IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JULIE ANN CLARK Plaintiff, v. VIRGINIA BOARD OF BAR EXAMINERS and W. SCOTT STREET, III, Secretary Virginia Board of Bar Examiners Defendants.	:	C.A. # 94-211-A

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Julie Ann Clark brought this action seeking declaratory and injunctive relief against the Virginia Board of Bar Examiners ("Board"). Although she has successfully passed the Virginia Bar examination and has satisfied all of the other requirements of the Board's character and fitness review, she has refused to answer question 20(b) of the Board's application, which asks,

> Have you within the past five (5) years been treated or counseled for any mental, emotional, or nervous disorder?

Ms. Clark's lawsuit seeks a declaration that the Board violated title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. II 1990) by asking question 20(b). Ms. Clark also seeks a permanent injunction barring the Board from inquiring into her mental health history and the mental health history of other bar applicants.

Earlier in this litigation, this Court denied both defendants' motion and the plaintiff's cross-motion for summary judgment. The defendants are now moving this Court again for summary judgment on arguments substantially similar to those raised in its prior motion because of their continuing belief that question 20(b), as currently written, does not violate title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12180.

The United States, as amicus curiae, urges this Court to deny the defendants' motion.

ARGUMENT

I. THE BOARD'S LICENSING PROCEDURES ARE SUBJECT TO TITLE II OF THE ADA

Title II contains a sweeping prohibition of practices by public entities that discriminate against persons with disabilities. Section 202 of the Act, 42 U.S.C. § 12132, provides,

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

A "public entity" is defined in title II to include "any department, agency ... or other instrumentality of a State ... or local government." 42 U.S.C. § 12131(1)(B). The Board falls within this definition as it is the State governmental agency responsible for licensing attorneys in the Commonwealth of

Virginia. As a public entity, the Board may not discriminate on the basis of disability in conducting its licensing activities.

Several provisions of the title II regulation prohibit policies that unnecessarily impose greater requirements or burdens on individuals with disabilities than those imposed on others. As a State licensing entity, the Board must comply with section 35.130(b)(6), which states,

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability * * *.

28 C.F.R. § 35.130(b)(6). Section 35.130(b)(3)(i) further provides,

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration ... that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. § 35.130(b)(3)(i). Also applicable is the regulatory provision prohibiting discriminatory eligibility criteria which states:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.150(b)(8)(emphasis added). This provision means that the Board cannot require applicants to answer question 20(b) as a condition for licensure unless the Board can demonstrate that this question is necessary to determining fitness to

practice law. As discussed further below, we do not believe that the Board can meet this burden.

II. THE ADA PROVISIONS RELATING TO EMPLOYMENT-RELATED INQUIRIES ARE NOT APPLICABLE TO PROFESSIONAL LICENSING ACTIVITIES

In support of its motion, the Board looks to title I of the ADA, which prohibits discrimination in employment on the basis of disability. 42 U.S.C. §§ 12111 - 12117 (Supp. II 1990). Among the areas addressed by title I are medical inquiries during the application stage for employment. Title I explicitly prohibits an employer from inquiring into an applicant's disability before a prospective employee is offered a job. 42 U.S.C. § 12112(c)(2). The Board interprets title I to allow an employer, once a conditional job offer is made, to then require the applicant to undergo a medical examination and respond to any medical inquiry so long as all applicants are similarly required to undergo this procedure. 42 U.S.C. § 12112(c)(3).[1]

The Board first asserts that it is entitled to ask question 20(b) because, in contrast to title I's specific prohibitions, title II of the ADA contains no specific prohibition on inquiries into disability. This argument is incorrect because the concerns raised by discrimination in employment and state licensing are completely different. Furthermore, the legislative history of the ADA does not support the Board's statutory interpretation.

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[1] It is not necessary here to determine whether this interpretation is correct, because title I is simply not applicable in these circumstances.

As noted by the court in Ellen S. v. Florida Board of Bar Examiners, 94-0429-CIV-KING (Aug. 1, 1994), at 8:

> [T]he legislative history reveals that Congress deliberately chose 'not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III.' H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), -reprinted in- 1990 U.S.C.C.A.N. 303, 367.

Congress chose instead to direct the Department of Justice to promulgate regulations. Id., n.6 (citing Kinney v. Yerusalim, 812 F. Supp. 546, 548 (E.D. Pa.), aff'd, 9 F.3d 1067 (3rd Cir. 1993), cert. denied, 114 S. Ct. 1545 (1994)). As the Ellen S. court found, the title II regulation prohibits bar examiners from inquiring into the mental health history of applicants. Id. at 10.

The Board also argues -- by analogizing to title I -- that it should be permitted to make medical inquiries, as it is in a posture comparable to an employer who has made a conditional job offer. This argument is flawed in two respects.

First, title I's division between "pre-offer" and "post-offer" medical inquiries has no application to the entirely separate area of professional licensing covered by title II. In title I, Congress created very detailed procedures and requirements in order to protect the rights of prospective employees with disabilities. This careful construct, because it was designed for a very specific transaction -- hiring of employees -- is unworkable when it is superimposed over a very different kind of transaction -- licensing of professionals. Title II, on the other hand, specifically applies to state

licensing processes, 28 C.F.R. 35.130(b)(6), and permits the Board to perform its very important function of assessing the competency of aspiring attorneys and imposing eligibility requirements that are "necessary" for this purpose, 28 C.F.R. 35.130(b)(8).

Furthermore, the court in Medical Society of New Jersey v. Jacobs, 1993 WL 413016 (D.N.J. 1993), rejected an argument similar to the one raised by the Board. The court examined the legislative history of both titles I and II of the ADA and concluded that, to the extent title I was to be incorporated in title II, it was to be done through the title II regulations, which the Court held, "are clear" and "invalidate the Board's procedure of placing extra burdens on disabled applicants." Id. at *9.

Second, even if title I were applicable to the Board's licensing procedures, the use of Question 20(b) would not be permissible. Just as title I allows certain "post-offer" medical inquiries, it just as clearly prohibits "pre-offer" inquiries into an applicant's disability. As the Board concedes, the license application procedure is not a "two-step" process (Defendant's Brief, p. 7). Yet, relying on title I would more logically prohibit the defendants from inquiring at all into any disability because prospective licensees to practice law never reach a "post offer" stage in the licensing process.[2] A license

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[2] As the court in Medical Society observed, "[t]he Board ... acknowledges in making this argument that, by analogy to (continued...)

is either granted or not; conditional licenses are not offered to applicants with medical examinations of all then being required. Rather, the Board makes pre-license medical inquiries of all applicants, and follow-up medical questions, not of all applicants, but only of those who answer "yes" to question 20(b).

III. QUESTION 20(B) IS OVERBROAD, UNNECESSARY, AND IMPOSES NEEDLESS BURDENS

A core purpose of the ADA is the elimination of barriers caused by the use of stereotyped assumptions "that are not truly indicative of the individual ability of [persons with disabilities] to participate in, and contribute to, society." 42 U.S.C. §12101(a)(7).[3] The ADA does not permit unnecessary inquiries into the existence of disabilities and prohibits policies that impose greater requirements or burdens on individuals with disabilities than those imposed on others. While the ultimate goal of the Board -- to ensure that persons admitted to the Virginia bar have the requisite moral character and fitness to practice law -- is certainly lawful, the means used by the Board to achieve that goal is not. By unnecessarily imposing additional burdens, including disclosures and the

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[2](...continued)
Title I ..., it is technically prohibited from asking the challenged questions before it issues licenses." Id., at *9.

[3] See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 30, 33, 40, 41 (1990) [hereinafter cited as Education and Labor Report]; H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. III at 25 (1990) [hereinafter cited as Judiciary Report]; S. Rep. No. 116, 101st Cong., 1st Sess. at 7, 9, and 15 (1989) [hereinafter cited as Senate Report].

possibility of follow-up investigations, on those individuals who have any history of treatment, diagnoses, or counselling for mental or psychiatric conditions, the Board is engaging in precisely the kind of impermissible stereotyping that the ADA proscribes.

This case does not present a situation where an individual has been denied admission to the bar based on disability. However, title II and its implementing regulations proscribe more than total exclusion on the basis of disability. See e.g., Ellen S. v. Florida Board of Bar Examiners, 94-0429-CIV-KING at 9 (S.D. Fla. Aug. 1, 1994); Medical Society of New Jersey, 1993 WL 413016, at *7. Section 35.130(b)(6) prohibits administering a licensing program "in a manner that subjects qualified persons with disabilities to discrimination." Similarly, section 35.130(b)(3)(i) prohibits use of "methods of administration" that have a discriminatory effect. Finally, as pointed out in the interpretative guidance accompanying the regulation, section 35.130(b)(8) not only outlaws overt denials of equal treatment of individuals with disabilities, it prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities greater than those placed on others. 28 C.F.R. pt. 35, app. A at 453-54 (1993); see Ellen S. at 10; Medical Society at *7. It also prohibits unnecessary inquiries into disability. Ellen S. at 9, 10, n. 7.

In Ellen S. v. Florida Board of Bar Examiners, 94-0429-CIV-KING (S.D. Fla. Aug. 1, 1994), the court held that simply asking

for the type of information called for by question 20(b) violated title II of the ADA. In that case, plaintiffs challenged a question that is substantially identical in scope to Question 20(b) of the Virginia application.[4] The court noted that, "as the Title II regulations make clear, question 29 and the subsequent inquiries discriminate against Plaintiffs by subjecting them to additional burdens based on their disability." Id., at 9. The court further held that, even apart from the ensuing investigation, the question itself independently violate title II. Id., at 10, n. 7

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[4] Question 29 of the application to the Florida bar reads as,

> 29. Consultation with Psychiatrist, Psychologist, Mental Health Counsellor or Medical Practitioner.
> a. ____ Yes ____ No 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.
>
> b. ____ Yes ____ No 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.
>
> c. ____ Yes ____ No 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. Psychotropic medication shall mean any prescription drug or compound effecting the mind, behavior, intellectual functions, perceptions, moods, or emotions, and includes anti-psychotic, anti-depressant, anti-manic and anti-anxiety medications.

Similarly, question 20(b) of the Virginia application also is overbroad, unnecessary, and imposes needless burdens on persons with disabilities.

A. Question 20(b) Violates Title II Because It Is Overbroad and Unnecessary

Unnecessary inquiries into disabilities are barred by the title II regulation, 28 C.F.R. § 35.130(b)(8), which is identical in substance to a statutory provision in title III, 42 U.S.C. § 12182(b)(2)(A)(i), and the title III regulation, 28 C.F.R. 36.301(a).[5] The legislative history of the title III statutory provision makes clear that Congress intended to prohibit unnecessary inquiries into disability.

> It also would be a violation for [a public accommodation] to invade such people's privacy by trying to identify unnecessarily the existence of a disability, as, for example, if the credit application of a department store were to inquire whether an individual has epilepsy, has ever ... been hospitalized for mental illness, or has other disability.

Senate Report at 62; see also Education and Labor Report at 105; Judiciary Report at 58. The Department of Justice emphasized this Congressional intention in the analysis accompanying its title III regulation, 28 C.F.R. pt. 36, app. B at 590. The title II Technical Assistance Manual, published by the Attorney General pursuant to statutory mandate,[6] reiterates that title II

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[5] Section 204 of the ADA provides that the title II regulation shall incorporate this concept insofar as it requires the title II regulation to be consistent with the ADA generally. 42 U.S.C. § 12134(b); Judiciary Report at 51; Education and Labor Report at 84; 28 C.F.R. pt. 35, app. A at 440.

[6] 42 U.S.C. §§ 12206(c)(3) & (d) (Supp. II 1990).

prohibits unnecessary inquiries into disability. U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual § II-3.5300 (1992 & Supp. 1993)("Technical Assistance Manual"). Thus, question 20(b) can lawfully be used by the Board only if it is necessary to the Board's licensing function.

Title II prohibits a public entity from discriminating against a "qualified individual with a disability," which is defined in title II of the ADA and section 35.104 of the title II regulation to mean:

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices ... meets the essential eligibility requirements for the receipt of services or the participation in the programs or activities provided by a public entity.

42 U.S.C. § 12131(2); 28 C.F.R. § 35.104 (emphasis added). Similarly, as noted in the analysis accompanying section 35.130(b)(6), a person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification. 28 C.F.R. pt. 35, app. A at 453 (July 1, 1993).[7] Where, as here, public safety may be affected

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[7] The section-by-section analysis also indicates that determining what constitutes "essential eligibility requirements" has been shaped by cases decided under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. 28 C.F.R. pt. 35, app. A at 451. These cases have demanded a careful analysis behind the qualifications used to determine the actual criteria that a position requires. School Bd. v. Arline, 480 U.S. 273, 287-288 (1986); Pandazides v. Virginia Bd. of Educ., 946 F.2d 345, 349-50 (4th Cir. 1991)(noting that "defendants cannot merely (continued...)

a determination of whether a candidate meets the "essential eligibility requirements" may include consideration of whether the individual with a disability poses a direct threat to the health and safety of others.[8]

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[7](...continued)
mechanically invoke any set of requirements and pronounce the handicapped applicant or prospective employee not otherwise qualified. The district court must look behind the qualifications"); Doe v. Syracuse School Dist., 508 F. Supp. 333, 337 (N.D.N.Y. 1981) (requiring analysis behind "perceived limitations"). See also Strathie v. Department of Transp., 716 F.2d 227, 231 (3d Cir. 1983) (finding State's characterization of essential nature of program to license bus drivers overbroad, and requiring a "factual basis reasonably demonstrating" that accommodating the individual would modify the essential nature of the program).

[8] As noted in the Department's title II analysis accompanying section 35.104,

> Where questions of safety are involved, the principles established in §36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 C.F.R. Part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.
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> A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.... Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not

(continued...)

The purpose of the Board's licensure process is to determine whether individuals are capable of practicing law in a competent and ethical manner, i.e. whether such persons will satisfy the "essential eligibility requirements" for the practice of law. The inquiries and investigations at issue here are poorly crafted to achieve the Board's goal of identifying persons unfit to practice law. Asking about an applicant's history of diagnosis and treatment for any mental, emotional, or nervous disorder treats a person's status as an individual with a disability as if it were indicative of that individual's future behavior as an attorney.[9] However, diagnosis or treatment for any mental, emotional, or nervous disorder provides an uncertain basis for assuming that these disabilities will affect behavior. See generally Jay Ziskin, Coping with Psychiatric and Psychological Testimony 1-63 (3d ed. 1981); Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974) (both articles citing extensive authority establishing the inability of mental health

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[8](...continued)
eliminate that risk.

28 C.F.R. pt. 35, app. A at 448 (1993).

[9] The ADA prohibits discrimination based on stereotypical and unfounded fears and misconceptions over the perceived consequences of disabilities. See, e.g., Title II Technical Assistance Manual at 12 ("A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However the public entity must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities") (emphasis added).

professionals to make reliable predictions of future behavior).[10] By using broad questions intended to reveal any treatment or consultation for mental, emotional, or nervous disorders, the Board is using presumptions about mental illness that are simply not supported in fact.

The Board's purposes are better served by questions that focus directly on conduct and behavior, including those that may be associated with mental illness. The Title II Technical Assistance Manual states that,

> [p]ublic entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."

Technical Assistance Manual, at II-3.7200 (emphasis added). One permissible "factor related to the disability" is any inappropriate behavior associated with that disability. Thus, the Board may inquire generally about any leaves of absence, disciplinary actions, suspensions, or terminations from school or

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[10] Of course this is even more true with respect to bar examiners, who are not usually professionals trained in the fields of psychiatry or psychology.

> [w]hile mental stability is obviously relevant to practice, current certification standards license untrained examiners to draw inference that the mental health community would find highly dubious...Even trained clinicians cannot accurately predict psychological incapacities based on past treatment in most individual cases.

Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 581-82 (1985).

jobs in the past but may not focus the inquiry only on such events occasioned by physical or psychiatric illnesses or conditions. Similarly, the Board may inquire about personal behavior, including whether the applicant uses illegal drugs and the frequency of use.[11] The Board may also ask applicants whether there is anything that would currently impair their ability to carry out the duties and responsibilities of an attorney in a manner consistent with the standards of conduct for an attorney admitted to practice in the Commonwealth of Virginia.[12]

Other questions already on the bar application elicit a wealth of information to illuminate an individual's past behavior. These inquiries require full disclosure of employment history, educational background, military service, and criminal record. These inquiries provide a sound and comprehensive basis for drawing inferences about an individual's fitness for the practice of law without resort to the mental health history. The caselaw also supports this conclusion. See Medical Society of

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11 Under the ADA, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12110(a).

12 For instance, in Doe v. Syracuse School District, 508 F. Supp. 333 (N.D.N.Y. 1981), the court held that a question on a job application form asking whether the applicant had ever experienced a nervous breakdown or undergone psychiatric treatment was illegal under the Rehabilitation Act and its implementing regulations. The district court noted that, "if defendant sincerely wanted to employ persons that were capable of performing their jobs, all it had to ask was whether the applicant was capable of dealing with various emotionally demanding situations." Id. at 337.

New Jersey v. Jacobs, 1993 WL 413016, at *7 (questions regarding applicants' diagnosis of and treatment for psychiatric illness or condition are unnecessary, where the medical examiners could "formulate a set of effective questions that screen out applicants based only on their behavior and capabilities"); In re Petition of Frickey, et al., No. C5-84-2139, 1994 WL 183523 (Minn. April 28, 1994), (order removing similar questions from Minnesota bar admissions application, finding that "questions relating to conduct can, for the most part, elicit the information necessary for the Board of Law Examiners to enable the Court to protect the public from unfit practitioners").

Furthermore, even if the Board could show that certain mental, emotional, or nervous disorders were indicative of a person's ability to practice law, question 20(b) still suffers from the fatal defect of being unnecessarily overbroad. Concluding that there is no "perfect question" that it can ask to identify only people who have a present mental or emotional condition that impairs their ability to practice law (Defendant's Brief, p. 13), the Board asserts that it must be allowed to inquire freely into any treatment or counseling for any mental, emotional, or nervous disorder within the past five years. Yet, armed with the wealth of information that answers to question 20(b) have produced concerning applicants' treatment or counseling, the Board, by its own admission, has rarely chosen to pursue additional investigation. The Board notes that, "[a]s the preamble to the Board's mental health inquiry states, only severe

mental problems will trigger an investigation or impact the admission decision" (Defendant's Brief, p. 10)(emphasis added). Oddly, to isolate those applicants with "severe mental problems," the Board has chosen the broadest conceivable definition of "disorder." The Board's motion is premised on the belief that title II allows for such a broad inquiry to accomplish such a narrow task. In fact, exactly the opposite is true.

In support of its motion, the Board cites to (and appended) Applicants v. Texas State Board of Bar Examiners, 93 CA 740 SS (Oct. 10, 1994). This case upheld a licensing board's use of a very narrow question regarding a few types of mental disabilities.[13] While the United States does not agree with the court's holding that this type of question is permissible under

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[13] Applicants to the Texas bar are required to answer the following:

> a) Within the last ten years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?
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> b) 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 bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?
>
> If you answered "YES" to any part of this question, please provide details on a Supplemental Form, including date(s) of diagnosis or treatment, and a description of your present condition. Include the name, current mailing address, and telephone number of each person who treated you, as well as each facility where you received treatment, and the reason for treatment.

the ADA, even the Texas State Board of Law Examiners opinion would disallow the Board's use of question 20(b). The Texas Board of Law Examiners court found that two previous formulations of the Texas questions would violate the ADA. The court rejected a question that was substantially similar to Virginia's question 20(b).[14] Indeed, the court also rejected a question that was substantially narrower than question 20(b).[15] The court

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[14] Prior to April 1992, the Texas Board asked applicants:

> Have you, within the last ten (10) years:
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> a) Been examined or treated for any mental, emotional or nervous conditions (You may exclude marriage counseling.)
>
> b) Been voluntarily or involuntarily admitted to a hospital or institution as a result of mental, emotional or nervous conditions?
>
> If you answered "YES" to 11a. or b., give details on the Supplemental Form. Include dates of treatment or confinement, name and current mailing address of the person(s) who treated you (or the facility where you received treatment), and the reason for treatment.

[15] Between April 1992 and July 1993, the Texas Board significantly narrowed its original question and asked applicants:

> a) Have you, within the last ten (10) years, been treated for any mental illness?
>
> b) Have you, within the last ten (10) years, been admitted to any hospital or other facility for the treatment of any mental illness?
>
> Section 571.033, Texas Health and Safety Code, defines mental illness, as follows: "Mental illness" means an illness, disease, or condition other an epilepsy, senility,

(continued...)

observed that these questions "intruded into an applicant's mental health history without focusing on only those mental illnesses that pose a potential threat to the applicant's present fitness to practice law. . . . [and] that such a broad-based inquiry violates the ADA." Id. at 20 (emphasis added).

The Virginia Board of Bar Examiners, however, has chosen exactly such an improper broad-based approach. Its boundless definition of "disorder" in question 20(b) does not include any limitation on the types of disorders that may be included. The Board only makes assertions, without a factual basis, for its claim that the range of "disorders" encompassed within the broad ambit of question 20(b) have any bearing on an applicant's ability to practice law. Three other courts have rejected similar claims. Texas State Board of Law Examiners, supra; Ellen S., supra; and Medical Society, supra at pp. 8-10.

B. Question 20(b) Violates Title II Because It Imposes Unnecessary Burdens

The Board also argues that title II permits inquiries into mental disorders, so long as it does not deny a professional license to a person who, despite his or her mental disability, still has the ability to practice law (Defendant's Brief, p. 9). This argument was rejected by the Ellen S. and Medical Society

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[15](...continued)
alcoholism, or mental deficiency, that:
(A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or
(B) grossly impairs behavior as demonstrated by recent disturbed behavior.

courts. Ellen S., at 10; Medical Society, at *6-8. See discussion, infra.

The Board's inquiries and reporting requirements concerning diagnosis and treatment for mental illness impose requirements on persons with histories of disabilities that are greater than those imposed on other applicants. The Board requires applicants to state whether, within the past five years, they have been treated or counseled for any mental, emotional, or nervous disorder. Affirmative answers automatically trigger a requirement that the applicant identify and provide the complete address of each individual consulted for the condition, and record the beginning and ending dates of consultation.[16] Mental health treatment, however, is often bound up with intensely personal issues such as family relationships and bereavement. The Board's licensure inquiry is invasive not only because it requires persons who answer the questions in the affirmative to provide information about these issues, but because it also requires them to disclose details about what is arguably the most private part of human existence -- a person's inner mental and emotional state.

The inquiries are also invasive and burdensome because of the stigma which still attaches to treatment for mental or emotional illness. The Supreme Court has recognized that individuals have a substantial liberty interest under the Due

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16 By signing their applications, candidates also waive their rights of confidentiality to and authorize release of their treatment or consultation records.

Process Clause of the Constitution in avoiding the social stigma of being known to have been treated for a mental illness. Parham v. J.R., 442 U.S. 584, 600 (1979); Addington v. Texas, 441 U.S. 418, 426 (1979).[17] See also Smith v. Schlesinger, 513 F.2d 462, 477 (D.C. Cir. 1975) ("[m]ental illness is unfortunately seen as a stigma. The enlightened view is that mental illness is a disease...but we cannot blind ourselves to the fact that at present, despite lip service to the contrary, this enlightened view is not always observed in practice") (ordering Department of Defense to present investigative file on plaintiff, whose security clearance had been revoked.)[18]

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[17] In Parham, the Court found that a person's liberty is "substantially affected" by the stigma attached to treatment in a mental hospital: "The fact that such a stigma may be unjustified does not mean it does not exist. Nor does the fact that public reaction to past commitment may be less than the public reaction to aberrant behavior detract from this assessment. The aberrant behavior may disappear, while the fact of past institutionalization lasts forever." Parham v. J.R., 442 U.S. 584, 622, n.3 (1979) (Stewart, J., concurring in judgment).

[18] See also In Re John Ballay, 482 F.2d 648, 668-69 (D.C. Cir. 1973) ("[d]ischarged patients must not only cope with stigma of having once been hospitalized, but must often continue to cope with the 'mental illness' label itself....Even the most enlightened persons may unwittingly harbor views associated with this stigma."), Estate of Roulet, 23 Cal.3d 219, 228-29 (1979) (finding that there is compelling evidence that society "still views the mentally ill with suspicion" and noting that:

> [i]n the ideal society, the mentally ill would be the subjects of understanding and compassion, rather than ignorance and aversion. But that enlightened view, unfortunately, does not yet prevail. The stigma borne by the mentally ill has frequently been identified in the literature: 'a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities.

(continued...)

The ADA's definition of disability also recognizes the stigma which attaches to persons with histories of mental illness. Regardless of whether they have ever suffered from an actual substantial impairment of a major life activity, persons who have ever been diagnosed or treated for mental illness may be covered by the third prong of the "disability" definition -- "regarded as having such an impairment." 42 U.S.C. § 12102 (2)(C).[19] Unfortunately, due to popular misconceptions concerning persons who have sought treatment for mental health problems in the past, such persons are often regarded as emotionally disabled or mentally ill although their past and/or current capability or stability may not be affected. See discussion infra. As the Supreme Court observed in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), Congress, in enacting the "regarded as" provision, "acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

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[18](...continued)
Many people have an irrational fear of the mentally ill.' The former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination.

(citing People v. Burnick, 14 Cal.3d 306, 321 (1975)).

[19] The title II regulation defines this prong to include persons who have "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such an impairment . . . ." 28 C.F.R. § 35.104 (1992).

The Board's inquiries into an individual's history of disabilities also has a more insidious discriminatory effect. Concern over the Board's inquiries about diagnosis and treatment for mental illness deters law students and other applicants from seeking counseling for mental or emotional problems. See Stephen T. Maher & Lori Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Ind. L. Rev. 821, 830-33 (1990) (detailed discussion of how such inquiries have deterrent effect). Indeed, this deterrence factor was part of the basis for the State of Minnesota Supreme Court's order in In re Petition of Frickey, et al., No. C5-84-2139 (Minn. Apr. 28, 1994) (deleting questions regarding mental health history from bar admissions application on grounds that the questions deterred law students from seeking needed counseling.)[20] Even when treatment is sought, its effectiveness may be compromised, because knowledge of the Board's potential investigation of issues surrounding treatment is likely to undermine the trust and

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[20] The court's conclusion is supported by studies suggesting that law students may decide against seeking treatment because they are afraid that it might disqualify them from admission to the bar. In a recent survey of over 13,000 law students, 41 percent responded that they would seek assistance for a substance abuse problem if they were assured that bar officials would not have access to the information. As to whether they would refer a friend who had a substance abuse problem, 47 percent responded that they would if bar officials would not have access to the information. Association of American Law Schools, Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 Journal of Legal Education 35, 55 (1994) It can be reasonably assumed that a study asking the same questions about mental health problems would show similar findings.

frank disclosure on which successful counseling depends. See Maher & Blum, supra, at 824, 833-46.[21]

The Board's motion is premised on the important role that it serves in protecting the public against attorneys unfit to practice in the Commonwealth of Virginia. The United States fully supports this laudable goal. As we have noted above, however, the means to this end, however, are not without limitation. In enacting the ADA, Congress sought to protect persons with mental disabilities against discrimination and the destructive stereotypes common in our society. This suit seeks to protect those rights.

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[21] The chilling effect of the Board's practices runs completely counter to the goal ostensibly served by the inquiries -- ensuring that applicants will be fit practitioners. See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 582 (1985). As Professor Maher and Dr. Blum state in their article, legal practice is a stressful enterprise, and many persons can benefit professionally from mental health counseling.

> [I]f there is any wisdom in the choice to inquire at the cost of discouraging treatment, it is penny-wise and pound-foolish because it discourages applicants from taking advantage of opportunities to develop their mental and emotional fitness before they are admitted to the bar. This is a mistake because law practice is stressful, and students need to prepare for the stress of practice, just as they need to prepare for its other demands. Through counseling, students can develop healthy coping strategies that will permit them to deal with the stress of practice. Without adequate preparation, they may resort to unhealthy coping strategies, such as drug or alcohol abuse.

Maher & Blum, supra, at 824.

CONCLUSION

For the foregoing reasons, this Court should deny the defendants' motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, attorney for the United States of America, do hereby certify that I have this date served upon the persons listed below, by overnight delivery, true and correct copies of the foregoing Memorandum of the United States as Amicus Curiae in Opposition to Defendants' Motion for Summary Judgment.

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