

MENTAL HEALTH AND THE CHARACTER AND FITNESS EXAMINATION: THE TIDE IS SHIFTING

ABSTRACT

Bar associations throughout the United States have an obligation to admit only those candidates who are fit to practice law. One aspect of the inquiry that has come under scrutiny in recent years is the requirement to disclose mental health issues. The legal profession is in the midst of a mental health crisis, with rates of depression, anxiety, and suicide among lawyers far outpacing those of the general public. The stigma attached to mental illness has long discouraged individuals from seeking treatment, leading to an increase in related problems in the legal profession. In an effort to address this crisis, some jurisdictions have eliminated the mental health questions from the character and fitness exam, while others have shifted the focus from requiring disclosure of specific diagnoses to a more behavior-based inquiry. North Dakota, like many jurisdictions, currently requires disclosure of “condition[s] or impairment[s]” including mental, emotional, or nervous disorders or conditions. The number of jurisdictions facing litigation over similar questions is rising, leading many jurisdictions to eliminate those questions altogether. In the future, it is likely North Dakota will find it beneficial to the state’s bar to eliminate mental health and substance abuse questions from the character and fitness inquiry.

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I. INTRODUCTION

Under North Dakota Century Code section 43-17.3-05(2)(c), applicants to the State Board of Medical Examiners for licensure as a physician are allowed to answer “no” to mental health and substance use questions on their licensure application as long as they’re enrolled and participating in the North Dakota Professional Health Program (“NDPHP”).¹ The NDPHP provides mental health and substance abuse treatment to medical doctors and students of the University of North Dakota School of Medicine.² The NDPHP will not reveal to the State Medical Board that the applicant is involved in the program, so long as that person remains in compliance with their individual treatment plan.³ In 2014, the North Dakota Supreme Court opened services through the state’s Lawyer Assistance Program (“LAP”) to students the University of North Dakota School of Law,⁴ but participation does not preclude those students from answering invasive personal questions about mental health or substance use on the character and fitness exam. This note proposes adopting a similar provision for bar applicants as that which is provided by section 43-17.3-05(2)(c) of the North Dakota Century Code for applicants to the Board of Medical Examiners.⁵

According to a study published in 2016, the vast majority of law students who self-reported as having mental health or substance use issues cited a fear of delayed or denied bar admission as the main reason for their reluctance to seek help,⁶ followed closely by a fear of potential threat to job or academic status.⁷ Many of these same students expressed concern about discussing mental health or substance issues with their state’s LAP out of fear that the information would be shared with the bar admission team and would lead to delayed or denied bar admission.⁸ For these reasons, many law students refuse to seek help, despite evidence that some may need it more during their time in law school than at any other period of their lives.⁹

1. N.D. CENT. CODE § 43-17.3-05(2)(c) (2019).

2. See N.D. PROF. HEALTH PROGRAM, <https://ndphp.org/> (last visited Feb. 10, 2020).

3. N.D. CENT. CODE § 43-17.3-05(2)(c) (2019).

4. N.D. SUP. CT. ADMIN. R. 49.

5. N.D. CENT. CODE § 43-17.3-05(2)(c) (2019).

6. Jerome M. Organ, David B. Jaffe, & Katherine M. Bender, Ph.D., *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. OF LEGAL EDUC. 116, 141 (2016).

7. *Id.*

8. *Id.* at 141-42.

9. *Id.* at 145 (“Of the one-fifth to one-sixth of respondents with a diagnosis of anxiety or depression, many received their diagnosis after beginning law school.”).

II. HISTORY AND PURPOSE OF THE CHARACTER AND FITNESS EXAMINATION

Bar associations have not always focused primarily on a candidate's moral character and fitness to practice law. Historically, the focus was on more immutable characteristics such as a candidate's race, sex, and economic standing. It was not until much later that the focus shifted to the candidate's moral character, and eventually to mental health and substance use.

A. ROOTED IN RACISM, CLASSISM, AND SEXISM

Like much of the American legal system, the use of some form of character and fitness examination for entry into the legal profession was borrowed from England.¹⁰ The bifurcated structure of the British legal system was composed of barristers in the upper tier and solicitors in the lower.¹¹ To become an upper-tier barrister, one was largely required to be a person of wealth and high social standing.¹² Excluded from membership in the upper tier were such "presumptively unfit groups" as Catholics, tradesmen, journalists, and solicitors, as well as those who were unable to afford the high expenses of legal education and establishing a practice.¹³ However, little effort was made to investigate the moral character of those who met the stringent class and wealth requirements for membership.¹⁴ The lower tier of solicitors, on the other hand, was less strict on its membership requirements.¹⁵ By the early eighteenth century, the relatively unregulated tier of solicitors had developed a poor reputation of an "abysmal level of practice."¹⁶ This reputation led Parliament to enact a statute requiring specific educational requirements before one could be admitted as a solicitor.¹⁷ However, even this increase in regulation appeared to have had little impact on professional discipline for immoral conduct within the profession, and the sour reputation remained.¹⁸

The negative reputation of poor performing solicitors followed the English into colonial America, with some colonies pushing for the profession to be banned outright for their "blood-suck[ing]" practices.¹⁹ As a result, many

10. Lindsey Ruta Lusk, Note, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection,"* 2018 U. ILL. L. REV. 345, 349 (2018).

11. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494 (1983).

12. *Id.*

13. *Id.*

14. *Id.* at 495.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 496.

19. *Id.*

colonies began imposing character requirements in order to gain admission to the bar.²⁰ For example, Massachusetts required candidates for admission to furnish references from three ministers while Virginia required certification from a local judge.²¹ However, there is little evidence that these steps taken to regulate the morality of hopeful bar members had much of a practical impact on bar membership.²² One applicant in Kentucky, for example, was unable to accurately answer any of the legal questions posed to him during his examination.²³ Despite this, he was still admitted to that state's bar because "no one would employ him anyhow."²⁴

While few male candidates were denied bar admission on the basis of moral character,²⁵ women, on the other hand, were often excluded categorically.²⁶ For example, in the case of *Bradwell v. Illinois*,²⁷ Mrs. Myra Bradwell attempted to gain admission to the Illinois state bar.²⁸ Despite having met all required qualifications, Mrs. Bradwell was denied admission based solely on her status as a woman.²⁹ In his concurring opinion, Justice Bradley stated that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."³⁰ In another case, *In re Goodell*,³¹ the court stated that the:

"peculiar qualities of womanhood, its gentle graces its quick sensibility, its tender susceptibility, its parity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife."³²

Women were not the only category of individuals effectively excluded from practice.³³ In the early 20th century, the influx of Eastern European immigrants to the United States coincided with a renewed interest in strengthening barriers to bar admission.³⁴ While the stated focus at that time was to increase educational standards rather than specifically focusing on an

20. *Id.*

21. *Id.*

22. *Id.* at 497.

23. ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA*, VOLUME 2 38 (1965).

24. *Id.*

25. Rhode, *supra* note 11, at 497.

26. *Id.*

27. 83 U.S. 130 (1873).

28. *Bradwell*, 83 U.S. at 138.

29. *Id.* at 138, 140.

30. *Id.* at 139, 141.

31. 39 Wis. 232 (Wis. 1875).

32. *Goodell*, 39 Wis. at 245.

33. Rhode, *supra* note 11, at 497.

34. *Id.* at 499-500.

individual's moral character, the new entry requirements disproportionately impacted candidates who lacked the financial means to attend college or law school as well as those who had an "inadequate command of the King's English."³⁵ During the first eight years of Philadelphia's implementation of their stringent new registration and preceptorship program, approximately 7% of all candidates were rejected or withdrew, with others likely discouraged from even applying in the first place.³⁶ The proportion of Jewish candidates who were admitted dropped by sixteen percent and almost no black candidates were admitted.³⁷

B. MENTAL HEALTH, SUBSTANCE ABUSE, AND THE LEGAL PROFESSION

More recently, the focus of the character and fitness examination has been on ensuring that individuals who are admitted to practice law are of good moral character and possess the ability to practice in an open, honest, and forthright manner.³⁸ Each applicant for bar admission is subject to a thorough investigation into their legal, financial, educational, employment, residential, and psychological backgrounds.³⁹ Of particular interest here is the requirement that applicants disclose information relating to mental health or substance use concerns or treatment.⁴⁰ According to a study funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyers Assistance Programs, practicing lawyers are abusing alcohol at a "hazardous, harmful, or otherwise generally consistent with alcohol use disorders" at much higher rates than the general population.⁴¹ The rate of mental illness among licensed attorneys is even greater, with twenty eight percent of respondents reporting depression in the past year compared to only eight percent among the general population.⁴² These mental health and substance abuse problems are sometimes accompanied by ethical problems that can endanger the welfare of clients, such as missed court dates and deadlines, improper handling or misuse of client funds, and poor preparation

35. *Id.* at 500.

36. *Id.* at 501.

37. *Id.*

38. Timothy Dinan, *Bar Application Character and Fitness Background Check – Part 1*, NAT'L JURIST (Mar. 22, 2018, 9:47 AM), <http://www.nationaljurist.com/national-jurist-magazine/bar-application-character-and-fitness-background-check-part-1>.

39. See *NCBE Sample Application*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbe.org/dmsdocument/134> (last visited May 3, 2020).

40. *Id.*

41. Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. OF ADDICTION MED., Jan.-Feb. 2016, at 46, 52.

42. *Id.* at 51.

and representation of clients.⁴³ According to the National Conference of Bar Examiners (“NCBE”), whose character and fitness investigation services are utilized by twenty-two jurisdictions,⁴⁴ “[t]he public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers.”⁴⁵

It was against this backdrop that a slow, almost imperceptible national push to end the stigma of mental illness and substance abuse also began to take root. Erwin Goffman, an early researcher of mental illness stigma, published a book on the subject in 1963, *Stigma: Notes on the Management of Spoiled Identity*.⁴⁶ In the following decades, huge strides have been made in the United States to address the stigma of mental illness and substance abuse and to improve access to resources for treatment. For example, the American Bar Association maintains a website which offers a wealth of resources for practicing attorneys and law students relating to mental health and substance abuse treatment and management.⁴⁷

III. THE SHIFTING TIDE

Over the past decade, several states have begun scrutinizing the use of mental health and substance use questions on their character and fitness examinations, with a handful of states choosing to eliminate the questions altogether.⁴⁸

A. THE LOUISIANA CONSENT DECREE

In 2011, two complaints were filed with the United States Department of Justice Civil Rights Division against the Louisiana Supreme Court, the Louisiana Supreme Court Committee on Bar Admissions, and the Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel.⁴⁹ These

43. See David D. Dodge, *Legal Ethics and the Impaired Lawyer*, ARIZ. ATT’Y, Jan. 2017, at 10.

44. David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 THE PROF’L LAW. 3, 9 (2020).

45. NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2019 vii (2019).

46. See generally ERWIN GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (Simon & Schuster, Inc., ed. 1963).

47. See *Mental Health Resources*, AM. B. ASS’N, <https://abaforlawstudents.com/events/initiatives-and-awards/mental-health-resources/> (last visited Feb. 10, 2020).

48. See generally Jaffe & Stearns, *supra* note 44.

49. *Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to the Honorable Bernette J. Johnson, Chief Justice of the Louisiana Supreme Court, Elizabeth S. Schell, Executive Director of the Louisiana Supreme Court Committee on Bar Admissions, and Charles B. Plattsmier, Chief Disciplinary Counsel of the Louisiana*

complaints were filed by the Bazelon Center for Mental Health Law on behalf of individuals seeking admission to practice law in the state of Louisiana.⁵⁰ In the complaints, it was alleged that applicants who answered the following questions in the affirmative would be required to submit to additional conditions in order to be admitted to practice law in the state:⁵¹

25. 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?

26A. 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?

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. 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?⁵²

In the subsequent investigation by the Department of Justice into the use of these mental health status-based questions, it was determined that the Louisiana Supreme Court's practice of requiring conditional admission for applicants with specific mental health or substance use diagnoses without any overt indication of troublesome conduct on the part of the applicants constituted a violation of the provisions of the Americans with Disabilities Act.⁵³ This investigation resulted in a consent decree with the Louisiana Supreme Court on August 15, 2014 which mandated that the Court:

Attorney Disciplinary Board, U.S. DEP'T OF JUST. C.R. DIVISION (Feb. 5. 2014), <https://www.ada.gov/louisiana-bar-lof.pdf>.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

Refrain from inquiring into mental health diagnosis or treatment, unless (1) an applicant voluntarily discloses this information to explain conduct or behavior that may otherwise warrant denial of admission, . . . or (2) the Committee learns from a third-party source that the applicant raised a mental health diagnosis or treatment as an explanation for conduct or behavior that may otherwise warrant denial of admission. Any such inquiry shall be narrowly, reasonably, and individually tailored.⁵⁴

This consent decree provided guidance for states around the country on how best to inquire about mental health or substance use while maintaining compliance with the Americans with Disabilities Act, specifically that questions should focus on an applicant's conduct rather than diagnosis or treatment status.⁵⁵

B. THE SLOW SHIFT TO A CONDUCT-BASED INQUIRY

Following the Louisiana Consent Decree, other states and entities began rethinking their approach to mental health and substance abuse in their character and fitness inquiries. In 2015, the American Bar Association Commission on Disability Rights submitted Resolution 102 to the House of Delegates, which urged other states and licensing authorities to adopt the mandates of the Louisiana Consent Decree, specifically to abandon status-based and diagnosis-based questions from character and fitness examinations in favor of conduct-based questions.⁵⁶ This resolution was followed by a report from the National Task Force on Lawyer Well-Being, which also advocated a shift in focus toward support of law student well-being.⁵⁷ The report requested four specific changes: (1) that regulators re-evaluate bar application inquiries about mental health history, (2) that they adopt essential eligibility admission requirements, (3) that they adopt a rule for conditional admissions to practice law with specific requirements and conditions, and (4) that they publish data reflecting the low rate of denied admissions due to mental health disorders and substance abuse.⁵⁸ Further, in response to the release of the National Task Force's report, several groups, including the ABA Working Group to Advance Lawyer Well-Being, the ABA Commission on Lawyer Assistance Programs, the ABA Standing Committee on

54. *Press Release: Settlement Agreement Between the United States of America and the Louisiana Supreme Court Under the Americans with Disabilities Act*, U.S. DEP'T OF JUST. C.R. DIVISION (Aug. 14, 2014), https://www.ada.gov/louisiana-supreme-court_sa.htm.

55. Jaffe & Stearns, *supra* note 44, at 5.

56. *Id.*

57. *Id.* at 6.

58. *Id.*

Professionalism, and the National Association of Bar Counsel, joined together to adopt another resolution, Resolution 105.⁵⁹ The resolution stated in part, “[t]hat the American Bar Association supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students[.]”⁶⁰ Also, in 2017 the Conference of Chief Justices voted in favor of a resolution to support the National Task Force Report and states the intention to “[r]educe stigma of mental health and substance use disorders,” and generally support lawyer and judge well-being “as a critical component of lawyer competence[.]”⁶¹

Along with the above-mentioned entities pushing for changes in mental health inquiries, several states have begun changing or eliminating mental health questions from their character and fitness examinations altogether.⁶² For example, in California, a new statute was enacted on January 1, 2020 that prohibits the State Bar of California, or members of its Examining Committee, from looking at or considering the contents of an applicant’s mental health related medical records during the character and fitness examination for admission to practice law.⁶³ In January of 2018, the Connecticut Bar Examining Committee voted to remove the mental health questions from its character and fitness examination completely.⁶⁴ In October of 2018, the Florida Board of Bar Examiners implemented four new reforms: (1) reform of the mental health questions, (2) addition of a broad frequently asked questions section to address the board’s position on disclosure of mental health and substance use information, (3) implementation of substantial training of hearing panels on which questions are and are not appropriate to ask applicants, and (4) an agreement to pay costs for any additional testing or evaluation they may require of bar applicants.⁶⁵

In Michigan in 2019, the Michigan State Bar Board of Commissioners requested a reform of their character and fitness process from the Michigan Supreme Court to more closely align with the standards set forth in the Louisiana Consent Decree.⁶⁶ The Michigan Lawyers & Judges Assistance Program further requested to have a psychologist or other mental health professional available at all bar hearings that involve applicants with a history of substance use or mental illness.⁶⁷ In New York, the state bar association

59. *Id.*

60. *Id.*

61. *Id.* at 7.

62. *Id.* at 11-12.

63. *Id.* at 11.

64. *Id.*

65. *Id.*

66. *Id.* at 11-12.

67. *Id.*

eliminated a question from their character and fitness assessment which asked for disclosure of “any condition or impairment including, but not limited to a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way impairs or limits your ability to practice law[.]”⁶⁸ Instead, a new question has been added in its place that narrows the focus to behavior and conduct relevant to the practice of law rather than asking for blanket disclosure of mental health status.⁶⁹

As of January 1, 2019, the Virginia Board of Bar Examiners no longer asks for disclosure of mental health conditions or treatment.⁷⁰ What makes this particular situation unique is that in Virginia, the push to eliminate the mental health inquiry was spearheaded by students in the state’s law schools.⁷¹ Gray O’Dwyer, a spring 2018 graduate of the T.C. Williams School of Law, initiated a letter-writing campaign during her third year of law school in conjunction with her schools’ Black Law Students Association, the Public Policy and the Common Good Association, the American Bar Association Student Division, and the Virginia State Bar Association Law School Council.⁷² One year later, the Virginia Board of Bar Examiners agreed to eliminate the mental health portion of the character and fitness examination.⁷³

C. SUFFERING IN SILENCE: THE SURVEY OF LAW STUDENT WELL-BEING

Under a grant from the American Bar Association, a survey was conducted in the spring of 2014 at fifteen different law schools across the United

68. Debra Cassens Weiss, *New York Removes Mental Health Question from State Bar Application*, ABA JOURNAL (Feb. 28, 2020, 1:07 PM), <https://www.abajournal.com/news/article/new-york-removes-mental-health-questions-from-state-bar-application>.

69. Jane Wester, *New York to Eliminate Mental Health Question on Bar Application*, LAW.COM (Feb. 26, 2020, 12:23 PM), <https://www.law.com/2020/02/26/chief-judge-difiore-announces-new-york-will-eliminate-mental-health-question-in-bar-application-292-62220/?slreturn=20200409130625>.

70. Jaffe & Stearns, *supra* note 44, at 12.

71. *Id.*; see also A.J. Quinlan, *Mental Health Question Removed from Virginia Bar After Law School Graduate’s Efforts*, THE COLLEGIAN (Mar. 10, 2019, 6:16 AM), <https://www.thecollegianur.com/article/2019/03/mental-health-question-removed-from-virginia-bar-after-law-school-graduates-efforts>.

72. Kim Smith, *Law Student Leads Effort to Change Mental Health Policies on Virginia State Bar Applications*, THE COLLEGIAN (Apr. 3, 2018, 5:59 PM), <https://www.thecollegianur.com/article/2018/04/law-student-leads-effort-to-change-mental-health-policies-on-virginia-state-bar-applications>.

73. A.J. Quinlan, *Mental Health Question Removed from Virginia Bar After Law School Graduate’s Efforts*, THE COLLEGIAN (Mar. 10, 2019, 6:16 AM), <https://www.thecollegianur.com/article/2019/03/mental-health-question-removed-from-virginia-bar-after-law-school-graduates-efforts>.

States.⁷⁴ Published in 2016, this survey, partially titled “Suffering in Silence: The Survey of Law Student Well-Being,” collected self-report data from law students on mental health, substance use, and treatment, among other concerns.⁷⁵ The authors of the study identified it as, “the first multischool study in over twenty years to address law student use of alcohol and street drugs, and the first-ever multischool study to explore prescription drug use and the mental health concerns and help-seeking attitudes of law students.”⁷⁶

Among the most eye-opening results of this groundbreaking study was the finding that thirty-seven percent of law student respondents screened positive for anxiety,⁷⁷ and more than one in six screened positive for depression.⁷⁸ Forty-two percent of respondents indicated that they believed they needed help for emotional or mental health problems in the past year.⁷⁹ Of these respondents, only about half actually received counseling from a mental health professional.⁸⁰ When asked about factors discouraging them from seeking help from a professional, forty-five percent of respondents cited “potential threat to bar admission” as the main deterrent from seeking mental health assistance, and sixty-three percent of respondents cited it as the main deterrent from seeking help with substance abuse issues.⁸¹ Other deterrents cited included, “potential threat to job or academic status” (62% for substance use and 48% for mental health), and “concerns about privacy” (43% for substance use and 30% for mental health).⁸² These results indicated the possibility that law students are receiving the message that seeking professional help for mental health or substance use issues during law school is detrimental to their professional careers.⁸³

When asked about the perceived confidentiality of discussing mental health or substance use concerns with their dean of students or state LAP, fewer students believed conversations with the dean of students would remain confidential.⁸⁴ Furthermore, fifty-four percent of participants stated a belief that having a conversation about substance abuse with the dean of students would delay or prevent admission to the bar, while forty-six percent believed a similar conversation with a state LAP would also delay or prevent

74. Organ, Jaffe, & Bender, *supra* note 6, at 118, 123.

75. *Id.*

76. *Id.*

77. *Id.* at 137.

78. *Id.* at 136.

79. *Id.* at 140.

80. *Id.*

81. *Id.* at 141.

82. *Id.*

83. *Id.*

84. *Id.* at 142.

bar admission.⁸⁵ Moreover, forty-nine percent of all respondents agreed with the following statement, “If I had a drug or alcohol problem, my chances of getting admitted to the bar are better if the problem is hidden.”⁸⁶ While forty-three percent of respondents agreed that, “If I had a mental health problem, my chances of getting admitted to the bar are better if the problem is hidden.”⁸⁷

Law student respondents to the survey also indicated an unwillingness to inform a campus counseling center, dean of students, or state LAP when they are concerned about a fellow student.⁸⁸ The main reasons cited were, “potential threat to job or academic status,” “potential threat to bar admission,” “social stigma,” and “don’t want to get involved.”⁸⁹ It is clear from these findings that the possibility of disclosure of mental health or substance use issues on the character and fitness examination is enough to deter students who are otherwise in need, possibly desperate need, of professional services from seeking the help they require to become competent practitioners of law. Instead, students are choosing to struggle silently with mental health or substance use issues, likely carrying them over into licensed practice, simply to avoid the inevitable paper trail that comes with seeking professional mental health or substance use services.

IV. WHAT DOES THE SHIFTING TIDE MEAN FOR NORTH DAKOTA?

The character and fitness questionnaire in North Dakota asks candidates to disclose not only conduct related to mental health and substance use, but also requests disclosure of specific diagnoses. I propose that the State Bar Association of North Dakota eliminate all character and fitness question related to mental health and substance use, specifically those asking for diagnostic status. In the alternative, I propose the adoption of a process similar to that used by the State Board of Medical Examiners, which allows candidates to withhold disclosure as long as they participate in a monitored mental health or substance use program.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 144.

89. *Id.*

A. A CASE FOR ELIMINATING MENTAL HEALTH AND SUBSTANCE USE QUESTIONS IN NORTH DAKOTA

North Dakota is one of a handful of states who use the National Counsel of Bar Examiner's character and fitness questionnaire without any alterations or supplementation.⁹⁰ There are three questions pertaining to mental health or substance use, questions 29 through 31.⁹¹ The questions are provided verbatim below:

29. 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?

30. 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.

31. 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?⁹²

If question 30 is answered in the affirmative, the applicant is then further asked: "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?"⁹³ Question 30 is listed under the heading, "Condition or Impairment," solidifying the fact that the question is

90. *Bar Admission Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH L., <http://www.bazelon.org/wp-content/uploads/2019/05/Bar-Application-Character-and-Fitness-Questions.pdf> (last visited May 3, 2020).

91. *NCBE Sample Application*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/dmsdocument/134> (last visited May 3, 2020).

92. *Id.*

93. *Id.*

asking applicants to disclose specific diagnoses rather than just inquiring about conduct.⁹⁴

The American Bar Association recently made a statement concerning question 30 of the NCBE character and fitness examination.⁹⁵ In that statement, the ABA proposes that Question 30 should be eliminated from the examination on the basis that it is not a conduct-based question, which would be in compliance with the Louisiana Consent Decree, but is rather a status-based question of the type found by the U.S. Department of Justice to be in violation of the Americans with Disabilities Act.⁹⁶ It was also proposed that the NCBE replace the following preamble it had removed from that section in 2018.⁹⁷ The preamble is provided below:

Through this application, the National Conference of Bar Examiners makes inquiry about circumstances that may affect an applicant's ability to meet the professional responsibilities of a lawyer. This information is treated confidentially by the National Conference and will be disclosed only to the jurisdiction(s) to which a report is submitted. The purpose of such inquiries 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; boards of bar examiners routinely certify for admission individuals who demonstrate personal responsibility and maturity in dealing with fitness issues. The National Conference encourages applicants who may benefit from assistance to seek it.

Boards do, on occasion, deny certification to applicants whose ability to function is impaired in a manner relevant to the practice of law at the time that the licensing decision is made, or to applicants who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the licensing responsibilities assigned to bar admission agencies; further, the responsibility for demonstrating qualification to practice law is ordinarily assigned to the applicant in most jurisdictions.

The National Conference does not seek information that is fairly characterized as situational counseling. Examples of situational counseling include stress counseling, domestic counseling, grief

94. *Id.*

95. Jaffe & Stearns, *supra* note 44, at 9.

96. *Id.*

97. *Id.*

counseling, and counseling for eating or sleeping disorders. The National Conference does not seek medical records.⁹⁸

The ABA argues that this preamble served to inform applicants on how best to respond to the broad wording of questions 29-31.⁹⁹ Instead, the removal of this preamble is “problematic for all applicants, including applicants with a history of substance use or other mental health conditions[,]” as well as their counselors and advisors.¹⁰⁰

As the results of the Law Student Well-Being Survey indicate, a statistically significant number of law students have indicated that the requirement to disclose specific mental health or substance use information on the character and fitness examination acts as a deterrent to seeking professional help with potentially troubling issues.¹⁰¹ An argument could be made that, rather than protecting the public from unfit lawyers, the use of mental health and substance use questions on the character and fitness examination is instead causing potential future harm to the public. It does this by discouraging applicants who would benefit from professional help from seeking it and becoming competent, ethical practitioners as a result. Instead, applicants are encouraged to deny any issues with mental health or substance use and to forego necessary treatment in favor of having a clear record to present to the North Dakota State Bar Association. For this reason, North Dakota should follow the recommendations of the U.S. Department of Justice, the American Bar Association, the Counsel of Chief Justices, and others by eliminating the status-based question 30 from the character and fitness examination. Further, questions 29 and 31 should be eliminated as well, based on the findings of the Law Student Well-Being Survey that disclosure of any mental health or substance use-related information acts as a deterrent to students receiving treatment when it is necessary.¹⁰²

B. IF NOT, THEN PERHAPS A COMPROMISE?

In 2014, the North Dakota Legislature passed a statute that allows medical students seeking admission to practice medicine in North Dakota to answer “no” to questions about mental health and substance use on their admission application, as long as they participate in and comply with the provisions of the North Dakota Professional Health Program (“NDPHP”).¹⁰³ What if the legal profession in North Dakota were to adopt a similar plan? The North

98. *Id.* at 9-10.

99. *Id.* at 10.

100. *Id.*

101. Organ, Jaffe & Bender, *supra* note 6, at 141.

102. *Id.*

103. N.D. CENT. CODE § 43-17.3-05(2)(c) (2019).

Dakota Supreme Court has already opened the state's Lawyer Assistance Program to law students at the University of North Dakota School of Law.¹⁰⁴ Perhaps if law students were allowed to answer "no" to invasive mental health questions while still receiving necessary treatment, it might ameliorate the deterrent effect of those questions.

The NDPHP program and corresponding statute are not without their problems. Specifically, the program allows anyone to refer a student for participation, not just the applicant themselves.¹⁰⁵ While it could be useful to allow faculty, staff, or other treatment providers the ability to refer someone for participation in the program, it also stands to reason that "anyone" includes classmates, colleagues, and others who may not have the students' best interests in mind. Also, in order to remain compliant with the program, individuals may be required to refrain from working (and thus earning income). If they are allowed to work they are often expected to be watched closely by their supervisors for any concerning behaviors, and those supervisors are required to make periodic reports of that behavior to the NDPHP.¹⁰⁶ Also, if a participant fails to complete the program, or chooses to end their participation for any reason, they risk discipline or denial of licensure by the Board of Medical Examiners.¹⁰⁷ So even if a participant decided the program was too invasive, too demanding, or not useful for their ongoing treatment needs, they would be essentially barred from choosing a different treatment plan, lest they put their entire career at risk. This plan does not serve as a perfect model of compromise for the legal profession in North Dakota. However, it may certainly offer more benefits to law students who are struggling with mental health or substance use problems, allowing them to seek necessary treatment while avoiding the potentially stigmatizing and traumatizing experience of disclosing sensitive personal information to the State Board of Bar Examiners.

V. CONCLUSION

The use of character and fitness examinations to control admission to the practice of law pre-dates the United States.¹⁰⁸ However, in recent years, the use of mental health and substance use inquiries to examine moral character

104. N.D. SUP. CT. ADMIN. R. 49.

105. *Referrals*, N.D. PROF. HEALTH PROGRAM, <https://ndphp.org/referrals/> (last visited Feb. 10, 2020).

106. *FAQs*, N.D. PROF. HEALTH PROGRAM, <https://ndphp.org/faqs/> (last visited Feb. 10, 2020).

107. N.D. CENT. CODE § 43-17.3-03(4) (2019).

108. Lusk, *supra* note 10, at 349.

has garnered pushback from the legal community.¹⁰⁹ The U.S. Department of Justice found status-based, rather than conduct-based, questions to be in violation of the Americans with Disabilities Act, and a steady push to eliminate status-based questions has begun in a small portion of states.¹¹⁰ Studies show that the existence of questions about mental health and substance use on the character and fitness examination acts as a deterrent for law students seeking admission to practice law from seeking professional help for potentially treatable conditions, instead encouraging students to forgo treatment in order not to potentially jeopardize their futures.¹¹¹ Two potential solutions to this ongoing problem were discussed. First, I propose the complete elimination of mental health and substance use questions on the state's character and fitness examination. Alternatively, I propose the adoption of a system similar to that used by the State Board of Medical Examiners, which allows students who are actively participating in and maintaining compliance with the NDPHP to answer "no" to any mental health or substance use questions posed on the medical licensure application.¹¹²

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109. *See generally* Jaffe & Stearns, *supra* note 44.

110. *Id.* at 4-12.

111. Organ, Jaffe, & Bender, *supra* note 6, at 141.

112. N.D. CENT. CODE § 43-17.3-05(2)(c) (2019).

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