

Too Much Information: Use of Mental Health Questions in the Bar Licensing Application Process



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TransCen, Inc.

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Mid-Atlantic ADA Center, a project of TransCen, Inc.

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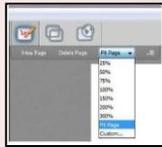
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Archive

- This webinar is being recorded and can be accessed within a few weeks
- You will receive an email with information on accessing the archive



Too Much Information: Use of Mental Health Questions in the Bar Licensing Application Process



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What types of mental health inquiries do state bar examiners make?

- Bar examiners in a majority of states seek mental health information from bar applicants.
- Questions typically seek information about applicants' mental health diagnoses, conditions, history, or treatment

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- Questions may have various limitations on their scope (eg time limits, limits on diagnoses or type of treatment, limits restricting inquiries to conditions that currently impair an applicant's ability to practice)
- In many states, positive answers may result in an individual receiving a probationary or "conditional admission" to practice. May include submitting to and paying for monitoring by a psychiatrist; providing psychiatric reports to the individual's employer.

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Title II of the Americans with Disabilities act (ADA) Applies to bar licensing

- Prohibits public entities (state and local government agencies) from discriminating on the basis of disability
- Public entities may not use **criteria or methods of administration that have the effect of subjecting people with disabilities to discrimination** (28 CFR § 35.130(b)(3)(i))
- Public entities may not administer a **licensing program in a manner that subjects qualified people with disabilities to discrimination** (28 CFR § 35.130(b)(6))
- Public entities shall not apply **eligibility criteria that tend to screen out people with disabilities unless necessary** for the provision of the program, service or activity (28 CFR § 35.130(b)(8))

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- **Disability** = physical or mental impairment that substantially limits a major life activity or major bodily function, a history of such an impairment, or being regarded as having such an impairment
- **Psychiatric disabilities** such as bipolar disorder, major depressive disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia are virtually always covered by the ADA. 28 CFR § 35.108(d)(2)(iii)(K).

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Early ADA cases challenging use of mental health questions in bar admissions process

- ADA prohibits mental health inquiries that are overbroad in scope, such as those that have no time limitation, and those not limited to mental health conditions that would impair a person's ability to practice law.
- See, e.g., *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995); *Ellen S. v. Florida Board of Bar Examiners*, 859 F. Supp. 1489 (S.D. Fla. 1994); *In re Petition and Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996)

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S.P. Administrative complaint against Louisiana supreme court and justice department findings letter (2014)

- **S.P. complaint** filed by the Bazelon Center in 2011 with DOJ, alleging violations of ADA Title II and Section 504 of the Rehabilitation Act stemming from questions about bar applicants' mental health and imposition of conditional admission on S.P. despite absence of any evidence that S.P.'s mental health history affected the ability to practice law.
 - Diagnosis or treatment for certain conditions during past 5 years

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- Any condition or impairment that currently affects or if left untreated could affect ability to practice law
- Has mental health condition been raised as a defense or explanation for actions in judicial proceeding, investigation, proposed termination from a job or school, licensing authority, etc?
- **DOJ findings letter** (2014) finding violations of ADA and Section 504 based on questions used by Louisiana and on its use of conditional admission for S.P. and others. Importance of **conduct** rather than diagnosis, treatment, history.

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Subsequent developments

- National Conference of Bar Examiners changes its model mental health questions (2014)
- DOJ enters Settlement Agreement with Louisiana (2014) limiting use of mental health inquiries of bar applicants and use of conditional admission
- Other states begin eliminating or narrowing mental health inquiries of bar applicants (e.g. Tennessee, California, Washington, Vermont, New York, and others)

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ABA RESOLUTION 102 (2015)

- American Bar Association adopts resolution Aug. 2015 calling for an end to mental health screening of bar applicants.
- Urges bar licensing entities “to eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant’s ability to practice law in a competent, ethical, and professional manner.”

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- Bar licensing entities “are not precluded from making reasonable and narrowly-tailored follow-up inquiries concerning an applicant’s mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and a mental health condition has either been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.”
- Difference from earlier ABA resolution

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Pending litigation

- Challenge to Florida’s use of mental health inquiries for bar applicants; recent decision. Hobbs v. Florida Supreme Court et al., No. 4:17-cv-00422-RH-CAS (N.D. Fla. June 18, 2018)
- Administrative complaints concerning mental health inquiries and conditional admission in bar, medical, nursing or other licensing

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Mental health inquiries and conditional admission: what complies with the ADA?

- Focus on conduct. Diagnoses, treatment, and history do not by themselves call into question fitness to practice law.
- Conditional admission should not be imposed on bar candidates with mental health diagnoses unless they would otherwise be denied admission.

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**25th Annual Conference on the
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Thank You!

Mid-Atlantic ADA Center

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