3-10(H)

FILE NO. C5-84-2139

STATE OF MINNESOTA
IN THE SUPREME COURT

OFFICE OF
APPELLATE COURTS

MAR 10 1994

FILED

In re Petition for Order of this Court directing the State Board of Law Examiners to Delete Questions 4.22, 4.23, and 4.24 from the Application for Admission to Bar of Minnesota

PETITION OF PROFESSOR PHILIP P. FRICKEY, DEAN ROBERT A. STEIN, AND PROFESSORS STEPHEN BEFORT AND LAURA J. COOPER OF THE UNIVERSITY OF MINNESOTA LAW SCHOOL; OF DEAN JAMES F. HOGG, DEAN OF STUDENTS JAMES H. BROOKS, AND PROFESSORS JENNIFER J.S. BROOKS AND JOHN O. SONSTENG OF THE WILLIAM MITCHELL COLLEGE OF LAW; AND OF DEAN ROBERT J. SHERAN AND PROFESSORS MARIE A. FAILINGER, MARY JANE MORRISON, JOSEPH OLSON, LINDA RUSCH, PETER N. THOMPSON, AND HOWARD J. VOGEL OF THE HAMLINE UNIVERSITY LAW SCHOOL FOR ORDER REQUIRING STATE BOARD OF LAW EXAMINERS TO DELETE QUESTIONS 4.22, 4.23, AND 4.24 FROM THE APPLICATION FOR ADMISSION TO THE BAR OF MINNESOTA

I. INTRODUCTION

This petition, brought by petitioner law school deans and law professors, seeks an Order of the Court requiring the State Board of Law Examiners (the "Board") to delete questions 4.22, 4.23, and 4.24 from the Application for Admission to the Bar of Minnesota on the grounds that these questions, which require information about mental health treatment, violate the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213), the Minnesota Human Rights Act (Minn. Stat. Ch. 363), the Constitution of the United States, and the Constitution of the State of Minnesota, and on the additional ground that, as a matter of policy, these questions unduly deter law students from seeking mental health counseling, unduly invade privacy, and have a disproportionally disadvantageous effect upon women applying for admission to the bar contrary to the gender-bias policies of this Court.[1]

A copy of pages 4-6 of the current Minnesota bar application form, which contain the

[1]Petitioners challenge Question 4.24 only so far as it applies to voluntary hospitalization, a consensual act that the presence of the question illegally and unwisely deters. Petitioners do not question that involuntary hospitalization, which is triggered by overt conduct, may be the subject of a character and fitness review.

"Applicant Information" questions, accompanies this petition as Attachment A. Questions 4.22, 4.23, and 4.24, the subjects of this petition, are found on page 6. Question 4.22 requires disclosure of any counseling experience for the past decade, no matter how trivial (e.g., stress-management counseling or marital counseling) or how intensely private (e.g., rape counseling) the subject matter of the counseling might have been. Question 4.23 expands the inquiry to include a common form of mental health treatment today, the taking of medication. Question 4.24 expands the inquiry further to include hospitalization associated with mental health treatment, even when that hospitalization was voluntary, for limited duration, and was necessary simply to monitor medication levels. An applicant who answers *any* of these questions in the affirmative is required by the general instructions at the top of page 4 to "provide a **complete** narrative statement describing the incident or circumstances" (emphasis in original) and the names and addresses of any "physicians" or other persons holding records of the referenced matter. The final sentence of the "Note" at the top of Page 6 indicates that the Board may seek mental health treatment records to supplement this information.

II. PARTIES

Petitioners are the chief administrative officers of the three state law schools and several faculty members of those schools who are particularly interested in the subject of this petition.

III. JURISDICTION

Jurisdiction of this Court is based upon its inherent power to administer justice, to protect rights guaranteed by the Constitution, to prescribe conditions upon which persons may be admitted to practice in the courts of Minnesota, and to supervise the conduct of attorneys admitted to practice in Minnesota.

IV. STATE BOARD OF LAW EXAMINERS

The Board is granted authority by the Court to conduct or cause to be conducted investigations of applicant background as may be reasonably related to fitness to practice or eligibility to practice law in Minnesota.

V. PROCEDURAL HISTORY

(a). In November 1992, petitioner Frickey filed a letter with the Board objecting to the mental health counseling questions on the Minnesota bar application form, which at that time were numbered Questions 4.18 and 4.19. A copy of this letter accompanies this petition as Attachment B. Former Questions 4.18 and 4.19 are quoted in footnotes 1 and 2 of that letter. (To the best of our information, Questions 4.18 and 4.19 were introduced into the Minnesota bar application form sometime in the mid-1980's.)

(b). In December 1992, Petitioners Brooks, Failinger, Frickey, and other interested persons affiliated with the law schools met with the Board and discussed the appropriateness of these questions. Petitioners Brooks and Frickey introduced to the Board the mental health counselor for

William Mitchell College of Law and the head of mental health services at the University of Minnesota's Boynton Health Service. These counseling professionals also objected to the mental health questions.

(c). In September 1993, the Board responded by adding current questions 4.24 and 4.25 to the bar application form, by modifying former Questions 4.18 and 4.19 (now current questions 4.22 and 4.23) by placing a ten-year limit on the scope of the questions, and by adding the last two sentences of the "Note" now found at the top of page 6 of the application form (Attachment A). These modifications are explained in the Board's letter to interested parties, a copy of which accompanies this petition as Attachment C. These modifications did not address the primary concern raised in petitioner Frickey's letter—that requiring law students to disclose mental health counseling deterred them from seeking counseling while in law school. The disclaimer included in the "Note," which states that the Board does not wish to deter counseling or unduly invade privacy, is ineffectual in the circumstances in which the mental health counseling questions are included in an application form primarily focused on misconduct. The message, as a student put it to one of us, is that "law students should avoid cops and shrinks."

VI. VIOLATIONS OF LAW

(a). Questions 4.22, 4.23, and 4.24 violate the Americans with Disabilities Act. The Maine Supreme Judicial Court has squarely so held with respect to questions similar to Questions 4.22 and 4.23. A copy of the Maine decision accompanies this petition as Attachment D. A decision of the federal district court for the District of New Jersey has also concluded that similar questions, in that case focused on medical licensure, probably violate the Americans with Disabilities Act. A copy of this federal decision accompanies this petition as Attachment E. In the New Jersey federal case, the United States Department of Justice, charged with the responsibility of promulgating regulations and developing enforcement measures for implementing the Americans with Disabilities Act, filed an amicus brief concluding that such questions violate the Act and the federal regulations promulgated by the Department to implement the Act. Under the so-called "*Chevron* doctrine" (see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), this interpretation of a federal statute and its implementing regulations by the federal agency charged with implementing the statute and promulgating the regulations is subject to substantial deference by a reviewing court. A copy of the amicus brief of the United States Department of Justice accompanies this petition as Attachment F. For reasons similar to those under the Americans with Disabilities Act, the questions also violate the Minnesota Human Rights Act.

(b). The questions violate the federal and state constitutional protections guaranteeing equal protection of the laws. Attorneys licensed to practice law in Minnesota are never queried about mental health counseling. If the public interest were served by such questioning, it would be as equally served by querying the practicing bar as it would be by querying applicants to the bar. For this reason, the inquiries about mental health counseling treat similarly situated persons completely dissimilarly, violating the core principle of equal protection. This kind of unjustified underinclusiveness in regulation is, in fact, a particularly serious affront to equal protection values. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J.,

concurring) ("nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected"). Under the Minnesota Constitution, as interpreted by this Court, harsh underinclusive regulation targeted at the politically powerless is subject to a level of scrutiny even more stringent than the federal standard. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Under *Russell* as well as general equal protection principles, imposing these questions solely upon bar applicants violates the Minnesota Constitution.

(c). The questions violate constitutional protections of privacy. The questions are very intrusive into matters of personal privacy, and even more invasive is the Board's examination of mental health counseling records. We know of no data to support the proposition that the information that can be obtained only by asking these questions correlates in the slightest with fitness to practice law. Questions solely focused on conduct, rather than experience with mental health counseling, should produce all the relevant information while much better protecting privacy.[2]

(d). Because of concerns about legality, the Utah State Bar in September 1993—before the decisions in the Maine and New Jersey cases and the filing of the federal amicus brief in the New Jersey case—withdrew its similar questions from the bar application form of that state. A copy of the minutes of that meeting accompanies this petition as Attachment G. The Utah experience serves as a model for Minnesota.

VII. POLICY CONCERNS IMPLICATING THIS COURT'S SUPERVISORY FUNCTION

Petitioners fully support the objective of the Supreme Court and its subordinate boards to protect the public and to promote high-quality legal services in Minnesota. This objective, however, is best served by exploring the *conduct* of those applying for the bar and those already admitted to the practice of law.

Petitioners have initiated this proceeding primarily out of a concern for the disruption caused by these questions in the law school environment. The presence of these questions on the bar application form deters law students from seeking mental health counseling. Patricia la Plante, Counseling Center Director at Hamline University, reports that when law students at that school "seek a counseling appointment we inform them in writing of the Bar's disclosure requirement. Although I do not have statistics, it is my experience that a number of students decline to use our services because they wish to protect their privacy." Quoted from March 2, 1994 letter from Ms.

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[2]The District of Columbia abandoned its general inquiry into mental health counseling after a seven-year review indicated that the answers to this question, standing alone, provided essentially no information relevant to character and fitness that could not be obtained by asking questions about past conduct. See Reischel, *The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health*, The Bar Examiner, August 1992, at 20.

la Plante to Petitioner Frickey, which accompanies this petition as Attachment H.[3] Similarly, Dr. Dan Larson, head of mental health services at the University of Minnesota's Boynton Health Service, reports that he has had law students "voice concerns" and even refuse treatment, such as declining to take antidepressant medications, "for fear of the impact on future applications." Quoted from November 10, 1992 letter from Dr. Larson to Professor Frickey, attached to Attachment B hereto. The costs of this deterrence are incalculable, but certainly very significant.

These costs are not spread evenly throughout the law-student population. In general, women tend to utilize mental health treatment more than men,[4] and this remains true of the law-student population. See Attachment H (over 60% of Hamline law students who were clients of that school's Counseling Center over the past three years have been women).[5] Thus, mental health counseling questions on the bar application have a disproportionally disadvantageous effect upon women, in contravention of this Court's efforts to rid the Minnesota legal system of gender bias. The benefits to the bar admission process of the information obtained by these questions are minimal, considering that relevant information about character and fitness can be obtained by asking questions about past conduct.[6] Thus, even apart from the illegality of the questions, this Court should, in an exercise of its supervisory authority, order their removal from the bar application as a matter of policy.

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[3]For further support, see Maher & Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 Ind. L. Rev. 821, 830-33 (1990); Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 582-83 (1985).

[4]See Russo, *Forging Research Priorities for Women's Mental Health*, American Psychologist, March 1990, at 368.

[5]We have not been able to obtain statistics broken down by gender on mental health counseling usage at the other two law schools. The counselors at these schools have informed us, however, that the "60/40" gender breakdown at Hamline is similar to the gender breakdown they encounter as well.

[6]In addition to the studies cited in notes 2-3, above, a study by the Minnesota Board of Law Examiners itself demonstrates, if anything, that mental health inquiries have no evident relationship to later professional discipline. See Baer & Corneille, *Character and Fitness Inquiry: from Bar Admission to Professional Discipline*, The Bar Examiner, November 1992, at 5. The study examined the admissions files of fifty-two attorneys later disciplined. Only two of these individuals had disclosed "histories of mental health treatment" on their bar application forms. Because the percentage of the general applicant pool responding positively to the mental health treatment question is surely much greater than 4%, this study, if anything, suggests a *negative* correlation between mental health counseling prior to admission to the bar and later disciplinary problems. Of course, because the study size is so small and not the study was not structured to produce statistically significant conclusions, answers probably cannot be gleaned from it, one way or the other. Suffice it to say, however, that the study provides absolutely no support for the proposition that mental health counseling prior to admission has a positive correlation to later disciplinary problems.

Words come easily to convey the illegality of these questions. Similarly, it is not difficult to express in dispassionate, statistical terms the disproportionate impact upon women caused by these questions. Words do not come easily, however, to convey the true "human side" of the story. Petitioner Frickey's letter, found as Attachment B, attempted to do so. Petitioners have faced a variety of extraordinarily sensitive and harsh situations because of these questions. To recount just three: a female student who was brutally raped as an undergraduate wonders why her rape counseling is the business of anybody, much less a state agency, and is repulsed by the prospect of writing "a **complete** narrative statement describing the incident or circumstances"; another student, when advised by a professor that her "blues" seemed to go far beyond the ordinary and merited the attention of a mental health professional, responds that she will consider seeking counseling *after* she has safely been admitted to the bar; yet another student, who has been missing classes and defaulting on other responsibilities, confesses to a professor that she is having a difficult time of it, but has for the past year been avoiding seeking professional help because she is afraid of putting herself in the position of having to disclose mental health treatment in her bar application, and since that revelation she has not returned to school.

Furthermore, the existence of these questions places law school professors and staff in an impossible position. If a student seems to need counseling, there is a responsibility to provide that advice. In addition, however, because the relationship of professor/staff to student has fiduciary overtones, there may well exist a simultaneous responsibility to disclose the existence of all information the student might deem relevant to exercise informed consent—including the existence of these questions on the bar application that student will face sometime in the future, despite the obvious problem that this disclosure makes it less likely the student will seek counseling.

REQUEST FOR RELIEF

Petitioners respectfully petition the Court to issue an Order immediately requiring the Board to remove Questions 4.22, 4.23, and 4.24 from the Application for Admission to the Bar of Minnesota, and further requiring the Board to disregard answers to Questions 4.22, 4.23, and 4.24 in making character and fitness assessments of applicants for the July 1994 bar examination.

In the alternative, Petitioners respectfully petition the Court to provide public notice of the filing of this petition and establish a period in which comments may be submitted to the Court concerning this petition, and following this comment period to issue the Order requested above.

Philip P. Frickey
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Lead Petitioner

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Attorney for Petitioners

DATE: March 10, 1994

CERTIFICATE OF SERVICE

Maury S. Landsman, Attorney at Law, hereby certifies that on this 10th day of March, 1994, I caused to be served a copy of this Petition by first-class mail upon Margaret Fuller Corneille, Esquire, Director, Minnesota Board of Bar Examiners, One West Water Street, Suite 250, St. Paul, MN 55107, and upon John Tunheim, Esquire, Chief Deputy Attorney General of the State of Minnesota, 102 State Capitol Building, St. Paul, MN 55155.

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4.00 APPLICANT INFORMATION

Character and Fitness

For each "YES" answer, you must provide a complete narrative statement describing the incident or circumstances. The statement must include names and addresses of courts, counsel of record, authorities holding the record of this matter, creditors, physicians, and any other person or authority referred to in your statement. **For each "YES" answer you must obtain and attach appropriate documentation. Attach additional pages following page six of the application.** If official documentation is not available, a letter of verification from the appropriate agency or attorney of record is required.

		Yes	No
4.01	Have you ever in your entire life been charged with, arrested for, pleaded guilty to or convicted of a felony or gross misdemeanor or the equivalent? Attach copies of records relative to the incident(s), including police reports and court records. Provide a narrative statement describing the incident(s) or circumstances. (You must disclose this requested information, even if the charges were dismissed or you were acquitted or the conviction was stayed or vacated or the record sealed or expunged, regardless of whether you were told you need not disclose this information.)	___	___
4.02	Within the past 10 years, have you been charged with, or arrested for, the violation of any law, including traffic laws ? (Exclude felonies, gross misdemeanors and paid parking violations.) Attach copies of records relative to any incident other than speeding violations. Include police reports and court records. Provide a narrative statement describing the incident(s) or circumstances. (You must disclose this requested information, even if the charges were dismissed or you were acquitted or the conviction was stayed or vacated or the record sealed or expunged, regardless of whether you were told you need not disclose this information.)	___	___
4.03	Has your driver license ever been cancelled, suspended or revoked for any reason? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.04	Have you individually (or as an officer or director of a corporation, or as a member of a partnership) ever been accused of or charged with civil fraud, criminal fraud, misconduct, or dishonorable conduct in any legal, administrative, or military proceeding? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.05	Have you ever individually (or as an officer or director of a corporation, or as a member of a partnership ever been a party to or a witness in any legal proceeding (civil, criminal, administrative, family law, or domestic abuse law)? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.06	Have you ever been found in contempt by any court, tribunal, or legislative body? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.07	Have you ever failed to comply with any court order directed against you, including child support and other family law orders? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___

		Yes	No
4.08	Have you ever resigned or been discharged from employment after being told that your conduct was not satisfactory? Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.09	Have you ever been denied a license or bond? Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.10	Were you ever placed on probation, disciplined, dropped, suspended, or expelled from a post-secondary school, college, university, or law school? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.11	Have charges, complaints or allegations (formal or informal) ever been made against you during your enrollment in a post-secondary school, college, university or law school alleging academic or personal misconduct, including plagiarism? Attach copies of records relative to the incident(s). Provide a narrative statement describing the incident(s) or circumstances.	___	___
4.12	Do you have any debts which are 120 days or more past due? State the creditors' names, addresses, amount past due, length of time past due, and the nature and status of payment arangements.	___	___
4.13	Have you ever failed to file any required local, state or federal tax return, or failed to pay any taxes due including employers' withholding taxes ?	___	___
4.14	Are you in default or delinquent in payments on any student loans? State the creditors' names, addresses, amounts past due, length of time past due, and the status and nature of payment arrangements.	___	___
4.15	Are there any unsatisfied judgments against you? Attach copies of court records to the application.	___	___
4.16	Have you ever filed a voluntary petition in bankruptcy or been the subject of an involuntary petition? If "YES", attach copies of bankruptcy petitions, schedules, motions, objections and orders of discharge.	___	___
4.17	Have you ever held a license, other than as an attorney, the procurement of which required proof of good character (e.g. certified public accountant, real estate broker, law enforcement officer)? Give the name and address of the licensing authority.	___	___
4.18	Have any charges or complaints been filed, or are any charges or complaints presently pending concerning your conduct as an attorney, as a member of any other profession, or as a holder of a public office? Give the name and address of the agency holding the record, the date(s) of the charges/complaints, and the disposition(s) of the matter(s).	___	___
4.19	Have you ever been disciplined, suspended, reprimanded, censured or disbarred as an attorney, as a member of any other profession, or as a holder of a public office? Give the name and address of the agency holding the record, the date(s) of the action and the disposition(s) of the matter(s).	___	___
4.20	Have you ever failed to fulfill the obligations of professional licensure, such as maintaining records of accounts, complying with continuing education, or paying fees? Give the name and address of the agency holding the record, the date(s) of the incident and the disposition(s) of the matter(s).	___	___

Note: Questions regarding professional counseling, treatment and medication are not intended to invade unnecessarily the applicant's privacy nor to discourage applicants from seeking professional assistance. The Board of Law Examiners seeks this information pursuant to the Character and Fitness Guidelines established by the Minnesota Supreme Court and the Board of Law Examiners. Applicants must disclose this information. The Board does not regard occasional or short-term counseling for relationship problems or situational stress, standing alone, as reason for further inquiry. The Board will not seek mental health treatment records without first notifying the applicant that it intends to do so.

		Yes	No
4.21	Have you ever received professional advice or treatment for abuse of narcotics, alcohol, controlled substances or other drugs? State the name(s) and address(es) of the physician, treatment center, person, or entity holding the record(s), and date(s) of treatment.	___	___
4.22	Within the past ten years, have you received professional counseling or treatment for any form of emotional disturbance, nervous or mental disorder including, but not limited to, chronic depression, character disorders, conduct disorders, or thought disorders? State the name(s) and address(es) of the treating physician, psychologists, counselors or treatment centers and the date(s) you began and ended treatment.	___	___
4.23	Within the past ten years, has a medical doctor, including a psychiatrist, prescribed for you medication for the treatment of any form of emotional disturbance, nervous or mental disorders? State the name and address of the prescribing physician and the name of the medication prescribed and the dates that you used that medication.	___	___
4.24	Within the past ten years, have you been admitted to a hospital, either on a voluntary or involuntary basis, for treatment of any emotional disturbance, nervous or mental disorder?	___	___
4.25	Have you ever been declared legally incompetent or been placed under conservatorship or guardianship as an adult ?	___	___
4.26	Are there any other incidents or circumstances, which may relate to your character or fitness for admission to the bar? If "Yes", attach written explanation.	___	___

5.00 SPECIAL ACCOMMODATIONS

5.01	Do you have a medical or physical condition for which you request a special testing accommodation at the bar examination? **(Requests for special accommodations must be accompanied by supporting documentation which describes the condition and the accommodation requested.)**	___	___
5.02	Do you wish to type the essay portion of the bar examination? **If "Yes", furnish brand name and model of typewriter. Memory typewriters are not permitted.**	___	___

6.00 USE OF EXAM ANSWERS

I authorize the Minnesota Board of Law Examiners to reproduce & publish my essay answers for the benefit of future examinees Yes___ No___

Date _____ Signature of Applicant _____

B

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November 23, 1992

Margaret Fuller Corneille
Director
Board of Law Examiners
One West Water Street
Suite 250
St. Paul, MN 55107

Re: Questions 4.18 and 4.19 of Minnesota bar application form

Dear Ms. Corneille:

Thank you for speaking with me several times recently about my concerns about Question 4.18 of the Minnesota bar application form.[1] Upon reviewing the application form, it turns out that I have a similar concern about Question 4.19 as well.[2] I appreciate your willingness to share this letter with the Board of Law Examiners and to provide an opportunity for me to express my views orally as well in the near future.

My understanding is that I am invited to meet with the Board on two occasions. First, I plan to appear at the afternoon

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[1] Question 4.18 asks:

> Have you ever received professional advice or treatment for any form of emotional disturbance, nervous or mental disorder including, but not limited to, chronic depression, character disorders, conduct disorders, or thought disorders? State the name(s) and address(es) of the treating physicians, psychologists, counselors or treatment centers and the date(s) you began and ended treatment.

In addition, the applicant who answers in the affirmative is supposed to make records available and provide a narrative.

[2] Question 4.19 asks:

> Has a doctor prescribed medication in order to maintain your mental health status? State the name and address of the prescribing physician and the name of the medication prescribed and the dates that you used that medication.

Again, the applicant who answers in the affirmative is supposed to make records available and provide a narrative.

session on December 3, where I understand that a variety of subjects will be discussed in addition to concerns about Questions 4.18 and 4.19. I also plan to come to a meeting with the Board on December 4 at 11:30 a.m., for a discussion exclusively about these questions. With your permission, I have asked Dr. Dan Larson, a psychiatrist who is director of mental health treatment at the Boynton Health Service of the University of Minnesota, to attend the December 4 session as well. For your information, I have attached a letter from Dr. Larson expressing his concerns about these questions.

In this letter, I will first introduce myself, then explain why I have an interest in Questions 4.18 and 4.19, and then discuss why I request that the Board either delete these questions or modify them.

* * *

Because I have never appeared before the Board of Law Examiners before, a short introduction may be appropriate. I am currently the Faegre & Benson Professor of Law at the University of Minnesota Law School, where I have been a member of the faculty since 1983. I graduated from the University of Michigan Law School in 1978. I then served as a law clerk for Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit in 1978-79 and for Justice Thurgood Marshall of the Supreme Court of the United States in 1979-80. Following a semester of teaching at the University of Kansas, I practice law in Washington, D.C., in 1981-83 with the firm of Shea & Gardner.

I am concerned about the impact of Questions 4.18 and 4.19 because of my experiences as a teacher and adviser to students. I have the support of many of my colleagues on the issue I raise, but I should emphasize that I am acting in an individual capacity rather than as a representative of any institution.

As the Board is no doubt aware, there are serious issues concerning the legality of Questions 4.18 and 4.19 under the Americans with Disabilities Act[3] and the federal and state

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[3] A law suit is now pending in the federal district court in Connecticut concerning the legality, under the Americans with Disabilities Act, of a Connecticut bar application question similar to Question 4.18. There is also a law suit in New Jersey challenging a similar question that jurisdiction asks of a physician when renewing the license to practice medicine.

constitutions.[4] It is my hope, however, that, in light of the

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[4] This letter is not the place to present these arguments fully. In a nutshell, there seem to me to be two major lines of attack. First, Questions 4.18 and 4.19 may constitute such an invasion of privacy as to violate "substantive due process." Second, Questions 4.18 and 4.19 may involve such an irrational set of classifications treating similarly situated persons dissimilarly as to violate equal protection.

On the equal protection point, in my view Questions 4.18 and 4.19 are both grossly overinclusive and grossly underinclusive. Most obviously, Question 4.18 is grossly overinclusive because it asks an intrusive question that many applicants must answer affirmatively (if they are honest) when only a handful of these people actually pose any threat to the public interest and they can be identified by a narrower question. Question 4.18 is grossly underinclusive because, if there is any public interest in requiring bar applicants to disclose such personal material, the same public interest should lead to the same inquiry being made of practicing attorneys. The public interest is precisely the same for the regulation of both applicants and practitioners--protecting the public from those who are unfit to practice law. It is no defense to say that regulation of practicing attorneys is done by another board, because both boards are under the control of one entity, the Supreme Court of Minnesota, which must ensure that the regulation done by both boards is evenhanded. It may well be that, as with most grossly underinclusive regulation, the reason that the regulation remains in place is that the people being regulated (applicants) are less politically powerful than the similarly situated people who are not regulated (practitioners). (For the classic exposition of the relation between underinclusive regulation and political powerlessness, see Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).) Imagine the reaction of the practicing bar if, upon opening the envelope next year containing the bill for bar dues, each attorney were required to fill out a form that included Question 4.18. There is no way that the board regulating practicing lawyers could get away with asking that question, at least for long (although a narrower question might well be appropriate to ask of practicing attorneys), and that is one powerful reason why the board regulating bar applicants should not ask that question, either.

What is true about the completely open-ended Question 4.18 is also true of Question 4.19--disclosing the mere use of prescribed drugs in the context of voluntary counseling discloses no fact relevant to the fitness to practice law that could not be obtained by a narrower question, and the overinclusiveness and underinclusiveness of the regulation is apparent.

public policies involved, the Board will choose, as did the Committee on Admissions of the District of Columbia recently, to reformulate the questions regardless of the precise merits of the available legal challenges. I approach the Board in a cooperative, rather than confrontational, spirit. If the Board is unwilling to delete or modify these questions, however, other, more formal means of achieving this goal will be seriously considered, including formal rulemaking petitions and litigation, if necessary.

One basic objection to these questions is that they amount to an invasion of privacy. I find that objection substantial, but that is not the primary reason that I am asking you to reformulate these questions. I object to the questions because they intrude deeply and unjustifiably into the professor/student relationship in the law school, thereby interfering with our educational mission.

My colleagues and I sometimes find ourselves providing advice to students. Of course, in most instances the advice concerns how to analyze a legal question, how to prepare for a law school exam, matters of career counseling, and the like. Sometimes, however, the advice is of a more personal nature. The academic and personal aspects are often interrelated: for example, the student's inability to concentrate on studying law may seem to be related to a personal matter such as a marital or other relational problem. In such circumstances, as well as others, the advice from the faculty member may be that the student should seriously consider seeking counseling, which is readily available at the University of Minnesota.

The extent to which law students take advantage of counseling is unknown to me; I have no data on this question. (Dr. Larson, in the attached letter, reports that about 30 law students are currently receiving counseling at Boynton Health Service. No doubt others are now receiving counseling elsewhere, including at another University facility, the University Counseling Services.) Whatever may be the case about the use of counseling, it is obvious that law school is a very stressful experience, and it comes at the time of life for many law students that emerging questions of adulthood must be confronted

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The regulation of applicants is also underinclusive even if the class of similarly situated persons is confined to the class of applicants. For example, as Dr. Larson in the attached letter notes, the application asks questions about very minor mental health problems, but asks nothing about serious physical problems that are more likely to interfere with the practice of law.

as well. Many law students would profit from counseling, even if all that is involved is "first-year stress." Moreover, because Question 4.18 has no time limit on its inquiry, within its sweep would be counseling in college or high school, counseling because of a marital or other relational problem, and just about any other situation in which the applicant has sought advice from a counselor. Estimates from Dr. Larson and others suggest that somewhere between 25-50% of law students would probably have to answer Question 4.18 "yes" if they were being completely truthful and if the question is given a breadth consistent with its apparent intent.

For the reasons discussed below, Questions 4.18 and 4.19 deter students from seeking counseling. These questions also put faculty members in the impossible position of simultaneously urging a student to seek counseling and telling the student that any counseling may have to be disclosed at a later date.

Law students are generally aware that bar applications, applications for federal employment, and other forms may probe their personal histories. Indeed, in the attached letter Dr. Larson states that law students who seek counseling are quite worried about this problem. In addition, as he explains in the letter, he has had patients who are law students decline medication out of a fear that taking the medication might be the triggering factor requiring disclosure of mental health treatment to some regulatory body. And how right they are, both with respect to Question 4.18 and Question 4.19! It follows--and my colleagues and I, as well as Dr. Larson, are certain of this--that the existence of Question 4.18 and similar questions around the country deters law students from seeking counseling in the first place. Moreover, Question 4.19 interferes with the counseling experience of those students who go to counseling despite the deterrent effect of Question 4.18, because Question 4.19 has a chilling effect upon undergoing medically appropriate treatment.

In addition, the existence of these kinds of questions puts a faculty member in a Kafkaesque position. In my view, the relationship of faculty member to student is a fiduciary one. If the faculty member concludes that the student might profit from counseling, the faculty member is obliged to provide that advice; but the existence of these questions also triggers a different obligation, to tell the student that the existence and details of a counseling experience must be disclosed to the Board of Law Examiners. It is quite difficult to get students to go to counseling in the first place, even though it is readily available on campus and either free or inexpensive. By focusing the student on Questions 4.18 and 4.19, the professor ends up

providing the student with an apparently rational reason not to go to counseling. The more faculty members respect the fiduciary responsibilities owed to students, including a responsibility of full disclosure, the less likely it is that any given student will seek help that the student may well need.

For these reasons, asking questions of this sort on the bar application form has a perverse impact upon the educational environment. Assurances that the board will not abuse the information disclosed will not come close to undoing this damage--students are distrustful, and they feel that the board has no right to this degree of information in the first place. Indeed, I am certain that there is nothing short of revising the application form that can ameliorate the incredibly detrimental deterrent effects of Questions 4.18 and 4.19.

Adding to the deterrent effects of these questions is the requirement of attaching a narrative and making medical records available. A student could easily read this requirement as forcing the student to disclose the personal problems that led to the counseling. Moreover, the student could easily imagine bar examiners or their employees reading highly personal, and otherwise strictly confidential, notes of conversations undertaken in counseling. When I urge a student to go to counseling, Boynton Health Service will never confirm or deny to me whether the student carried through on the suggestion--that is how private those records are at the University of Minnesota. That these same records are there simply for the asking for the Board of Law Examiners is completely inconsistent with the reasonable expectations and hopes of privacy about such extremely personal and potentially embarrassing material.

Many law students have high aspirations. Some would like to run for public office; others hope for appointment to important positions; all of them hope to earn the respect of their peers in the legal community and elsewhere. In my experience, students are extremely fearful that a counseling experience in their past could become public at a later time, embarrassing them and perhaps foreclosing their opportunity to obtain elected or other office or position. I have no doubt that your office maintains the secrecy of its files, but those files are one more place this information exists, and the student cannot forget it. This is yet another reason why some students, in my judgment, will forego counseling in the first place, and others who undergo counseling will be chilled in accepting medication for fear that disclosure

of that could come back and haunt them later.[5]

For these reasons, I respectfully request that the Board of Law Examiners delete Questions 4.18 and 4.19 from the application form. If that is not possible, I respectfully request that the Board narrow the questions in a way similar to that recently done in the District of Columbia, by providing a time limit (the past five years, for example) and a much more limited ambit (limiting required disclosure to psychiatric hospitalizations).

Deleting these questions entirely, or at least narrowing them to require disclosure only of psychiatric hospitalizations, will not jeopardize the public interest. Several jurisdictions, such as California, the District of Columbia, Illinois, New York, and Wisconsin, have decided that there is no reason to ask questions as broad as Questions 4.18 and 4.19. Dr. Larson agrees that the information sought by these questions is entirely unnecessary. There is additional substantial evidence, as well, that deleting or modifying Questions 4.18 and 4.19 will not deprive the board of any relevant information.

For example, Charles L. Reischel, a member of and counsel to the Committee on Admissions of the District of Columbia Court of Appeals, has reported that in that jurisdiction an affirmative answer to its former open-ended question about mental health treatment, standing alone, provided essentially no useful information that could not have been obtained in less intrusive ways.[6] Based on this background, in 1992 the District of

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[5] For support for the proposition that mental health questions like Questions 4.18 and 4.19 serve little useful function and deter and interfere with counseling, see Maher & Blum, A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants, 23 Ind. L. Rev. 821, 830-33 (1990); Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 582-83 (1985). The impact of inquiries such as Questions 4.18 and 4.19 is the sole focus of the Maher & Blum article.

[6] Reischel, The Constitution, the Disability Act, and Questions About Alcoholism, Addiction, and Mental Health, The Bar Examiner, August 1992, at 20. Consider his conclusions:

> The response to Question 28 ("Have you ever been treated or counseled for any mental, emotional, or nervous disorder or condition") by itself has never (at least in the last seven years or so) caused the Committee to withhold certification, and has very rarely caused a delay for additional information. The vast bulk of such responses have concerned counseling,

Columbia abandoned its open-ended question about mental health treatment. It retained its question asking whether the applicant had been voluntarily or involuntarily institutionalized "for treatment of a mental, emotional or nervous disorder or condition," but for the first time limited the duration of the question to the five-year period prior to the date of the answer to the question.[7]

My own view is that of Professors Maher & Blum: the application should ask about adverse life problems, not voluntary

---

> most frequently marriage counseling, with no relevance to fitness to practice. Almost always more serious mental health problems have been signalled by responses to other questions (about arrests, crimes, debt, litigation, discipline, etc.). Indeed, since mental health information is only relevant to a fitness inquiry because it might show a risk to job performance, arguably the only evidence that is material is that the applicant's mental condition has interfered with the applicant's job, school, or analogous activities. Any such significant interference should be, and almost invariably has been, reflected in the other information the committee seeks. Arguably, then, the protection which the committee has been able to afford the public would not be appreciably diminished if Question 28 were eliminated entirely, particularly if more specific information regarding the applicant is sought from employers and schools. The Committee's experience with Question 29 (institutionalization) has been somewhat similar. The Committee has rarely discovered a fitness problem with information about prior hospitalization alone, i.e., without other evidence (litigation, arrest, etc.) of fitness-related problems. However, it is more readily apparent, at least with respect to recent institutionalization, that there might be a fitness problem that might not otherwise be detected--if, for example, there was no absence from work or school significant enough to trigger further inquiry. It does not seem unreasonable that a recent institutionalization should trigger closer scrutiny of recent and current conduct to insure that an applicant is capable and reliable.

Id. at 20-21.

[7] Id. at 10.

counseling.[8] Even if that proposition is not self-evident at this point, in my judgment the case for it is so substantial that the need for a significant narrowing of the scope of Questions 4.18 and 4.19 is evident. Accordingly, I urge the Board to address this matter immediately.

For their information, I have copied several interested persons, in Minnesota and elsewhere, as well as the representatives of the law schools who will be attending the December 3 meeting.

---

[8] Maher & Blum propose:

> . . . We suggest that the examiners should focus their initial inquiry on whether applicants have had serious life problems, rather than on whether they have taken advantage of mental health resources like counseling. The indication that an individual suffered serious life problems should raise the question of fitness. The fact that an individual has sought and obtained counseling should not raise the question of fitness. Applicants who indicated that they have experienced serious life problems should be asked if they have sought mental health treatment. If so, inquiries can be made into their treatment, including counseling.
>
> Examiners might combine the inquiry we suggest with limited inquiries concerning mental health treatment. The bar application should make clear that the examiners do not want the existence of counseling disclosed, no matter now many visits to a counselor are involved, unless the applicant has experienced serious life problems. The application should also make clear that a limited inquiry will be made into the substance of counseling. The application could also ask about more serious mental health treatment, such as whether the applicant has ever been hospitalized for mental illness, or participated in a drug or alcohol treatment program, as an inpatient or as an outpatient. The application could also ask whether the applicant has ever been adjudicated incompetent or insane. Inquiry into these particular circumstances may prove as useful for examiners' purposes as more general inquiries into counseling, but they will not cause as severe a chilling effect on counseling as the more general inquiry causes.

Maher & Blum, supra note 5, at 859-60.

Thank you for your consideration.

Sincerely,

Philip P. Frickey
Faegre & Benson Professor of Law

Attachment: Letter from Dan Larson, M.D., dated November 10, 1992

cc: The Honorable Rosalie Wahl, Minnesota Supreme Court
The Honorable John Simonett, Minnesota Supreme Court
Professor Marie Failinger (Hamline University School of Law)
Dean Frank De Guire (Marquette University Law School)
Dean Robert A. Stein (Univ. of Minnesota Law School)
Professor Ann Burkhart (Univ. of Minnesota Law School)
Dean James H. Brooks (William Mitchell College of Law)
Professor Barry Vickrey (Univ. of N. Dakota School of Law)
Dean Daniel O. Bernstine (Univ. of Wisconsin Law School)
Dan Larson, M.D.
Robert A. Guzy, Esquire, President, Minnesota State Bar Association.
Maurice Dysken, M.D., President, Minnesota Psychiatric Society
Leonard S. Rubenstein, Esquire, Director, Mental Health Law Project, Washington, D.C.
James M. Jacobson, Esquire, Director, Policy Analysis, American Psychological Association, Washington, D.C.

UNIVERSITY OF MINNESOTA
TWIN CITIES

Boynton Health Service
410 Church Street S.E.
Minneapolis, Minnesota 55455-0346

November 10, 1992

Philip Frickey
Faegre & Benson
Professor of Law
University of Minnesota Law School
450 Law Center
229 - 19th Ave. So.
Minneapolis, MN 55455

Dear Professor Frickey:

I am writing now to summarize the topics of our meeting of 11/5/92. I am Director of the Mental Health Clinic for the Boynton Health Service of the University of Minnesota. Our clinic is a primary mental health resource for University of Minnesota students including those from the law school. At our clinic, we see an over-representation of students from the more rigorous academic areas including the law school. I would estimate that at this current time, we are seeing approximately 30 University of Minnesota law students. You have made me aware of the question on the Minnesota Law Board numbered 4.18 with regard to a history of mental health care. I find this question alarming, particularly since it is likely to serve as a deterrent for students coming for professional help.

I have discussed this issue with several members of our staff, and uniformly the staff has expressed concern as to possible deterrents from needed help. Certainly, the huge majority of students coming to us do not have emotional concerns which would in any way impair their performance in a professional career. Rather, I think it could be said that those coming to us may be strengthened by their experience and better able to serve the public than they would otherwise have been. I am especially concerned for those students who may suffer from some degree of depression which may in itself create a pessimistic outlook and make the student more likely to believe that any disclosure or possible disclosure to an official agency would likely result in denial of privileges. I would tell you that I have seen a significant number of students, particularly from professional areas, who have voiced concerns and some of whom have refused treatment such as with

antidepressant medications for fear of the impact on future applications. I would strongly support a more limited version of the current question which would be time-limited to perhaps a five year period and which would specify either such a thing as "serious mental disorder" or to specify something such as psychiatric hospitalizations. While this still does represent some degree of deterrence, it would at least make those who wish to come for the more usual modes of treatment comfortable in doing so.

I have been with the Mental Health Clinic at the University of Minnesota for the last 13 years, and in that course of time have seen many students from professional areas and would say with no hesitancy that I have never seen a student for whom the more restricted definition of mental health care to be disclosed to the Board would cause any possible threat to the public. I would further add that the question with regard to mental health appears to me to be discriminatory against those with emotional or mental problems since there are many physical disorders which could equally, if not more so, impair ones ability to practice law, but to my knowledge, these are not inquired about. It is also offensive, I think, that the questions with regard to chemical dependency and mental health are placed with other questions of a seemingly moral nature which seems to imply that these conditions are moral lapses as opposed to legitimate concerns.

In conclusion then, I would strongly support a revision of question 4.18 and also 4.17 to a more restricted format with some time limitation and narrowing of focus. I think, based upon the discriminatory argument, one could argue that these questions should be deleted entirely since if the Bar does not feel it necessary to inquire as to a person having had such factors as chronic diabetes, multiple sclerosis, or other neurologic conditions which certainly could impair functioning, then I see no logical reason why the Board needs to inquire as to mental health concerns.

Sincerely,

Dan Larson

Dan Larson, M.D.

DL:vem/11/12/92

C

THE SUPREME COURT OF MINNESOTA

BOARD OF LAW EXAMINERS
BOARD OF CONTINUING LEGAL EDUCATION
BOARD OF LEGAL CERTIFICATION

One West Water Street, Suite 250, St. Paul, Minnesota 55107
(612) 297-1800 • FAX (612) 296-5866 • TDD (612) 282-2480

Margaret Fuller Corneille, Esq., Director

September 22, 1993

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Dean James Hogg
William Mitchell College of Law
875 Summit Avenue
St. Paul, MN 55105

Dean Robert A. Stein
University of Minnesota Law School
285 Law Building, Room 426
229 19th Avenue South
Minneapolis, MN 55455

Gentlemen:

The Board of Law Examiners has concluded an intensive review and evaluation of Bar application questions concerning mental health status. In part, our study was prompted by expressions of concern from lawyers and law professors regarding the scope of the questions the Board has used for several years. For example, we were told that some students may have chosen not to seek counseling services out of fear that doing so would jeopardize their standing for admission to the Bar. Such concerns, and alternatives for meeting them, were discussed over a period of several months with representatives of the Minnesota State Bar Association, the law schools of Minnesota and Wisconsin, and with professionals in the mental health field.

The Board wishes to make it clear that no applicant has ever been denied admission to the Bar of Minnesota simply because he or she has made use of mental health services. As a general rule, the Board views the

utilization of such services by persons who very often are undergoing considerable stress, as an indication of good judgment. At the same time, we have found that a history of serious mental health problems may well relate to, or be an indicator of, difficulties that affect an applicant's fitness to practice law.

On the basis of what we have learned from our inquiries, including consultations with seven mental health professionals, we have revised the mental health questions. To begin with, we have added the following information to the note that immediately precedes the mental health questions on the bar application form:

> "The Board does not regard occasional or short-term counseling for relationship problems or situational stress, standing alone, as reason for further inquiry. The Board will not seek mental health treatment records without first notifying the applicant that it intends to do so."

Beginning with the February, 1994 Bar Examination application, the following questions will be submitted to bar applicants:

4.21 **Within the past ten years**, have you received professional counseling or treatment for any form of emotional disturbance, nervous or mental disorder, including, but not limited to, chronic depression, character disorders, conduct disorders, or thought disorders; state the name(s) and address(es) of the treating physicians, psychologists, or treatment centers and the date(s) you began and ended treatment.

4.22 **Within the past ten years**, has a medical doctor, including a psychiatrist, prescribed for you medication for the treatment of any form of emotional disturbance, nervous or mental disorders? State the name(s) of the medication prescribed and the dates that you used that medication.

4.23 **Within the past ten years, have you been admitted to a hospital, either on a voluntary or involuntary basis for treatment of any emotional disturbance, nervous or mental disorder?**

4.24 **Have you ever been declared legally incompetent or placed under conservatorship or guardianship as an adult?**

4.25 Are there any other incidents or circumstances which may relate to your character or fitness for admission to the Bar? If "yes," attach a written explanation.

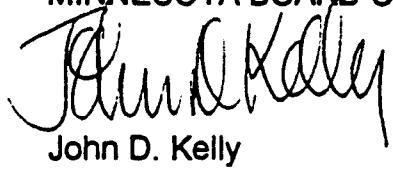
Portions of the foregoing questions which appear in underlined bold print are additions or revisions to the questions which have been used recently.

The Board has no desire to inquire more closely into areas we recognize to be highly sensitive than is reasonably necessary for us to evaluate the fitness of Bar applicants. We believe that the revised questions strike a better balance between the privacy concerns of applicants and the Board's need for relevant fitness information.

I am sending a copy of this correspondence to a number of Bar and law faculty representatives who have expressed an interest in our efforts on this subject. I want to take this opportunity to thank them, and you, for the helpful criticism and comments we have received as we've studied this issue. If you have any further comments or questions, please let me know.

Very truly yours,

MINNESOTA BOARD OF LAW EXAMINERS



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President

JDK:dlg

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D

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. BAR-93-21

In re Applications of ANNE UNDERWOOD and JUDITH ANN PLANO for Admission to the Bar of the State of Maine	)))))	OPINION AND ORDER

This matter is before the court pursuant to M. Bar R. 1(b) on the applications of Anne Underwood and Judith Ann Plano for admission to the Bar of the State of Maine. The Board of Bar Examiners has declined to issue a Certificate of Qualification for either Underwood or Plano, *see* M. Bar Adm'n R. 8(1), despite their having attained passing grades on the bar examination and Multistate Professional Responsibility Examination. Underwood and Plano both refused to answer questions 29 and 30[1] on the application to take the Bar Examination. *See* M. Bar Adm'n R. 5(c)(5). Those questions requested information as to diagnoses and treatment of amnesia, emotional disturbances, and nervous or mental disorders.

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[1] The questions read:

> 29. Have you ever received diagnosis of an emotional, nervous or mental disorder? Yes _____ No _____ If so, state the names and addresses of the psychologists, psychiatrists or other medical practitioners who made such diagnosis.
>
> 30. Within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder? Yes _____ No _____ If so, state the names and complete addresses of each psychologist, psychiatrist or other health care professional, including social worker, who treated you. (THIS QUESTION DOES NOT INTEND TO APPLY TO OCCASIONAL CONSULTATION FOR CONDITIONS OF EMOTIONAL STRESS OR DEPRESSION, AND SUCH CONSULTATION SHOULD NOT BE REPORTED).

TO [illegible] 12-8

Underwood and Plano also refused to sign the standard authorization and release[2] and instead signed an authorization and release with the medical authorization redacted.[3]

Applicants contend that the Board's inquiries into their mental health histories and requests for complete release of all medical records violate the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 - 12213 (Pamph. 1993). The court agrees. The ADA requires that no qualified individual with a disability shall be subject to discrimination by any public entity. 42 U.S.C.A. § 12132. "Disability" is defined as "(A) a physical or mental impairment ...; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* at § 12102(2). A "public entity" includes any state government, and any department or other instrumentality of a state government. *Id.* at § 12131(1)(A)-(B). Applicants are individuals with disabilities within the meaning of the ADA, and thus

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[2] The authorization and release reads in pertinent part:

> I, [Applicant], having filed an application with the Maine Board of Bar Examiners ... hereby (1) authorize and consent to have an investigation made as to my moral character, credit, college and law school records, medical records, general reputation, professional reputation, and fitness for the practice of law and (2) authorize and request every medical doctor, school official, employer, government agency, professional association and every other person ... having control of any documents, records or other information pertaining to me, to furnish the originals or copies of any such documents, record and other further information to the said Board ... including but not limited to any and all medical records and reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with any examination or examinations, consultation or consultations, test or tests, evaluation or evaluations of the undersigned....

[3] The applicants were granted permission to take the bar examination in July of 1993 despite their refusal to answer the questions and sign the complete authorization.

they have standing to invoke the Act. The Board of Bar Examiners is a public entity within the meaning of the Act.[4]

The regulations promulgated pursuant to the ADA have controlling weight "unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984). Those regulations provide that a public entity may not "utilize criteria or methods of administration ... that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability...[.]" § 35.130(b)(3)(i) (1992). Prohibited are "blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." 28 C.F.R., Ch. 1, pt. 35, App. A, at 440 (1992) (comments on regulations).

Moreover, pursuant to the ADA, 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). The intent of this provision is that a person is a qualified individual if that person can meet "the essential eligibility requirements for receiving the license or certification." 28 C.F.R., Ch. 1, pt. 35, App. A, at 441. In addition, the ADA prohibits the imposition or application of

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[4] The Board of Bar Examiners consists of seven Maine attorneys and two representatives of the public appointed by the Governor. The lawyers are appointed on the recommendation of the Supreme Judicial Court. M. Bar Adm'n R. 3(a); *see also* 4 M.R.S.A. § 801 (1989).

> 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[.]

28 C.F.R. § 35.130(b)(8). This requirement is intended to prohibit policies that impose unnecessary burdens on individuals with disabilities when those burdens are not placed on other people. 28 C.F.R., Ch. 1, pt. 35, App. A, at 441.

The Board's requirement that applicants answer questions 29 and 30, and that they sign a broad medical authorization violates the ADA because it discriminates on the basis of disability and imposes eligibility criteria that unnecessarily screen out individuals with disabilities. *See The Medical Soc'y of New Jersey v. Jacobs*, No. 93-3670 (WGB), 1993 U.S. Dist. LEXIS 14294, at *19 (D. N.J. Oct. 5, 1993) (finding likelihood that inquiries into mental health of applicants for medical licenses violates ADA in action for injunctive relief).

Although it is certainly 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, the questions and medical authorization objected to here are contrary to the ADA. Accordingly, the applicants cannot be required to answer the questions or sign the medical authorization.

Because the court finds that the questions and the medical authorization are contrary to the ADA, the second issue raised by the applicants, namely, whether there is any authority under state law for the

Board to require that those questions be answered and the medical authorization be signed, is not addressed. *See* 4 M.R.S.A. § 805-A (1989); M. Bar Adm'n R. 5.

The applicants also request that they be awarded their attorney fees and costs incurred in prosecuting this application. They rely on the ADA, 42 U.S.C.A. § 12205, and 28 C.F.R. § 35.175. The reasonable attorney fees contemplated by section 12205 are consigned to the discretion of the court and apply to actions or administrative proceedings commenced pursuant to the ADA. Section 12205 by its terms does not apply to proceedings commenced pursuant to the Maine Bar Rules. Neither the nature or circumstances of this proceeding warrant attorney fees and costs. Therefore, the request is denied.

The applications for admission to the Bar of ANNE UNDERWOOD and JUDITH ANN PLANO are granted.

Dated: December 7, 1993

Robert W. Clifford, Associate Justice

E

Not Reported in F.Supp.
62 USLW 2238, 2 A.D. Cases 1318
(Cite as: 1993 WL 413016 (D.N.J.))

The MEDICAL SOCIETY OF NEW JERSEY, Plaintiff,

v.

Fred M. JACOBS, M.D., J.D., and The New Jersey State Board of Medical Examiners, Defendants.

Civ. A. No. 93-3670 (WGB).

United States District Court, D. New Jersey.

Oct. 5, 1993.

Kern, Augustine, Conroy & Schoppman, P.C. Steven I. Kern, and Robert J. Conroy, Bridgewater, NJ, for plaintiff.

New Jersey Dept. of Law and Public Safety, Div. of Law Steven N. Flanzman, Newark, NJ, for defendants.

United States Dept. of Justice, Civil Rights Div., Public Access Section Sheila M. Foran, Washington, D.C., amicus curiae.

BASSLER, District Judge:

***1** Plaintiff, the Medical Society of New Jersey, is applying for a preliminary injunction under Fed.R.Civ.P. 65 against the New Jersey Board of Medical Examiners and its president. The United States Department of Justice has filed a brief as amicus curiae in support of plaintiff's application. For the following reasons, the Court denies plaintiff's application.

I. BACKGROUND

A. Factual History

Defendant Board of Medical Examiners (the "Board") is a state agency that issues and renews licenses to practice medicine in New Jersey. As part of the initial application process, the Board requires that applicants fill out an Application for Endorsement (the "initial application"). Similarly, to renew his or her medical license for the period 1993-95, a physician must complete a Biennial Renewal Application (the "renewal application") and a Supplementary Application Form (the "supplementary form"). The renewal application and supplementary form were mailed to each licensee in July of 1993. Responses to these forms were due by August 31, 1993.

Plaintiff, an incorporated association that represents over 9,300 practicing physicians in New Jersey, seeks to enjoin the Board and its president from compelling licensees and applicants to answer certain questions asked in these forms, or from denying an initial or renewal application based on answers to the challenged questions. Additionally, plaintiff requests an order from the Court that the Board may not disseminate the answers to the questions at issue to any other entity or person.

Plaintiff claims that asking the challenged questions is an unlawful inquiry into the existence of a disability, and that making licensing decisions based on affirmative answers to the questions is discrimination on the basis of disability in violation of Title II, the public entity provisions, of the Americans with Disabilities Act ("ADA"), 42 U.S.C. ss 12131-12180.

At issue are questions 7, 8, 10, and 11 of the initial application; questions 5, 6, 12, 13, and 14 of the renewal application; and questions 9(d), 9(e), 9(f), and 9(g) of the supplementary form. The initial application asks each applicant: 7. Have you ever been dependent on alcohol or Controlled Dangerous Substances? 8. Have you ever been

treated for alcohol or drug abuse? 10. Have you ever suffered or been treated for any mental illness or psychiatric problems? 11. Do you have any uncorrected physical handicap which causes substantial impairment of, or limitation on, your ability to practice medicine and surgery? If the applicant answers in the affirmative to any of these questions, he or she is required to have any "TREATING PHYSICIANS ... SUBMIT DIRECTLY TO THE BOARD OFFICE, A SUMMARY OF THE DIAGNOSIS, TREATMENT, AND PROGNOSIS RELATING TO ANY OF THE ABOVE."

The renewal application asks each licensee, for the period from July 1, 1991 to the present: 5. Are you presently or have you previously suffered from or been in treatment for any psychiatric illness? *2 6. Have you been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or any employer for reasons that related to any physical or psychiatric illness or condition? (Parental leaves of absence need not be disclosed.) 12. Are you now or have you been dependent on alcohol or drugs? 13. Are you now or have you been in treatment for alcohol or drug abuse? 14. Have you been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or any employer for reasons that related to any drug or alcohol use or abuse? The supplementary form asks each licensee similar questions with respect to the period from July, 1 1981 to June 30, 1991: 9(d). Have you suffered from or been treated for any mental or psychiatric illness? 9(e). Have you been dependent upon alcohol or controlled dangerous substances? 9(f). Have you ever been treated for alcohol or drug abuse? 9(g). Have you ever been granted a leave of absence by a health care facility, HMO or any employer for reasons that relate to any physical, mental, or emotional condition (other than parental leave) or for any drug or alcohol problem? A licensee who answers "yes" to any of these questions on the renewal application or supplementary form is required to "explain in detail on a separate sheet, including dates of all incidents."

The renewal application additionally states that "[f]ailure to answer any question, whether in part or in whole, may result in a denial" of renewal. Although not employing the same language, both the initial application and supplementary form similarly direct that each question must be answered fully. Moreover, both the initial application and renewal application, but not the supplementary form, also state that the provision of false information is cause for the denial, suspension, or revocation of a medical license.

Furthermore, all three forms require the applicant or licensee to certify that "I have carefully read the questions ... and have answered them completely, and I declare under penalty of perjury that my answers and all statements made by me herein are true and correct." The renewal application and supplementary form, however, notify licensees of their right to assert, in writing, their Fifth Amendment privilege against self-incrimination and refuse to answer the portions of questions 12, 13, 14, 9(e), 9(f), and 9(g) that inquire about illegal use or abuse of drugs.

B. Procedural History

Plaintiff initially brought an action in state court in 1991 challenging similar questions in the Biennnial Renewal Application for 1991-1993. The New Jersey Supreme Court, relying on the opinion of the Appellate Division, ruled that the questions were reasonable under state law. Hirsch v. New Jersey State Board of Medical Examiners, 128 N.J. 160 (1992), aff'g, 252 N.J.Super 596 (App.Div.1991). The Supreme Court declined to rule on plaintiff's ADA claims, mainly because the plaintiff first presented the claims to the Court after the petition for certification had been granted. Id. at 161.

*3 On August 17, 1993, plaintiff commenced this action, based on the ADA, through a verified complaint and order to show cause seeking temporary, preliminary,

and permanent injunctive relief. In its original complaint, plaintiff challenged only the questions on the renewal application and supplementary form, but not those on the initial application.

On August 20, the Court denied plaintiff's request for a temporary restraining order, ruling that the plaintiff had not made the requisite showing of immediate and irreparable harm. For the most part, the Court based its decision on the certification of Board Executive Director Charles A. Janousek that the information gained through the renewal and supplementary forms is kept confidential, and on the lack of a showing that the Board was about to deny relicensing to any physician based on the answers to any of the challenged questions. The Court also wrote, however, "[t]hat this application does not present a situation demanding immediate action is further evidenced by the fact that Plaintiff seeks no relief with respect to the original application forms required for initial licensing, which the Court is advised contain the same questions Plaintiff labels as repugnant to ADA requirements." Medical Society v. Jacobs, Civil Action No. 93-3670 (WGB) (D.N.J. filed Aug. 20, 1993) at 5.

Plaintiff immediately amended its complaint to include a challenge to questions 7, 8, 10, and 11 on the initial application form. Thus, plaintiff's present application for preliminary injunctive relief challenges questions on all three forms.

II. DISCUSSION

A. The Standing Issue

The Court originally raised the issue of plaintiff's standing to sue, and I am convinced that it is proper to raise the issue sua sponte at this stage of the proceedings. Because injunctive relief is "an extraordinary remedy which should be granted only in limited circumstances," Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3rd Cir.1989), it would be folly to grant such relief in favor of a party that lacks standing. The Third Circuit has affirmed a dismissal for lack of standing where the dismissal occurred after the District Court raised the issue sua sponte at a preliminary injunction hearing. See Frissell v. Rizzo, 597 F.2d 840, 843 (3rd Cir.1979), cert. den., 444 U.S. 841 (1979), overruled on other grounds by Amato v. Wilentz, 952 F.2d 742, 750 n. 8 (1991). The present case is in the same posture as Frissell.

After examining the supplemental affidavit of plaintiff's Executive Director, the Court is now satisfied that plaintiff has standing to challenge all three application forms. For an association to have standing to sue on behalf of its members, the association must show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

***4** The plaintiff association meets all three criteria. In the context of a preliminary injunction, the first element of the Hunt test is met by a sufficient allegation that the organization's members are in immediate danger of suffering concrete injury. See Hospital Council of Western Pennsylvania v. City of Pittsburgh, 949 F.2d 83, 87 (3d Cir.1991). The plaintiff numbers among its members both actively practicing physicians who must fill out the renewal application and supplementary form, and medical students, residents, and unlicensed physicians who are currently applying for an initial license. Certification of Vincent A. Maressa at P 2. Plaintiff has therefore met the first element of the Hunt test, because it has sufficiently alleged that its members are in immediate danger of suffering invidious discrimination in connection with all three application forms. [FN1]

The second Hunt criteria is met because protecting the civil rights of its members is germane to plaintiff's broad purpose of promoting its members' interests. See Id. at 88. Finally, plaintiff has satisfied the third Hunt criteria, because its request for injunctive relief does not require individualized proof and can be properly resolved in a group context. See Hunt, 432 U.S. at 344; Hospital Council of Western Pennsylvania, 949 F.2d at 89. Plaintiff thus has standing to prosecute this action.

B. The Application for a Preliminary Injunction

Claiming a violation of the ADA, plaintiff is applying to enjoin the Board from asking, or using the information obtained through, questions 7, 8, 10, and 11 of the initial application, questions 5, 6, 12, 13, and 14 of the renewal application, and questions 9(d), 9(e), 9(f), and 9(g) of the supplementary form. Plaintiff also seeks to enjoin the Board from sharing the answers to the questions with any other person or entity.

Because Congress has not given any indication to the contrary, this Court must apply the traditional equitable standard in deciding whether to grant preliminary injunctive relief. See 42 U.S.C. s 12133; 29 U.S.C. s 794a; 42 U.S.C. s 2000d-7; Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc., 906 F.2d 934, 940-41. (3rd Cir.1990). The issuance or denial of a preliminary injunction is a matter committed to the sound discretion of the trial court. Penn Galvanizing Co. v. Lukens Steel Co., 468 F.2d 1021, 1023 (3d Cir.1972). An injunction is, however, "an extraordinary remedy which should be granted only in limited circumstances." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir.1989).

To issue an injunction, the Court must be satisfied (1) that the moving party is likely to succeed on the merits; and (2) that the moving party will suffer immediate and irreparable harm without injunctive relief. The Court should also take into account, where relevant, the possibility of harm to other interested persons and the public interest. Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir.1990); In re Arthur Treacher's Franchise Litigation, 689 F.2d 1137, 1143 (3d Cir.1982). The Court should weigh each of these factors in determining whether to issue an injunction. Spartacus, Inc. v. Borough of McKees Rocks, 694 F.2d 947, 949 (3d Cir.1982).

1. Probability of Success on the Merits

***5** The ADA protects individuals with disabilities from various forms of discrimination. As a public entity, the Board must abide by the provisions of Title II of the ADA, which prohibits discrimination in public services. 42 U.S.C. s 12131(1)(B).

To decide whether Title II prohibits asking the questions at issue, or making licensing decisions based on the answers to the questions, the Court must "begin[ ] with the language of the statute itself, including all of its parts. There is no need to resort to legislative history unless the statutory language is ambiguous." Velis v. Kardanis, 949 F.2d 78, 81 (3d Cir.1991). The Court therefore begins with the operative section of Title II, which provides that "[n]o 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." 42 U.S.C. s 12132.

The parties do not dispute that all of the challenged questions inquire into the existence of "disabilities," as that term is employed in the ADA. The ADA defines "disability" as "(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 an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. s 12102(2). The ADA thus protects those individuals who have recovered from a disability, those who have been misdiagnosed as having a disability, as well as those who are merely perceived as having

a disability.

The regulations promulgated by the Attorney General to implement Title II explain what constitutes a "physical or mental impairment." Because Congress explicitly authorized the Attorney General to implement Title II through these regulations, See 42 U.S.C. s 12134, they "must be given legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984). The regulations provide that the phrase "physical or mental impairment" includes a wide variety of diseases and conditions, including drug addiction and alcoholism. See 28 C.F.R. s 35.104. Thus each of the challenged questions inquire into disabilities, because each question asks for information regarding physical or mental impairments, or alcohol or drug abuse.

It is also unquestionable that many qualified individuals with disabilities will be singled out through their affirmative answers to the challenged questions. Title II defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modification to rules, policies, or practices ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. s 12131(2).

***6** The concept of a "qualified individual" who meets "essential eligibility requirements" is taken from the regulations implementing s 504 of the Rehabilitation Act, 29 U.S.C s 794, which prohibits discrimination against the disabled in federally assisted programs. See, e.g., 28 C.F.R. s 41.32 ("Qualified handicapped person means: (a) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (b) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services."); 29 C.F.R. s 1613.702(f) (defining a qualified handicapped person for purposes of employment as a "person who, with or without reasonable accomodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who ... (1) [m]eets the experience and/or education requirements ... of the position in question.") For purposes of Title II, what constitutes an "essential eligibility requirement" should be decided consistently with past interpretations of the Rehabilitation Act regulations. See 42 U.S.C. s 12134(b); 28 C.F.R. 35.103(a); H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. III ("Judiciary Report"), at 49.

Under the Rehabilitation Act case law, this Court may not accept, without scrutiny, the Board's assertion that the challenged questions are necessary to determine whether applicants meet the essential eligibility requirements for a medical license. While the Board is entitled to some deference in view of its experience and knowledge, the Court must perform its own analysis of the essential qualifications for a medical license. See Strathie v. Department of Transportation, 716 F.2d 227, 231-32 (3d Cir.1983). Under even the most minimal scrutiny, it is obvious to this Court that many, if not the vast majority, of the applicants who answer "yes" to one of the challenged questions are nevertheless qualified to hold a medical license by reason of the applicant's character, training, and experience. Therefore, it is certain that many applicants who are screened out by the challenged questions are "qualified individuals with disabilities" under Title II.

The present controversy thus boils down to the issue of whether the Board's use of the challenged questions in making licensing decisions is "discrimination" against those "qualified individuals with disabilities" who answer in the affirmative. Several provisions of the Title II regulations define and prohibit discrimination: A public entity

may not ... utilize criteria or methods of administration ... [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.... 28 C.F.R. s 35.130(b)(3)(i). 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.... *7 28 C.F.R. s 35.130(b)(6). 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 or 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. s 35.130(b)(8).

Taken together, these regulations prohibit the imposition of extra burdens on qualified individuals with disabilities when those burdens are unnecessary. Yet this is exactly what the Board is doing. The Executive Director of the Board has admitted that those who provide affirmative answers to the challenged questions are subject to further investigation. Certification of Charles A. Janousek at P 6. The questions are therefore used, in the language of 28 C.F.R. s 35.130(b)(8), as a "screening" device to decide on whom the Board will place additional burdens. Because of the exceedingly broad nature of most of the questions, these additional burdens are falling, in probably the vast majority of cases, upon qualified individuals with disabilities.

Furthermore, these additional burdens are unnecessary. The Court is confident that the Board can formulate a set of effective questions that screen out applicants based only on their behavior and capabilities. For example, the Board is not foreclosed by Title II from screening out applicants based on their employment histories; based on whether applicants can perform certain tasks or deal with certain emotionally or physically demanding situations; or based on whether applicants have been unreliable, neglected work, or failed to live up to responsibilities. In these areas, the applicants' references remain a valuable source of information. Also noteworthy is that the Board may discriminate against individuals based on their current illegal use of drugs. 28 C.F.R. s 35.131.

The Court further notes that there remain to the Board other sources of information, besides license applications, to determine the fitness of applicants and physicians. For instance, information about malpractice payments, along with information about sanctions taken by boards of medical examiners and health care entities, is available to the Board through the Health Care Quality Improvement Act of 1986, 42 U.S.C. s 11101 et seq. Furthermore, New Jersey doctors are required to report to the Board "information which reasonably indicates that another practitioner has demonstrated an impairment, gross incompetence or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare." N.J.Stat.Ann. 45:9-19.5. And, of course, the Board will always have available that most important source of information of all, patient complaints.

The essential problem with the present questions is that they substitute an impermissible inquiry into the status of disabled applicants for the proper, indeed necessary, inquiry into the applicants' behavior. In the context of other anti-discrimination statutes, it has been held to be fundamental that an individual's status cannot be used to make generalizations about that individual's behavior. See, e.g., Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 710-11 (1978) (under Title VII, it is impermissible to require women as a class to make larger contributions to a pension fund, even though, statistically, women live longer); EEOC v. Massachusetts, 987 F.2d 64, 72-73 (1993) (under the ADEA, a state law that required only those

employees over 70 to take and pass physical examinations constituted age discrimination).

*8 The Court stresses, however, that it is not actually the questions themselves that are discriminatory under the Title II regulations. Theoretically, the Board could ask questions concerning the status of applicants, yet neither have the time nor the manpower to act upon the answers. Rather, it is the extra investigations of qualified applicants who answer "yes" to one of the challenged questions that constitutes invidious discrimination under the Title II regulations.

To be sure, some of the challenged questions are partially focused on an applicant's capabilities. For example, question 11 on the initial application inquires into physical handicaps that impair the ability of an applicant to practice medicine. Although superficially this question seems to be asking for relevant information about an applicant's capabilities, the imposition of extra burdens based on answers to this question is still impermissible under Title II, because these burdens will fall only upon those individuals with physical handicaps. Those applicants with other types of problems, besides physical handicaps, that interfere with their abilities to practice medicine will not be burdened by the additional scrutiny that will be produced by an affirmative answer to this question.

The same reasoning applies to questions 6 and 14 on the renewal application and question 9(g) on the supplementary form. On the surface, these questions seem to be inquiring about relevant past events that speak to behavior: whether an applicant has been terminated by a health care provider. Extra investigations based on the answers to these questions are discriminatory, however, because the questions ask only for information regarding terminations that stemmed from a disability. These questions thus impermissibly subject only those with disabilities to further scrutiny.

The Board makes two alternative arguments in support of its present procedures. The first argument begins by noting that there is a specific prohibition on asking pre-employment questions about disabilities in Title I of the ADA, which prohibits discrimination in employment. See 42 U.S.C. s 12112(d)(2). Therefore, according to the Board, the absence of such a prohibition in Title II--and in the Title II regulations--is conspicuous, and must mean that government entities may ask the types of questions at issue.

The answer to this contention is twofold. First, as explained supra, the Title II regulations are fully applicable to the present situation, and these regulations are not "arbitrary, capricious, or plainly contrary to the statute." It therefore makes no difference what provisions may be present in other parts of the ADA, because the regulations control the present controversy. Second, this Court does not hold that the Board is prohibited from asking the challenged questions; the Board may, in fact, ask applicants anything it wants. It may not, however, place the burden of extra investigations on an applicant who answers in the affirmative to questions about that applicant's status.

*9 The Board's alternative argument applies only to the applications for license renewal. (This argument is fact-sensitive, and there are no facts in the record in regard to the Board's procedures with initial applications.) This argument, citing the legislative history, proceeds from the premise that Title II is meant to incorporate the more detailed prohibitions on discrimination contained in Title I. See Judiciary Report at 51; H.R.Rep. No. 485, 101st Cong., 2d Sess. pt. II ("Education and Labor Report"), at 84; S.Rep. No. 216, 101st Cong., 1st Sess. ("Senate Report"), at 44. The Board thus acknowledges in making this argument that, by analogy to Title I, See 42 U.S.C. s 12112(d)(2), it is technically prohibited from asking the challenged questions before it issues licenses.

Nevertheless, the Board argues that it has substantially complied with the incorporated provisions of Title I in its treatment of renewal applications. Under Title I, medical inquiries into a disability, which are prohibited pre- employment, may be made after a conditional job offer. A conditional offer may then be withdrawn based on a post-offer medical examination, as long as the reason for the withdrawal is job-related and justified by business necessity. See 42 U.S.C. s 12112(d)(3); Equal Employment Opportunity Commission Technical Assistance Manual on Title I of the ADA, at s 6.2.

Reasoning from these provisions of Title I, the Board points out that renewal licenses are issued to all licensees who complete an application, regardless of their answers to the challenged questions. Certification of Charles A. Janousek at P 5. The Board uses the information elicited through the challenged questions only after a renewal license is issued, and then the answers are used solely to trigger individualized investigations of the licensees' fitness to practice medicine. See Id. at P 6. According to the Board, these procedures substantially comply with Title I, which allows wide-ranging post-offer inquiries into offerees' medical histories.

There are several problems with the Board's argument. First, although there are statements in the legislative history that Title II is meant to incorporate Title I, precisely what is to be incorporated is unclear. A close reading of the legislative history makes it doubtful that Title II is intended to incorporate Title I in its entirety.

The report of the House Judiciary Committee contains a brief statement concerning incorporation: "Title II should be read to incorporate the provisions of titles I and III which are not inconsistent with the regulations implementing Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. s 794], such as [42 U.S.C. s 12112(b)(4)]." Judiciary Report at 51. The report of the Senate Labor and Human Resources Committee is similarly brief: "The forms of discrimination prohibited by [42 U.S.C. s 12132] are comparable to those set out in the applicable provisions of titles I and III of this legislation." Senate Report at 44.

***10** The report of the House Education and Labor Committee, however, goes into more detail on the incorporation issue: The Committee intends ... that the forms of discrimination prohibited by [42 U.S.C. s 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in [42 U.S.C. s 12112](b) and (c) and [42 U.S.C. s 12182(b)] should be incorporated into the regulations implementing this title. Education and Labor Report at 84.

These committee reports produce an ambiguous picture. The quote from the House Judiciary Report is very close to a flat statement that Title II incorporates Title I. Such a flat statement creates, however, an interpretive problem, because many of the more detailed provisions of Title I deal specifically with the employment context. It is not obvious at all, for example, how Title I's ban on pre-employment inquiries can apply to all government activities, many of which have nothing to do with employment.

Perhaps realizing this problem, the Senate Report says that the forms of discrimination prohibited by Title II are "comparable" to those prohibited by Title I. This statement provides the Court with little guidance in how to structure its reasoning.

The House Education and Labor Report is, however, more telling. In giving examples of what the Committee intends should be incorporated into Title II from Title I, the House cites to Title I's definition of the term "discriminate," 42 U.S.C. s 12112(b), and the immediately following subsection concerning covered entities in foreign countries, 42 U.S.C. s 12112(c).

Two propositions immediately follow from this passage from the Education and

Labor Report. First, that the Committee thought it necessary to give examples of what is incorporated indicates that not all of Title I is incorporated into Title II. Furthermore, notably absent from the Committee's examples is the very next subsection after the two cited, 42 U.S.C. s 12112(d), which is the section that prohibits pre-employment medical examinations and inquiries. This choice of examples indicates that, if the inquiry prohibition is incorporated at all, it does not function the same way under Title II as it functions under Title I. If the prohibition was to function the same under Title II, the Committee could have said that all of 42 U.S.C. s 12112 was incorporated by analogy into Title II, and it would not have been necessary to specify two particular subsections.

There is an even more important point to make in regard to the passage from the Education and Labor Report. Whatever the scope of incorporation, the Committee clearly states that incorporation of Title I into Title II is to be accomplished through the Title II regulations. As previously explained, the Title II regulations invalidate the Board's procedure of placing extra burdens on disabled applicants.

In conclusion, although the legislative history is unclear as to what extent Title II incorporates Title I, the regulations which control the present issue are clear, and therefore the Court must reject the arguments of the Board which are based on the legislative history.

***11** The Court appreciates that the Board performs a very important, and sometimes very difficult, function. The Board may not, however, carry out its duties in a fashion that discriminates against applicants with disabilities based on the the status of the applicants. The Court concludes that plaintiff has a high probability of succeeding on the merits.

2. Immediate and Irreparable Harm

That is not the end of the Court's analysis. Before the Court may issue a preliminary injunction, the party seeking an injunction must carry its burden of showing irreparable injury. Oburn v. Shapp, 521 F.2d 142, 150 (3d Cir.1975). The plaintiff must do more than show a mere risk of irreparable harm; there must be a "clear showing of immediate irreparable injury." Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.1989), cert. den., 493 U.S. 848 (1989).

The Court concludes that plaintiff has not carried its burden of showing immediate irreparable injury. With regard to the renewal applications, the Board has asserted, and its assertion is unchallenged, that all licensees who complete their applications will be issued renewal licenses, regardless of their responses to the challenged questions. Certification of Charles A. Janousek at P 5.

Furthermore, because it is the additional investigations that constitute discrimination under Title II, and not the mere asking of questions, the Court needs concrete proof that these investigations are imminent before it will issue a preliminary injunction. There is no evidence in the record that licensees who answer in the affirmative to any questions will be subjected to additional investigations with any frequency or rapidity. The plaintiff has provided no evidence on these issues, and the slim evidence in the affidavit of the Board's Executive Director indicates that the Board is heavily burdened with applications as it is, without initiating investigations of disabled applicants. Id. at PP 2-4. The bald statement that "inquiry may be initiated," Id. at P 6, as to licensees who answer one of the challenged questions in the affirmative is not enough to support a preliminary injunction.

As to the initial applications, the Court has no evidence at all of the Board's procedures. Without any proof of discrimination, no injunction may issue. And, in regard to plaintiff's motion that the Board be enjoined from sharing the information in

any application, the Executive Director of the Board has affirmed that the information in the applications has always been kept secret. Id. at P 7. There is no countervailing evidence in the record to show that the Board is about to reveal any information in the applications.

The Court concludes that plaintiff has not carried its burden of showing immediate and irreparable harm.

III. Conclusion

Because plaintiff has not carried its burden of showing immediate and irreparable harm, its application for a preliminary injunction is denied.

***12** An appropriate order follows.

FN1. The Court's conclusion that plaintiff has sufficiently alleged imminent harm for purposes of standing does not conflict with the conclusion, infra, that plaintiff has not sufficiently proven imminent harm to support a preliminary injunction. To decide standing, the Court must analyze the sufficiency of plaintiff's allegations, not their merit. See Warth v. Seldin, 422 U.S. 490, 500-01 (1974); Hospital Council of Western Pennsylvania, 949 F.2d at 86-87.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE MEDICAL SOCIETY OF NEW JERSEY, Plaintiff, v. FRED M. JACOBS, M.D., J.D., and the NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, Defendants.	Civil Action Case No.: 93-3670 (WGB)

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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TABLE OF AUTHORITIES

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MISCELLANEOUS

I. Introduction

Plaintiff the Medical Society of New Jersey ("Society") has brought this action on behalf of its members, alleging that certain questions on the New Jersey State Board of Medical Examiners' biennial license renewal application discriminate on the basis of disability in violation of title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (Supp. II 1990). The application, which all physicians seeking to renew their licenses to practice medicine in the State of New Jersey must complete, requires licensees to disclose certain physical or mental impairments -- including any psychiatric illness, drug or alcohol dependence or treatment, and physical, mental, or emotional conditions resulting in termination or a leave of absence -- experienced during the past twelve years.[1] New applicants for licenses to practice medicine in the State are subject to a similar inquiry.

As amicus curiae, the United States supports plaintiff New Jersey Medical Society's position that the licensure inquiries violate the ADA.[2] While the ultimate goal of the New Jersey State Board of Medical Examiners ("the Board") to ensure that

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[1] The 1991 biennial license renewal application was the first to contain the questions at issue here and sought information dating back ten years (to 1981). Applicants failing to answer all the questions on the 1991 application were sent a supplementary form requesting information dating back to 1981 along with their 1993-1995 renewal application. Future license renewal applications will cover only the preceding two years.

[2] We take no position on other issues raised by the parties.

only persons able to practice medicine competently and safely be licensed is a laudable one, the means selected to achieve that goal is not.

The licensure questions at issue in this case target for further investigation those individuals who have histories or diagnoses of disabilities. A core purpose of the ADA is the elimination of barriers caused by the use of stereotypic 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] By categorizing persons with disabilities as potentially unfit and imposing additional burdens of investigation upon them, the Board is engaging in precisely the kind of impermissible stereotyping that the ADA proscribes.

The Board's licensure application does not focus on actual, current impairments of physicians' abilities or functions; on the contrary, the questions at issue are extremely broad in scope and are not narrowly tailored to determine current fitness to practice medicine.[4] While the Board is free, consistent with the

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[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].

[4] There are five inquiries at issue:

Question 5: "Are you presently or have you previously suffered from or been in treatment for any psychiatric illness?"

(continued...)

ADA, to ask specific, targeted questions designed to determine whether a physician has a current impairment of his or her ability to practice medicine, the inquiry as currently undertaken by the Board seeks information about a candidate's status as a person with a disability instead of focusing on any behavioral manifestations of disabilities that might impair the ability to practice medicine. Thus, the Board's use of the challenged inquiries in its licensure program violates the ADA.

II. Argument: The Board's Use of the Challenged Inquiries in its Relicensing Program Discriminates on the Basis of Disability

Title II contains a sweeping prohibition of practices by public entities that discriminate against persons with

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[4](...continued)

Question 6: "Have you been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or any employer for reasons that related to any physical or psychiatric illness or condition? (Parental leave of absence need not be disclosed)"

Question 12: "Are you now or have you been dependent on alcohol or drugs?"

Question 13: "Are you now or have you been in treatment for alcohol or drug abuse?"

Question 14: "Have you ever been terminated by or granted a leave of absence by a hospital, health care facility, HMO, or employer for reasons that related to any drug or alcohol use or abuse."

The supplemental application form, which was sent to licensees who did not answer all the questions propounded on the 1991 biennial application form, asks four questions very similar to those quoted above.

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.[5]

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 physicians in the State of New Jersey. Defendant's Answer ¶¶ 1 and 11.

Title II and the Department's title II regulation[6] prohibit a public entity from discriminating against a "qualified individual with a disability."[7] The term "qualified individual

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[5] Prior to the passage of the ADA in 1990, similar protections had been provided by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, but only in programs or activities receiving federal financial assistance (including assisted programs of State and local governments). In language that is substantively similar to that of section 504, title II expanded this prohibition to all programs, services, and activities of State and local governments, not just to those aided by federal funds. See H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II at 357 (1989), reprinted in 1990 U.S.C.C.A.N. 303.

[6] 28 C.F.R. §§ 35.130(b)(3)(i), (b)(6).

[7] Where, as here, Congress expressly delegates authority to an agency to issue legislative regulations, 42 U.S.C. § 12134, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). See also Petersen v. University of Wis. Bd. of Regents, No. 93-C-46-C, 2 Americans With Disabilities Act Cases (BNA) 735, 738, 1993 U.S. Dist. LEXIS 5427 (W.D. Wis.

(continued...)

with a disability" is defined in title II of the ADA and section 35.104 of the Department's 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 435-36 (July 2, 1991)(emphasis added).[8]

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[7](...continued)
Apr. 20, 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA).

Agencies are also afforded substantial deference in interpreting their own regulations. The Supreme Court has announced, as recently as May 3, 1993, that "provided that an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Stinson v. United States, 113 S. Ct. 1913, 1919 (1993) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). See Lyng v. Payne, 476 U.S. 926, 939 (1986); United States v. Larionoff, 431 U.S. 864, 872-873 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

[8] The commentary to the regulation 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. 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); Panzadides v. Virginia Bd. of Educ., 946 F.2d 345, 349-50 (4th Cir.
(continued...)

Where public safety may be affected, 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.[9] An essential eligibility requirement for the

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[8](...continued)
1991)(noting that "defendants cannot merely 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 Sch. Dist., 508 F. Supp. 333, 337 (1981)(requiring analysis behind "perceived limitations"). Cases in this Circuit have held likewise. See, e.g., 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).

[9] 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.
>
> 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

(continued...)

practice of medicine comprises the ability to safely and competently practice medicine; any person with a disability who can safely and competently practice medicine will be considered a "qualified person with a disability."[10]

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[9](...continued)
will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

28 C.F.R. pt. 35, app. A at 436.

[10] See Defendants' August 19, 1993, Memorandum in Opposition to Plaintiff's Application for Entry of a Temporary Restraining Order at 11 ("an 'essential eligibility requirement' for licensure is an ability to practice without risk of injuring patients"); Defendants' June 5, 1992, Memorandum in Response to the Amicus Brief of the National Mental Health Association at 2 ("[u]ltimately, the State Board must not only determine whether one has necessary educational qualifications, but also must determine whether a physician can practice in a manner that does not compromise the health, safety and welfare of patients"); Defendants' March 6, 1992, Memorandum in Response to Plaintiff's Brief Concerning Application of the ADA at 6 ("[a]bility to practice in a manner that does not compromise public safety is thus an 'essential eligibility requirement'").

As pointed out in Defendants' June 5, 1992, Memorandum in Response to the Amicus Brief of the National Mental Health Association, New Jersey law empowers the Board to suspend or revoke a practitioner's license if a licensee cannot "discharg[e] the functions of a licensee in a manner consistent with the public's health, safety and welfare," N.J. Stat. Ann. § 45:1-21(i)(1990)(emphasis added), or if a licensee "has demonstrated any physical, mental, or emotional condition or drug or alcohol use which impairs his ability to practice with reasonable skill and safety." N.J. Stat. Ann. § 45:9-16 (1990) (emphasis added).

As demonstrated below, however, the Board's inquiries are improper, in part because they focus on a licensee's condition and not behavior. The appropriateness of focusing on behavior, however, is also made clear by the Board's own statutory mandate.

The Board's inquiries discriminate against doctors with disabilities in the relicensure process because the Board utilizes the challenged inquiries to identify individuals for further investigation on the basis of disability. Yet the Board acknowledges that many of these individuals will ultimately be found to be qualified to practice medicine.[11] As we demonstrate below, this investigative process places greater burdens on doctors with disabilities than those placed on others. Moreover, these additional burdens are unnecessary in determining whether applicants meet the essential eligibility requirements for relicensure.

A. The Board's Relicensing Program Unnecessarily Imposes Burdens on Qualified Individuals with Disabilities[12]

Several provisions of the Department of Justice's 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,

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[11] See, e.g., Defendants' August 19, 1993, Letter Brief in Opposition to Plaintiff's Application for Entry of an Order Imposing Temporary Restraints, at 5. It is the overbroad nature of the inquiries that lead to such a result. Some people with histories of disabilities but who no longer have disabilities affecting their ability to practice medicine will satisfy the requirements for licensure, as will those whose current disabilities do not impair their abilities to practice medicine safely.

[12] The arguments presented below are based on materials currently in the record. However, ultimately an evidentiary hearing may be necessary to fully explore the relevant factual issues in this case.

> 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) 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 provision in the title II regulation 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. § 35.130(b)(8).[13]

This court is not here faced with a situation where an individual has been denied relicensure based on disability. However, title II and its implementing regulations proscribe more than total exclusion on the basis of disability. 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

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[13] See also 28 C.F.R. § 35.130(b)(1)(ii) and (iii) (prohibiting title II entities from providing qualified individuals with disabilities with a benefit or service that is not equal to that afforded others and not as effective in providing an equal opportunity to gain the same benefit afforded to others).

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 441. It also prohibits unnecessary inquiries into disability. See Part B. below.

The Board's inquiries and reporting requirements concerning diagnosis and treatment for substance dependency or mental illness impose requirements on persons with histories of disabilities that are greater than those imposed on other applicants. In order to be eligible to receive a renewal certificate to practice medicine in the State of New Jersey, the Board requires applicants to answer all questions on the application, including those regarding prior psychiatric illness, substance dependency, and the medical basis for leave or termination.[14] Based on the answers, further investigation may be undertaken. The questionnaire is thus used as a screening device to identify persons who will be subject to further inquiry and investigation.

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[14] Indeed, the application warns licensees that "[f]ailure to answer any question, whether in whole or in part, may result in denial of this renewal application," and licensees are required to certify that they have answered the questions completely. The form does, however, contain a proviso stating that licensees may decide to refrain from answering based on the fifth amendment protection against self-incrimination.

During the ensuing investigative process, certain members of the plaintiff Medical Society are singled out because of their disabilities and are forced to reveal information of a highly personal and potentially embarrassing nature. Once applicants affirm that they have experienced a psychiatric illness, substance dependency, or have taken leave or have been terminated for reasons of disability or substance dependency, they must provide additional detailed information beyond what is required by the application form.

Mental health treatment is often bound up with intensely personal issues such as family relationships and bereavement. The Board's relicensure inquiry is invasive not only because it requires persons who answer the questions in the affirmative to provide information about these issues, but requires them to disclose details about what is arguably the most private part of human existence -- a person's inner mental and emotional state. Of potentially even more harm is the Board's attempt to obtain information about the person's fitness from others; the Board's officers apparently may engage in a full-fledged exploration of a licensee's condition with the person's colleagues and supervisors, asking questions regarding a person's habits, affect, lifestyle, etc. It is not difficult to imagine the attendant potential damage to an individual's reputation.

In addition, the Board's inquiries into an individual's history of disabilities can have a more insidious discriminatory effect. Concern over the Board's inquiries about diagnosis and

treatment for mental illness or substance dependency may deter physicians or licensee applicants from seeking counseling for mental or emotional problems or treatment for substance disorders. 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). 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 frank disclosure on which successful counseling depends. See Maher & Blum, supra, at 824, 833-46.[15] Thus, rather than improving the quality of physicians in the State, the Board's inquiries may have the perverse effect

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[15] 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). Medical practice is a highly stressful enterprise, and many persons can benefit from mental health counseling as physicians. As Professor Maher and Dr. Blum state in their article regarding the use of analogous questions in the licensure process for attorneys:

> [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.

of deterring those who could benefit from treatment from obtaining it, while penalizing those who enhance their ability to perform successfully as physicians by seeking counseling.

Furthermore, the Board's focus on past diagnoses and treatment of disabilities rather than conduct cannot be deemed justified, because persons without such histories may well have undiagnosed impairments that impact on an individual's ability as a physician. Indeed, someone who has a mental or physical disability but is either unaware of it or unwilling to seek treatment for it may pose more of a risk than someone who has recognized his or her condition and obtained treatment. Yet the Board singles out for further investigation only those persons with a history of diagnosis or treatment for certain disabilities.

A recent court of appeals decision confirms that requiring persons to undergo medical scrutiny solely on the basis of their status as a member of a protected class violates anti-discrimination laws. In EEOC v. Massachusetts, 987 F.2d 64 (1st Cir. 1993), the Court of Appeals for the First Circuit addressed whether a Massachusetts statute, requiring that employees 70 or older pass an annual medical examination as a condition of continued employment, violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1986). The court found the state law to be facially discriminatory because it "allows age to be the determinant as to when an employee's deterioration will be so significant that it requires special treatment" and thereby

"strikes at the heart of the ADEA [whose] entire point ... is to abandon previous stereotypes about the abilities and capacities of older workers." 987 F.2d at 71.

In this case, an applicant's or licensee's status as a person with a history of a disability is the sole criterion used by the Board to trigger a requirement for submitting an additional detailed description of facts about the disability beyond that required by the application form, and in many cases, further investigation. The Board's requirements are rooted in assumptions and stereotypes about the capabilities of persons with mental disabilities and are just as unlawfully discriminatory as the age-based medical examination requirement struck down by the First Circuit.

B. The Board Cannot Establish That its Inquiries Are Necessary for the Safe Practice of Medicine

The purpose of the Board's licensure process is to determine whether individuals are capable of practicing medicine safely and competently, i.e. whether such persons will satisfy the "essential eligibility requirements" for the practice of medicine. See discussion at pp. 4-7, supra. The ADA recognizes the legitimacy of this objective. However, title II does not permit inquiries into disabilities where it is not necessary to achieve that objective because such inquiries may have the effect of discriminating against "qualified individuals with disabilities." Unnecessary inquiries are also barred by 28

C.F.R. 35.130(b)(8),[16] which is identical in substance to a statutory provision in title III, 42 U.S.C. § 12182(b)(2)(A)(i), and the Department of Justice's title III regulation, 28 C.F.R. 36.301(a). 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 accompanying analysis to 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, reiterates that title II prohibits unnecessary inquiries into disability. 42 U.S.C. §§ 12206(c)(3) & (d) (Supp. II 1990); U.S. Department of Justice, The Americans with Disabilities Act -- Title II Technical Assistance Manual (1992 & Supp. 1993)("Technical Assistance Manual"). Section 204 of the ADA provides that the title II regulation shall incorporate this concept.[17]

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[16] See discussion at 9, supra.

[17] 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 430.

Diagnosis or treatment for a mental disorder or substance dependency provides no basis for assuming that these disabilities will affect behavior. See generally 1 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 professionals to make reliable predictions of future behavior). The ADA implicitly recognizes this principle as it prohibits discrimination based on stereotypical and unfounded fears and misconceptions over the perceived consequences of disabilities.[18]

If a disability affects the ability to practice medicine, it must, at some point, also affect behavior associated with practicing medicine. Consequently, identifying unacceptable behavior (or other consequences of a disability) for the practice of medicine is the appropriate course under the ADA. As noted in the American Psychiatric Association guidelines,

> The salient concern is always the individual's current capacity to function and/or current impairment. Only information about current impairing disorder affecting

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[18] See, e.g., Department of Justice's 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).

> the capacity to function as a physician, and which is relevant to present practice, should be disclosed....[19]

The Board may obtain sufficient information to assess fitness to practice surgery or medicine through questions that focus on behavior rather than status. Nothing in the ADA prohibits the Board from asking applicants or licensees about past conduct or behavior that may evidence an incapacity to practice medicine or surgery. Such conduct or behavior, whether it results from mental illness, substance dependency, or other factors (such as irresponsibility or bad moral character), is a much better indicator of suitability as a physician than an applicant's diagnosis or treatment history. Consistent with this principle, the Department's title II Technical Assistance Manual, which is cited and relied upon by the Board,[20] states that,

> [p]ublic entities may not discriminate against qualified individuals with disabilities who apply for licenses, but <u>may consider factors related to the disability</u> 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 or terminations from employment in the past but may not

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[19] "Recommended Guidelines Concerning Disclosure and Confidentiality," American Psychiatric Association, Work Group on Disclosure (December 12, 1992) at 1.

[20] Defendants' August 19, 1993, Memorandum in Opposition to Plaintiff's Application for Entry of a Temporary Restraining Order at 8, 12.

focus the inquiry only on those leaves of absence and terminations occasioned by physical or psychiatric illnesses or conditions. Similarly, the Board may inquire about personal behavior, including whether the applicant uses drugs or alcohol and the frequency of use.[21] The Board may ask applicants whether there is anything that would currently impair their ability to carry out the duties and responsibilities of a physician.[22] Such a question, along with other questions about conduct and behavior, are a permissible means of ascertaining an applicant's fitness.[23] In contrast, asking about an applicant's history of diagnosis and treatment for mental disorders or substance

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[21] 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).

[22] 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.

[23] See, e.g., Education and Labor Report at 57 ("For people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat. This determination must be based on the behavior of the particular disabled person, not merely on generalizations about the disability"); see also Landefeld v. Marion General Hosp., Inc., 994 F.2d 1178 (6th Cir. 1993) (holding that hospital Board of Directors' decision to suspend internist's medical staff privileges did not violate § 504 where Board of Directors suspended physician for conduct -- stealing mail from hospital mailboxes -- rather than on the basis of his mental illness (bipolar disorder)).

dependency treats a person's status as an individual with a disability as if it were indicative of that individual's future behavior as a physician. By focusing upon the disability itself, instead of focusing on relevant factors that may be associated with the disability, the Board cannot accurately assess a licensee's fitness to practice medicine and may discriminate against a qualified individual with a disability.

Moreover, additional lawful avenues exist for the Board to inquire about subjects of legitimate concern that bear on fitness to practice medicine, such as suspension or revocation of hospital privileges, malpractice suits, or patient complaints. Such information will be available to the Board under the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, which is designed to gather, on a national basis, information about malpractice payments, sanctions and review actions (including suspensions, censures, reprimands, and probation) taken by hospitals, group medical practices and other health care entities. The HCQIA accomplished the goal of identifying and helping to remove incompetent and unprofessional physicians from practice by focusing on behavioral evidence of impairment, rather than generalizations about persons with disabilities.[24]

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[24] Robert S. Adler, Stalking the Rogue Physician: An analysis of the Health Care Quality Improvement Act, 28 Am. Bus. L.J. 683 (1991).

New Jersey recently enacted a similar statute, the Professional Medical Conduct Reform Act of 1989, requiring (continued...)

The ADA's prohibition on discrimination based upon an individual's mental health and substance dependency history places neither the public nor the medical profession at risk. The Board is free, consistent with the ADA, to ask specific, targeted questions designed to determine whether a physician suffers a current impairment of his or her ability to practice medicine. Furthermore, recent federal and State legislation will furnish the Board with considerable information regarding potential physician impairment.

Finally, the Board maintains that requiring individuals to identify themselves as having had a mental or physical disability is the only practical way for it to determine who should be investigated further. Indeed, the Board characterizes the task of reformulating the relicensure application's questions to target more precisely the behaviors about which it seeks

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[24](...continued)
medical practitioners (other than treating practitioners) to inform the Board of any evidence that another practitioner "has demonstrated an impairment, gross incompetence or unprofessional conduct which would present an imminent danger to an individual patient or to the public health, safety or welfare." N.J. Stat. Ann. § 45:9-19.5 (1990). Practitioners are granted immunity for making such good faith reports and are subject to disciplinary action and civil penalties for failure to do so. Id. The Reform Act also establishes a Medical Practitioner Review Panel intended to investigate allegations of impairment, incompetence, and other misconduct by health care providers and consumers and to gather information regarding malpractice claims, privilege suspensions, etc. N.J. Stat. Ann. §§ 45:9-19.8 to -19.11. This legislation will provide additional information to the Board and will further make the Board's improper inquiries unnecessary.

information as an "effort" that is "impractical and impossible."[25] While the Board may believe that using a screening device such as disability is a quick and easy method of separating out who warrants further investigation and who does not, the use of mental or physical disability as a "red flag" to conduct further investigation of a person for unfitness to practice medicine is precisely the sort of conclusory jump which the ADA was enacted to combat.

[25] Defendants' September 10, 1993, Letter Brief in Opposition to the Medical Society's Application for Preliminary Injunctive Relief, at 13.

III. Conclusion

For the foregoing reasons, the United States urges the Court to conclude that the Board's relicensure program violates title II of the ADA.

Dated: Washington, D.C.

September ___, 1993

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:

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SO CERTIFIED this 29th day of September, 1993.

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UTAH STATE BAR
BOARD OF BAR COMMISSIONERS
September 23, 1993
Utah Law & Justice Center, Salt Lake City, Utah
8:30 A.M.

MINUTES

Present were: President, H. James Clegg; President-Elect, Paul T. Moxley; Commissioners: Denise A. Dragoo, John Florez, J. Michael Hansen, Dennis V. Haslam, James C. Jenkins, Steven M. Kaufman, Charlotte L. Miller, Craig M. Snyder, Ray O. Westergard and D. Frank Wilkins; Ex Officio Members: Robert M. Archuleta, James Z. Davis, Randy L. Dryer, Kate Lahey, Lee B. Teitelbaum, and Mark S. Webber; Executive Director, John C. Baldwin; Assistant to the Executive Director, Richard Dibblee; Executive Secretary, Mary Munzert and Bar Counsel, Stephen A. Trost.

Excused: Commissioners: Gayle F. McKeachnie; Ex Officio Members: H. Reese Hansen, Norman S. Johnson and Reed L. Martineau.

The meeting commenced at 8:30 A.M.

ITEM 1 Approve August 26, 1993 Minutes.

The Board reviewed the minutes of the August 26, 1993 meeting and Kaufman moved and Westergard seconded to approve the minutes as amended. The motion passed.

ITEM 2 President's Report: H. James Clegg.

Jim Clegg welcomed Minority Bar Association representative, Robert Archuleta, to his first meeting and expressed appreciation for having him represent the Minority Bar at Commission meetings.

2.1 Presentation of Resolutions to Din Whitney and Jim Lee.

Jim Clegg presented James B. Lee with a resolution of appreciation and thanked him for his leadership and wisdom in directing the efforts of the Futures Commission and for his constant support of the Bar.

Clegg also presented a resolution of appreciation to Hardin A. Whitney for sharing his time and talents to help pave the way for the involvement of the Bar in the emerging areas of alternative dispute resolution.

Clegg indicated that a similar resolution for Dick Burbidge would be rescheduled for next month when Burbidge would be available.

2.2 Report on Visit to Wyoming Annual Meeting.

Clegg reported on the Wyoming Bar Annual meeting which he recently attended. He referred to his written comments under Tab 2 of the agenda materials and commented on the camaraderie of the group, noting that most of the attendees appeared to come from solo or small firm practices. He also commented that the conference was a relatively low-budget, well-attended, cordial affair.

2.3 Discussion of Americans with Disability Act Impact on Admissions Questions.

Clegg indicated that Bar Counsel Steve Trost has been talking with Mary A. Rudolph at the Legal Center For People with Disabilities with regard to questions on the Bar examination application which inquire about an applicant's mental health history.

Charlotte Miller indicated that the issue of "what is the benefit of the questions to the Bar and the public" needs to be explored. Randy Dryer indicated he has been talking with Chris Wangsgard, who could seek the assistance of the psychiatric community to come up with appropriate language or a way to limit the time period covered in the inquiry.

John Baldwin noted he has corresponded with Brian Barnard to keep him informed about the Commission's progress regarding his concerns.

Trost indicated he has been talking with two psychologists--both of which would be willing to consult with the Bar on this issue. Trost also indicated that no other jurisdiction has taken any action to remove these types of questions except Washington, D.C., and there has been no clear precedents on interpretation of the ADA.

Frank Wilkins commented that the issue should be focused on as a policy matter, and the Commission should resolve whether or not this is necessary and if so, how it could be appropriately obtained.

Ray Westergard indicated that CPA's don't have a question like this even though they are licensed to practice for confidential matters with the public. Trost explained that in the fields of legal and medical service, confidentiality between client and attorney or patient and doctor is extremely important and involves a "closed door" situation. He added that in the medical field there are very pointed questions about mental health and drug use.

Kate Lahey noted that the hospitalization issue may not be a good indicator of the seriousness of a mental or emotional problem since many problems can be treated on an out-patient basis and non-hospitalized problems are not necessarily less serious than hospitalized cases.

Mike Hansen indicated that it would be wrong to suspend questions which are legal and valid inquiries and that he would be in favor of drafting better questions.

Haslam commented that he would be willing to work with the committee and that the Board should expand the committee to include representation from the mental health community.

Haslam moved and Hansen seconded to reevaluate questions #15 and #21 on the Bar Examination application and expand the Character & Fitness Committee to include mental health community representation and Legal Center for People with Disability representation so that there is proper input, and to request a report in 60 days. The motion passed.

Florez moved and Haslam seconded to suspend questions #15 and #21 on the Bar Examination application until receipt of a report from the expanded Character & Fitness Committee. The motion passed 7 in Favor and 3 Opposed.

Haslam volunteered to serve as liaison with the Character & Fitness Committee on this issue.

John Baldwin reminded the Board that the initial application deadline is November 1 and a notice indicating that questions #15 and #21 have been temporarily suspended will go out with applications. The Character & Fitness Committee will be directed to disregard Questions #15 and #21 on those applications which have been previously sent out.

2.4 Review Policy Regarding Reimbursement of Visiting Bar Presidents to Annual Meeting.

Clegg brought up for discussion the Bar's policy of reimbursing some expenses of visiting Bar Presidents to our Annual Meetings. He indicated that New Mexico has the same policy as Utah, but California simply 'comps' on registration. He further indicated that seven surrounding western states have a policy similar to California's and two (New Mexico, plus 1 other) have a policy similar to Utah. The Board discussed the best ways to balance encouraging out-of-state Bar presidents' attendance while offering a minimally reasonable reimbursement policy. The Board felt that Utah should cover registration and ticketed functions and refrain from reimbursement of lodging. Clegg agreed to talk with the New Mexico bar president and report back next month.

2.5 Review Appointments of Delegates to ABA State Caucus.

Clegg inquired whether it was worthwhile to send a Bar commission representative to attend this year's State Caucus portion of the ABA convention. Randy Dryer, who attended last year's ABA meeting, commented that the state caucus meetings primarily deal with reallocation of representation on the ABA Board of Governors and House of Delegates. Dryer also indicated that it is important to have a representative attend, but it is not worth sending someone just to attend the state caucus portion of the ABA convention. Dryer suggested the Board have someone who is already planning to attend the ABA convention also attend the status caucus portion of the meeting and represent the Bar

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Hamline UNIVERSITY

March 2, 1994

Philip P. Frickey
University of Minnesota Law School
229 - 19th Avenue South
Minneapolis, MN 55455

Dear Phil:

At your request, I have compiled the following statistics for the past three academic years for our clients who are law students:

1990-1991	Females	31
	Males	14
	TOTAL	**45**
1991-1992	Females	20
	Males	11
	TOTAL	**31**
1992-1993	Females	35
	Males	26
	TOTAL	**61**

At the time that students seek a counseling appointment we inform them in writing of the Bar's disclosure requirement. Although I do not have statistics, it is my experience that a number of students decline to use our services because they wish to protect their privacy. Thus, it is my belief that this requirement is precluding students from receiving needed services.

Sincerely,

Patricia la Plante, Ph.D., L.P.
Counseling Center Director