application. Even with its stronger disclaimer, however, it is doubtful...

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93 Id.
94 Id.
95 QUESTIONNAIRE FOR CERTIFICATION, supra note 22, at 6.
96 Id. at Form 4.
97 The Virginia Bar Application question states:

The members of the Board recognize that stress of law school, as well as other life factors, frequently result in applicants seeking psychiatric or psychological counseling. The Board encourages you to obtain counseling or treatment if you believe that you may benefit from it. Because generally only severe forms of mental or emotional problems will trigger an investigation or impact on bar admission decisions, your decision to seek counseling should not be colored by your bar application.

Clark, 880 F. Supp. at 433.
98 QUESTIONNAIRE FOR CERTIFICATION, supra note 22, at 6. The KBE has long recognized the difference between such isolated instances of emotional stress and other, more relevant, mental illness. This disclaimer predates the ADA by at least ten years. Gill Interview, supra note 7.
99 See supra note 14.
that the *Clark* court would find the Kentucky inquiry "necessary to the performance of [the KBE's] duty to license only fit bar applicants" because the text of the Kentucky question remains as broad as the text stricken by the *Clark* court.

2. *Florida*

The United States District Court for the Southern District of Florida denied a Florida Board of Bar Examiners' motion to dismiss an action to enjoin the use of a similar question.100 The Florida Board's questionnaire asked:

> Have you ever consulted a psychiatrist, psychologist, mental health counselor or medical practitioner for any mental, nervous or emotional condition, drug or alcohol use? If yes, state the name and complete address of each individual you consulted and the beginning and ending dates of each consultation.

> Have you ever been diagnosed as having a nervous, mental or emotional condition, drug or alcohol problem? If yes, state the name and complete address of each individual who made each diagnosis.

> Have you ever been prescribed psychotropic medication? If yes, state the name of each medication and the name and complete address of each prescribing physician.101

The court ruled that the question and subsequent inquiries discriminate against applicants with mental health disabilities by "subjecting them to additional burdens based on their disability."102 After their motion to dismiss was denied, the Florida Board voluntarily changed its question to avoid further court proceedings.103

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101 *Id.* at 1491 n.1 (quoting the Florida Bar Application, question 29).
102 *Id.* at 1494. The court, citing Medical Soc'y of N.J. v. Jacobs, No. 93-3670, 1993 WL 413016 (D.N.J. Oct. 5, 1993), said that the questions were impermissible because they "substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicant's behavior." *Id.*
103 *See* Stephen W. Townsend, *Admission to the Bar Review by the Committee on Character*, N.J. L.J., Mar. 6, 1995, at 71. "Reportedly, however, the Justice Department is prepared to continue the suit to force the exclusion of
Again, the Kentucky question is somewhat narrower than the Florida inquiry as it includes a time limit of five years and includes the disclaimer against isolated instances. However, it is doubtful that the Kentucky inquiry would stand under the Southern District of Florida's test unless the KBE could offer proof to justify the "additional burden" imposed by the question. In other words, the burden is on the KBE to convince the court that the broad inquiry is necessary to adequately protect the public.\textsuperscript{104}

3. Maine

The Supreme Judicial Court of Maine enjoined the Maine Board of Bar Examiner's use of a broad-based mental health inquiry.\textsuperscript{105} The questionnaire asked:

Have you ever received diagnosis of an emotional, nervous or mental disorder? \ldots If so, state the names and addresses of the psychologists, psychiatrists or other medical practitioners who made such diagnosis. \ldots Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder?\textsuperscript{106}

The court held that while the Maine Board's question was too broad, it stated that it would be "permissible for the Board of Bar Examiners to fashion other questions more directly related to behavior that can affect the practice of law without violating the ADA."\textsuperscript{107} Again, the Kentucky question is not as broad as the stricken Maine question, as it limits the period of inquiry to only five years and does not call for disclosure of isolated instances of mental health treatment. However, the burden is on the KBE to meet the requirement that it be "directly related to behavior that can affect the practice of law." Considering that the Maine Supreme Judicial Court set the standard that the inquiry be based on behavior, it is doubtful that it would uphold the Kentucky inquiry, which focuses on condition rather than behavior.

\textsuperscript{104} See supra notes 14 and 15.
\textsuperscript{105} In re Underwood, 1993 WL 649283 (Me. Dec. 7, 1993).
\textsuperscript{106} Id. at *2 n.1 (quoting the Maine Bar Application, questions 29 and 30).
\textsuperscript{107} Id. at *2.
B. Inquiries Allowed

Two United States district courts have upheld narrow mental health inquiries that did not directly relate to behavior. The United States District Court for the Western District of Texas allowed inquiries based on specific mental illnesses, and the United States District Court for the Northern District of Illinois allowed the Illinois Board to continue its practice of asking an applicant's references whether they knew of any "affliction" which would affect the applicant's ability to practice law.

1. Texas

The United States District Court for the Western District of Texas upheld the Texas Board's question, which inquired about specific mental illnesses such as "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder." The Texas Board did redraft its broader mental health inquiries twice in response to this suit and to comply with the provisions of the ADA. The redrafted questions, which the court approved, currently ask:

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

A positive response to any of these questions requires a medical release by the applicant.

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110 Id. at *2.
111 Id. at *9-10.
112 Id. at *10 n.5 (quoting the Texas Bar Application question 11).
113 Id.
The court held that the ADA allows inquiry into mental illness when such investigation is "necessary to protect the integrity of the service provided and the public." The court concluded: "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."

This decision is the most permissive holding regarding the type of allowable mental health inquiry, and some argue that it is itself an anomaly as it is the only case to date allowing direct mental health inquiries. The court emphasized the importance of the inquiries' limitation to "specific serious mental illnesses." While the phrase "any other psychotic disorder" does not refer to any specific mental illness diagnosis, it certainly narrows the inquiry to a specific class of mental illnesses which is much more narrow than the Kentucky question's reference to any "emotional disturbance, nervous or mental disorder." Therefore, given the Texas court's emphasis on the specific serious illness standard, it is doubtful that the Kentucky question could be upheld even under the most permissive standard developed by the courts to date.

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114 Id. at *8.
115 Id.
116 See Cisneros, supra note 14, at 411.
118 The Diagnostic and Statistical Manual of Mental Disorders describes a number of definitions given to the term "psychotic," ranging from the narrow ("delusions or prominent hallucinations"), to the very broad ("impairment that grossly interferes with the capacity to meet ordinary demands of life"). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 273 (4th ed. 1994) [hereinafter DSM-IV]. The latter definition has been rejected as "probably far too inclusive."
119 While DSM-IV cautions against relying on terms such as "mental disorders" for the broad array of conditions it includes, it defines the term as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress . . . or disability . . . or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. . . . [I]t must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual.

Id. at xxi-xxii.
2. Illinois

The United States District Court for the Northern District of Illinois upheld the Illinois Board’s practice of asking an applicant’s references “whether they had knowledge of any drug or alcohol dependency or abuse by the applicant during the previous ten years, and whether they knew of any emotional, mental, behavioral or nervous affliction.”\(^{120}\) The court held that this procedure “is distinguishable from questions asked on the bar application itself because it is noncoercive and imposes no additional burden on the applicant. Further, such an inquiry directed at Plaintiff’s references necessarily focuses on his behavior, not his status.”\(^{121}\) The court did not consider whether direct mental health inquiries to the applicant violated the ADA.\(^{122}\)

C. Proposed Modifications

1. New Jersey

The Supreme Court of New Jersey has recently accepted, on an interim basis, recommendations to modify its mental health inquiries.\(^{123}\) The recommendations made by a special panel of the New Jersey Panel on Character included a time limit and consideration of “only those conditions that would place the public at risk because they impact on the judgment required by an attorney.”\(^{124}\) The recommended question asks:

Have you, within the past twelve months been admitted to a hospital or other facility for the treatment of bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

Are you currently suffering from an emotional, mental, or nervous disorder that impairs your judgment or that would otherwise adversely


\(^{121}\) Id. at *19-20.

\(^{122}\) Id. The court rejected an argument that asking these questions to the applicant’s listed references called for “medical and/or psychiatric training.” Id. at *20. It noted that such questions were asked “to acquire information regarding the applicants [sic] character and fitness,” and that the references could simply decline to answer the question if they felt that such knowledge was required. Id.

\(^{123}\) Townsend, supra note 103.

\(^{124}\) Id.
affect your ability to practice law in compliance with the Rules of Professional Conduct, the Rules of Court, and applicable case law?\textsuperscript{125}

The New Jersey Panel rejected proposals to replace all mental health inquiries with strictly behavior-based inquiries because “sole reliance on conduct questions may not elicit information critical to an informed decision regarding certification.”\textsuperscript{126}

By limiting the inquiry to what at least one federal district court has determined to be “serious mental illnesses,”\textsuperscript{127} and to conditions which would afflict the applicant’s ability to meet specific professional standards, New Jersey has adopted a well-reasoned approach without resorting to strictly behavior-based inquiries. Arguably, this approach addresses even the strict requirements of Title I of the ADA, which allow an inquiry as to whether or not the applicant can perform the functions of the job “with or without reasonable accommodation.”\textsuperscript{128}

2. The National Conference of Bar Examiners

The National Conference of Bar Examiners (the “NCBE”) conducts character investigations for a number of jurisdictions, often including its own “character and fitness” questionnaire.\textsuperscript{129} The NCBE has recently changed its mental health questions in an effort to conform to the ADA. The revision of these questions limits disclosure to the past five years and to specific conditions.\textsuperscript{130} A general question regarding any mental, emotional or nervous disorder is qualified by whether the applicant indicates that the disorder, if left untreated, could affect the applicant’s ability to practice law in a competent matter.\textsuperscript{131}

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} See supra notes 109-19 and accompanying text.
\textsuperscript{128} See supra notes 53-64 and accompanying text.
\textsuperscript{129} Robert L. Potts, Chair, National Conference of Bar Examiners, Presentation to the Joint Conference on Disabilities Issues (Apr. 7, 1995) (outline and appendices printed in Joint Conference on Disabilities Issues Materials booklet). The NCBE provides a Character Report Service for 32 jurisdictions. The KBE is a member of the NCBE and utilizes the NCBE background check service for applicants from out of state. For Kentucky resident applicants, the KBE conducts its own investigations. Gill Interview, supra note 7.
\textsuperscript{130} Potts, supra note 129, app. at 5.
\textsuperscript{131} Id. The old questions were: “Have you ever been treated or counseled for
Following a preamble which points out that information regarding "situational counselling" need not be disclosed, the new questions ask:

Within the past five years, have you been diagnosed with or have you been treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder? . . . 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? . . . If your answer to [the previous question] is affirmative, are the limitations or impairments caused by your mental health condition or substance abuse problem reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?132

While the NCBE tailored these new questions specifically to conform to the ADA, it is not clear whether they go far enough to provide the protections called for by the ADA.133 The first question mirrors the language upheld by the United States District Court for the Western District of Texas in Applicants v. Texas State Board of Law Examiners.134 The second question narrows the language used by Kentucky, regarding any "mental, emotional, or nervous disorder," to whether the disorder currently affects, or could affect if left untreated, the applicant's ability to practice law. While the NCBE approach does not spell out the definition of "in a professional manner" as does the New Jersey approach,135 this qualification could go a long way toward showing the relevancy of the inquiry.

IV. HOW THE KBE'S INQUIRIES CAN BE CHALLENGED UNDER THE ADA

The Kentucky Supreme Court Rules do not specifically provide for judicial review of a KBE Character and Fitness Committee Advisory

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132 Id. app. at 5 (quoting the new NCBE application questions 27 and 28).
133 See supra notes 52-79 and accompanying text.
135 See supra notes 123-28 and accompanying text.
opinion. Therefore, a Kentucky Bar applicant denied admission due to either a refusal to answer the mental health questions, or a positive response which leads to denial of admission, has no right to Kentucky Supreme Court review, and must go to the federal system to ensure a forum in which to seek relief. Under Title II of the ADA, the protected class is limited to “qualified individual[s] with a disability.”

Therefore, the litigant must be otherwise qualified for membership in the Bar and meet the ADA’s definition of “disability” (which includes those perceived to have a disability).

The ADA provides that the remedies, procedures, and rights set forth in § 504 of the Rehabilitation Act, which prohibit “discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement” under Title II. “As with [§] 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies.” This includes the recovery of damages.

The actions of individual KBE members in regulating the membership of the Kentucky Bar have been found to be judicial acts. Therefore, board members are immune from any personal liability based on such acts to the same extent as the members of Kentucky courts. However, a number of federal district courts have allowed the pursuit of

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136 See Newsome v. Helman, 771 S.W.2d 47, 47 (Ky. 1989).
138 See supra notes 54-60 and accompanying text.
140 42 U.S.C. § 12117(a) (Supp. V 1993); DEPARTMENT OF JUSTICE ADA HANDBOOK, supra note 60, at II-75.
141 Id. at II-76.
142 ROTHSTEIN, supra note 12, at 345 (citing 42 U.S.C. § 12133).
144 Id. The court’s reasoning was as follows:
The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by non judicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform this duty on behalf of the judiciary are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act.

Id. (quoting Sparks v. Character and Fitness Comm. of Ky., 818 F.2d 541, 544-45 (6th Cir. 1987), vacated and remanded, 484 U.S. 1022 (1988)).
injunctive relief from the discriminatory practice involved in reaching the judicial conclusion. 145

The United States Supreme Court addressed the issue of determinations of bar membership and federal district court jurisdiction in District of Columbia Court of Appeals v. Feldman. 146 The Court held:

United States district courts . . . have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. 147

The Court also stated:

If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do. 148

The Northern District of Illinois analyzed the jurisdiction question under the Feldman standard in McCready v. Illinois Board of Admission to the Bar. 149 The McCready court recognized that it did not have the jurisdiction to review a state court ruling, "even when dressed up as a civil rights suit." 150 However, the court "sifted" the complaint to find sufficient general allegations regarding certain questions which indicated a "general challenge to the constitutionality of certain of the Defendants'
practices and their relationship to the ADA." The general challenge that the court considered was the assertion that the information asked by the Illinois questions forced the applicant, and others like him, "to undergo the burden and humiliation of additional mental and or physical examinations based purely upon their disabilities."

The United States District Court for the Eastern District of Virginia initially ruled in Clark v. Board of Bar Examiners that it did not have jurisdiction over Clark's claim against the Virginia Board of Bar Examiners. The court relied on Feldman and a 1979 Fourth Circuit opinion to determine that it lacked jurisdiction "to interfere in the Board's proceedings to determine Clark's fitness to practice law." The court stated that Clark should pursue her ADA claim by petitioning the Supreme Court of Virginia. Upon motion for reconsideration, however, the court ruled that it had improperly dismissed the suit. The court reinstated the case in order to consider the plaintiff's request for injunctive and declaratory relief under the ADA, but declined to review the request for the Virginia Board to grant plaintiff a license to practice law. In explaining its decision, the court stated: "It is now clear to the Court that rather than attaching the Board's treatment of Clark in particular, this case challenges the defendants' right to enforce their rule of general application that all applicants must answer question 20(b)." Similarly, the United States District Court for the Southern District of Florida determined it had jurisdiction under the Feldman standard because the plaintiffs challenged the Board's general rules and regulations and noted that the Board had not even ruled on the plaintiffs' qualifications.

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151 Id. at *15.
152 Id. at *17.
154 Woodward v. Virginia Bd. of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979), aff'd 454 F. Supp. 4 (E.D. Va. 1978) (affirming dismissal of the plaintiff's complaint for lack of jurisdiction, despite the claim that the plaintiff sought to challenge rules of general application based on assertions of racial discrimination).
155 Clark, 861 F. Supp. at 516.
156 Id.
157 Id. at 518-19.
158 Id. at 519.
Based on the various federal district courts' application of the *Feldman* standard,\(^{160}\) it is probable that a federal district court would find proper jurisdiction so long as the applicant asserts a claim against the general practices of the KBE. However, it remains possible that a federal district court would not find jurisdiction over a claim by an applicant who had already been denied admittance to the Kentucky Bar, if that court determined that the general claim could not be separated from the specific denial of admittance. There appears to be no question that there would be jurisdiction over a claim by an applicant who challenged the general rules before a final determination had been made regarding admittance, such as not being allowed to sit for the bar examination until the questionnaire was completed.

A distinction can be raised between the Kentucky Character and Fitness Committee and the committees in some of the states in which federal district courts have addressed this issue. In two of the states discussed above, power to regulate the bar is granted to the state supreme courts by statute,\(^{161}\) making it clear that the promulgation of the admission rules are an administrative act by the judiciary branch, even though the final determination of admission to the bar is a judicial act. It could be argued that Kentucky's state constitutional grant of authority to regulate the bar\(^{162}\) makes the promulgation of such rules judicial acts, rather than administrative acts by the judicial branch. Federal district courts have jurisdiction over administrative procedures utilized by state courts, but not over judicial acts. An appeal from a judicial act of a state supreme court could only be made to the United States Supreme Court.

If the only challenge that could be made to the KBE's rules can be made to the United States Supreme Court, such a challenge would be much more difficult than in other states. However, regardless of how the Kentucky Constitution divides power among the branches, a neutral federal court will probably define the promulgation of rules to be an administrative act carried out by the judiciary, giving a federal district court jurisdiction in cases involving the violation of a federal law, and thus find that it has jurisdiction.

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\(^{160}\) *See supra* notes 149-59 and accompanying text.


\(^{162}\) *Ky. Const.* § 116.
CONCLUSION

Arguably, a mental health inquiry that is not based strictly on behavior cannot survive an ADA challenge;\textsuperscript{163} however, the current trend does not require such an extreme deviation from the KBE's approach.\textsuperscript{164} It is not clear how the standard for permissible mental health inquiries by bar examiners will develop as more courts address this issue. Nonetheless, it is doubtful that Kentucky's question could survive a challenge under even the most lenient standards established by the recent trend.\textsuperscript{165} Unless a higher court reverses this trend, it is just a matter of time before Kentucky's mental health inquiries are challenged under the ADA.

The current trend does not require the KBE to abandon all mental health inquiries and adopt questions which completely replace such inquiries with behavior-based ones. If the KBE does not wish to move to strictly behavior-based inquiries, the most reasoned approach would be to adopt middle-ground questions such as those proposed by the NCBE or the New Jersey Board of Bar Examiners,\textsuperscript{166} as well as adding language regarding one's physical ability to perform up to professional standards,\textsuperscript{167} until this issue is further worked out in the court system. By adopting a more restrictive set of questions, the KBE can show a good-faith effort to conform to the ADA and better ensure that it will not have to endure the expense and negative publicity inherent in any civil rights suit of this kind.

\textit{Lanny King}

\textsuperscript{163} See \textit{supra} notes 52-79 and accompanying text.
\textsuperscript{164} See \textit{supra} notes 80-107 and accompanying text.
\textsuperscript{165} See \textit{supra} notes 108-19 and accompanying text.
\textsuperscript{166} See \textit{supra} notes 123-35 and accompanying text.
\textsuperscript{167} See \textit{supra} notes 59, 60 and accompanying text.