

# Evaluating Conduct and Behavior Questions as Replacements for Specific Mental Health Inquiries on Bar Applications: Assessing the ADA Compliance of the New Questions

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## INTRODUCTION

Most states include questions relating to mental health on their bar applications.<sup>1</sup> In recent years, several states have replaced questions that ask specifically about mental health diagnoses and treatment with questions that inquire broadly into conduct and behavior in an effort to resolve conflicts with the Americans with Disabilities Act (“ADA”).<sup>2</sup> Because mental health status has been shown not to predict future misconduct effectively, disclosure of mental illness on bar applications cannot be considered necessary and therefore violates the ADA.<sup>3</sup> This Note will argue that the new broad conduct and behavior questions still effectively require disclosure of some mental illness, and states should therefore eliminate the new conduct and behavior questions from bar applications.

Mental health conditions pose a significant public health issue in the United States, and attorneys and law students as a group tend to be particularly affected by such conditions.<sup>4</sup> Bar admission character and fitness questionnaires have historically included questions requiring disclosure of mental health diagnoses and treatment.<sup>5</sup> Many states continue to include specific mental health inquiries on

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1. Bazelon Center for Mental Health Law, *Bar Admissions Questions Pertaining to Mental Health, School/Criminal History, and Financial Issues*, February 2019.

2. David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, *The Professional Lawyer*, Jan. 2020.

3. Mary Elizabeth Cisneros, Note, *A Proposal to Eliminate Broad Mental Health Inquiries on Bar Examination Applications: Assessing An Applicant's Fitness to Practice Law By Alternative Means*, 8 GEO. J. LEGAL ETHICS 401, 422 (1995); 42 U.S.C. § 12132 (2008); Alyssa Dragnich, *Have You Ever . . . ? : How State Bar Association Inquiries Into Mental Health Violate The Americans With Disabilities Act*, 80 BROOK. L. REV. 677, 680 (2015).

4. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT MED. 46, 52 (2016); Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 145 (2016).

5. See Bazelon Center for Mental Health Law, *supra* note 1.

their bar admission applications.<sup>6</sup> The threat of challenges to bar admission has been shown to discourage law students affected by mental health disorders from seeking treatment.<sup>7</sup> Required disclosure of mental health history on bar applications thus presents an important public health issue.

Mental health questions on bar applications have been challenged under the ADA.<sup>8</sup> Under the ADA and the corresponding Department of Justice (“DOJ”) implementing guidelines, state bar examiners may not screen out individuals on the basis of disabilities unless doing so can be shown to be necessary to the provision of legal services.<sup>9</sup> While some specific mental health questions have been held to be impermissible under the ADA, authorities—including the DOJ—have advised that bar examiners may inquire into applicants’ past conduct and behavior.<sup>10</sup> Following guidance from the DOJ and other sources, several states in recent years have exchanged questions that inquired specifically into mental health diagnoses and treatment for questions that inquire broadly into past conduct and behavior.<sup>11</sup>

While these new conduct and behavior questions may limit the extent to which states’ bar examiners can specifically inquire into applicants’ mental health histories, the questions may still effectively require disclosure of some mental illness. For example, if an individual with a mental illness has been symptomatic in recent years and as a result exhibited covered behavior, the questions as written may require disclosure of the individual’s condition. An individual may have initially exhibited symptoms and subsequently been diagnosed and treated for a mental illness all within the time period designated by the new questions. The individual could have been stable and asymptomatic since the initial incident after seeking treatment, but under the new broad conduct and behavior questions may still need to disclose mental health history. Given the severe penalties for lack of candor on bar applications, applicants will tend towards disclosure of mental illness.

Evidence shows that an individual’s mental health history does not effectively predict future misconduct.<sup>12</sup> Therefore, bar applications should not require any

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6. Florida Board of Bar Examiners, *Bar Application Sections A & B* [hereinafter *Florida Questionnaire*]; Texas Board of Law Examiners, *Bar Exam Application for In-State Law Students* [hereinafter *Texas Questionnaire*]; National Conference of Bar Examiners, *Character and Fitness Sample Application*, January 2021 [hereinafter *NCBE Questionnaire*].

7. Organ et al., *supra* note 4, at 141.

8. See Dragnich, *supra* note 3, at 687–99.

9. 42 U.S.C. § 12132 (2008); Dragnich, *supra* note 3, at 680.

10. Devin Chatterton, *Louisiana and the Department of Justice Agreement Elucidates the Lack of Adherence to the ADA*, 28 GEO. J. LEGAL ETHICS 417, 427 (2015).

11. Connecticut Bar Examining Committee, *Form M1*, January 2020 [hereinafter *Connecticut Questionnaire*]; New York State Supreme Court Appellate Division, *Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York*, November 2020 [hereinafter *New York Questionnaire*]; Virginia Board of Bar Examiners, *Character & Fitness Questionnaire*, February 2019 [hereinafter *Virginia Questionnaire*]; Michigan Board of Law Examiners, *Application to Sit for the Michigan Bar Examination*, June 2020 [hereinafter *Michigan Questionnaire*]; Indiana Board of Law Examiners, *Character and Fitness Questionnaire* [hereinafter *Indiana Questionnaire*].

12. Cisneros, *supra* note 3, at 422.

disclosure of mental illness because such disclosure cannot be considered necessary and therefore is impermissible under the ADA. Bar examiners should consequently remove the new broad conduct and behavior questions from bar applications.

Proponents of including questions that inquire into mental health history on bar applications justify their position by claiming that such questions are necessary to prevent attorney misconduct.<sup>13</sup> However, other, permissible questions on bar applications—including questions that inquire into specific conduct and behavior—as well as the *Model Rules of Professional Conduct* (“*Model Rules*”) guard against attorney misconduct and ensure attorney fitness independent of mental health status.

I. BACKGROUND AND CONTEXT

A. OVERVIEW OF MENTAL HEALTH QUESTIONS ON BAR APPLICATIONS

States’ mental health inquiries on bar admission character and fitness questionnaires range from highly detailed to no questions at all.<sup>14</sup> The level of detail of questions has evolved in recent years due to challenges to questions under the ADA.<sup>15</sup> One trend of changes to character and fitness questionnaires involves states replacing detailed mental health inquiries with broad questions that ask about past conduct and behavior.<sup>16</sup> The general categories of questions are illustrated in the table below.

Specific Questions	Conduct and Behavior Questions	No Questions
States ask about specific mental health diagnoses (Includes TX, FL, NCBE)	States ask broadly about conduct and behavior in recent years (Includes CT, NY, VA, MI, IN)	States ask no mental health questions (Includes IL, MS, WA, PA)

1. SURVEY OF MENTAL HEALTH INQUIRIES ON BAR APPLICATIONS

a. States with Detailed Questions

Some states continue to include detailed questions inquiring into mental health history on bar character and fitness questionnaires.<sup>17</sup> Florida and Texas provide examples of states with such detailed questions.<sup>18</sup> The National Conference of Bar Examiners’ (NCBE) questions, which are used in approximately one third of the states, similarly specifically require disclosure of mental health conditions and treatment.<sup>19</sup> Examples of detailed mental health questions are included below.

13. Dragnich, *supra* note 3, at 682.  
14. See, e.g., *Florida Questionnaire*, *supra* note 6; Illinois Board of Admissions to the Bar, *Character & Fitness Questionnaire* [hereinafter *Illinois Questionnaire*].  
15. Jaffe & Stearns, *supra* note 2.  
16. *Id.*  
17. See, e.g., *Florida Questionnaire*, *supra* note 6.  
18. *Id.*; *Texas Questionnaire*, *supra* note 6.  
19. *NCBE Questionnaire*, *supra* note 6.

NCBE <sup>20</sup>	<p>29. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?</p> <p>30. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?</p> <p>Are the limitations caused by your condition reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?</p> <p>Describe the condition or impairment.</p> <p>Describe any treatment, or any program that includes monitoring or support.</p> <p>Name of attending physician or counselor (if applicable).</p> <p>Name of hospital or institution (if applicable).</p>
FL <sup>21</sup>	<p>25. Within the past 5 years, have you been treated for, or experienced a recurrence of, schizophrenia or any other psychotic disorder, a bipolar disorder, or major depressive disorder, that has impaired or could impair your ability to practice law?</p> <p>If your answer to Item 25. is “yes,” please (i) identify each condition for which you received treatment or had a recurrence; (ii) state the beginning and end dates of any treatment (or state “present” if no end date); (iii) state the name and address of each professional who treated you; and (iv) identify any medication that was prescribed for you during treatment.</p> <p>Please direct each treating professional to provide any information or records that the Board may request regarding treatment, which includes, without limitation, hospitalization.</p>
TX <sup>22</sup>	<p>7.3 Since filing your Declaration of Intention to Study Law, do you have bipolar or any psychotic disorder (including but not limited to schizophrenia or paranoia) that in any way might affect your activities of daily living or ability to practice law in a competent, ethical, and professional manner?</p> <p>Date Diagnosed</p> <p>Name of facility or individual providing treatment [and contact information]</p> <p>Information as to why, in your opinion or that of your health care provider, your illness or disorder will not affect your ability to practice law in a competent, ethical, and professional manner.</p>

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20. *Id.*

21. *Florida Questionnaire*, *supra* note 6.

22. *Texas Questionnaire*, *supra* note 6.

b. States with Broad Conduct and Behavior Questions

In recent years, several states have replaced detailed mental health inquiries on bar admission applications with questions that ask broadly about conduct and behavior and could be interpreted to require disclosure of mental health history.<sup>23</sup> These states include Connecticut, New York, Virginia, Indiana, and Michigan.<sup>24</sup> Examples of these types of questions are included below.

CT <sup>25</sup>	39. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?
NY <sup>26</sup>	35. Except as otherwise disclosed in this application, within the past seven years, have you exhibited or engaged in any conduct or behavior, including conduct or behavior resulting from a condition or impairment, that could call into question your ability to practice law in a competent, ethical, and professional manner?
VA <sup>27</sup>	17.1 (A) Within the past five (5) years, have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner? (B) Within the past five (5) years, have you sought or been directed to seek treatment for your conduct or behavior? Provide all treating healthcare professionals and/or treating facilities related to your YES answer to 17.1. [The below questions must be completed by a healthcare professional.] Describe the condition/diagnosis and any treatment or monitoring program for which you are or have treated the above-named Applicant in the past five (5) years. Prognosis: Is it your opinion this condition will affect the Applicant’s fitness or ability to perform the duties of an attorney in a competent, ethical and professional manner?

23. Jaffe & Stearns, *supra* note 2.  
24. Connecticut Questionnaire, *supra* note 11; New York Questionnaire, *supra* note 11; Virginia Questionnaire, *supra* note 11; Indiana Questionnaire, *supra* note 11; Michigan Questionnaire, *supra* note 11.  
25. Connecticut Questionnaire, *supra* note 11.  
26. New York Questionnaire, *supra* note 11.  
27. Virginia Questionnaire, *supra* note 11.

MI <sup>28</sup>	54. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?
IN <sup>29</sup>	23. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical and professional manner?

c. States with No Mental Health Questions

Several states have entirely removed questions inquiring about mental illness from their bar admission applications.<sup>30</sup> These states include Illinois, Mississippi, Washington, and Pennsylvania.<sup>31</sup>

B. CHALLENGES TO MENTAL HEALTH INQUIRIES ON BAR EXAM APPLICATIONS UNDER THE ADA

The ADA was enacted in 1990 and went into effect for public entities in 1992.<sup>32</sup> Title II of the ADA states in relevant part 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.”<sup>33</sup> Courts have held that Title II applies to state bar associations, and bar applicants diagnosed with mental health conditions or who have undergone mental health treatment are qualified individuals with a disability.<sup>34</sup> Under the DOJ implementing regulations for the ADA, public entities are prohibited from administering “a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”<sup>35</sup> Additionally, “[a] public entity shall not impose or apply any eligibility criteria that screen out or tend to screen out an individual with a disability. . . unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”<sup>36</sup>

28. *Michigan Questionnaire*, *supra* note 11.

29. *Indiana Questionnaire*, *supra* note 11.

30. *Illinois Questionnaire*, *supra* note 14; Mississippi Board of Bar Admissions, *Application for Admission by Examination*, February 2022 [hereinafter *Mississippi Questionnaire*]; Washington State Bar Association, *Sample Washington Admission Application*, February 2021 [hereinafter *Washington Questionnaire*]; Pennsylvania Board of Law Examiners, *Bar Application*, February 2021 [hereinafter *Pennsylvania Questionnaire*].

31. *Illinois Questionnaire*, *supra* note 14; *Mississippi Questionnaire*, *supra* note 30; *Washington Questionnaire*, *supra* note 30; *Pennsylvania Questionnaire*, *supra* note 30.

32. Cisneros, *supra* note 3, at 405.

33. 42 U.S.C. § 12132.

34. Dragnich, *supra* note 3, at 680.

35. 28 CFR § 35.130(b)(6); Dragnich, *supra* note 3, at 680.

36. 28 CFR § 35.130(b)(8); Dragnich, *supra* note 3, at 680.

## 1. DOJ INVESTIGATION

In 2011, the DOJ began an investigation into Louisiana's bar admissions process based on allegations that the process discriminated against individuals with mental disabilities.<sup>37</sup> In particular, applicants in Louisiana with mental health conditions claimed that they were subject to "additional inquiries and/or conditions on admission on account of mental disability."<sup>38</sup> In 2014, at the conclusion of the investigation, the DOJ and the Louisiana Supreme Court settled to resolve the ADA violations in the bar admissions process.<sup>39</sup> The agreement stipulated that the Louisiana bar examiners could not ask "unnecessary and intrusive questions regarding mental health."<sup>40</sup> In particular, bar examiners were prohibited from asking questions about mental health diagnoses and treatment unless the applicant disclosed the information or a third party revealed the information to explain prior conduct or behavior.<sup>41</sup> The agreement also required that questions inquiring into mental health must be "narrowly, reasonably, and individually tailored."<sup>42</sup>

The agreement between the DOJ and the Louisiana Supreme Court resolving the DOJ's investigation also prompted the move towards the adoption of the new broad conduct and behavior questions on bar applications.<sup>43</sup> Specifically, the agreement required that some questions on Louisiana's bar application be revised to focus on conduct and behavior.<sup>44</sup> The agreement emphasized the distinction between asking about an applicant's conduct and behavior as opposed to mental health diagnoses and treatment on bar applications.<sup>45</sup>

## 2. OTHER AUTHORITIES

Following the DOJ consent decree resulting from the investigation into Louisiana's bar admission process, other authorities issued similar guidelines that emphasized replacing questions that inquired specifically into mental health diagnoses and treatment with questions that inquired into an applicant's past conduct and behavior.<sup>46</sup> For example, in 2015, the American Bar Association Commission on Disability Rights submitted a resolution to the House of Delegates that urged state bar examiners to replace questions that ask about mental health history with questions that "focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional

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37. Chatterton, *supra* note 10, at 425–26.

38. Jaffe & Stearns, *supra* note 2.

39. Chatterton, *supra* note 10, at 427.

40. *Id.*

41. *Id.*

42. *Id.*

43. Jaffe & Stearns, *supra* note 2.

44. Chatterton, *supra* note 10, at 427.

45. *Id.*

46. Jaffe & Stearns, *supra* note 2.

manner.”<sup>47</sup> The resolution also specified that the bar licensing entities were permitted to make

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 either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.<sup>48</sup>

In 2019, the Conference of Chief Justices (“CCJ”) adopted a resolution that urged states to replace questions on bar applications that asked specifically about mental health history with “questions that focus solely on conduct or behavior that impairs an applicant’s current ability to practice law in a competent, ethical, and professional manner.”<sup>49</sup> The CCJ’s resolution also stated that “reasonable inquiries concerning an applicant’s mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health condition has been offered or shown to be an explanation for such conduct or behavior.”<sup>50</sup>

## II. RECENT DEVELOPMENTS

### A. TRANSITION OF SOME STATES TO BROAD CONDUCT AND BEHAVIOR QUESTIONS TO REPLACE SPECIFIC MENTAL HEALTH INQUIRIES

In recent years, following guidance from the DOJ and other authorities, several states have changed the questions on their bar admission applications that inquired specifically into mental health diagnoses and treatment to questions that ask broadly about past conduct and behavior.<sup>51</sup> This change went into effect in Virginia in 2019 in response to a movement by students at the University of Richmond School of Law and the Virginia Supreme Court.<sup>52</sup> New York changed the question on their bar application following a blue-ribbon committee report issued in 2019 recommending the removal of the question asking specifically about mental health diagnoses and treatment.<sup>53</sup> Connecticut changed their bar application in 2018.<sup>54</sup> Michigan replaced the questions in its bar application which inquired specifically into mental health treatment and diagnoses with a conduct and behavior question starting in February 2021, following a recommendation by the

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*



State Bar of Michigan Board of Commissioners.<sup>55</sup> Indiana replaced the specific mental health questions on its bar application in 2020.<sup>56</sup>

## THE PROBLEM

### III. ISSUES WITH THE NEW BROAD CONDUCT AND BEHAVIOR QUESTIONS

Several entities, including the DOJ and the American Bar Association, have recommended that states exchange detailed mental health questions on bar applications for broad questions that inquire into past conduct and behavior in order to resolve conflicts with the ADA.<sup>57</sup> However, the new broad conduct and behavior questions still effectively require disclosure of some mental illness. Due to the severe penalties for lack of candor on bar admission applications, applicants will tend towards disclosure of mental illness. The ADA and DOJ implementing guidelines allow state bar examiners to screen out individuals on the basis of disabilities if doing so can be shown to be necessary to providing legal services.<sup>58</sup> However, evidence shows that the presence of mental illness does not effectively predict misconduct, and thus requiring disclosure of mental illness cannot be considered necessary.<sup>59</sup> Because the new broad conduct and behavior questions still effectively require disclosure of some mental illness, they may not fully resolve the conflict with the ADA.

#### A. THE NEW BROAD CONDUCT AND BEHAVIOR QUESTIONS AS WRITTEN STILL REQUIRE DISCLOSURE OF SOME MENTAL ILLNESS

The new broad conduct and behavior questions still effectively require disclosure of some mental illness, particularly if an individual has been symptomatic in the time period designated by the questions. Consider, for example, the question on the Connecticut application, which is similar to several other states. The Connecticut question reads, “Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?”<sup>60</sup> If an individual exhibited erratic or irrational behavior or conduct attributable to a mental illness any time within the past five years, as is not uncommon for many mental health conditions, the individual would need to report the behavior or conduct, and potentially the mental health condition as an explanation, on a bar admission application.

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55. State Bar of Michigan, *Changes Coming to Mental Health Questions on Bar Exam Application*, Mar. 18, 2020.

56. Bradley W. Skolnik & Terry Harrell, *JLAP: Bar Application Changes Promote Mental Health*, IND. LAW., Apr. 28, 2021.

57. Jaffe & Stearns, *supra* note 2.

58. 42 U.S.C. § 12132 (2008); Dragnich, *supra* note 3, at 680.

59. Cisneros, *supra* note 3, at 422.

60. *Connecticut Questionnaire*, *supra* note 11.

These conduct and behavior questions in particular tend to target individuals diagnosed with mental health conditions such as bipolar disorder and schizophrenia—conditions which tend to be highly stigmatized.<sup>61</sup> In particular, the conduct and behavior questions may be likely to require disclosure of these conditions given the typical age of bar applicants.<sup>62</sup> It is common for individuals to graduate from law school in their mid- to late-twenties and to apply for admission to the bar immediately after graduating.<sup>63</sup> Conditions such as bipolar disorder and schizophrenia frequently manifest in the late teenage years or early twenties.<sup>64</sup> The initial manifestation of these illnesses, before the individual has entered treatment, may likely result in erratic or irrational behavior or conduct of the type that would need to be disclosed under the broad conduct and behavior questions on bar applications.<sup>65</sup> Because of the age of affected individuals at the time of initial symptoms and their application to the bar, it is likely that their symptoms may manifest within the time period specified by the questions. It could therefore be entirely possible that an individual exhibited covered conduct or behavior attributable to mental illness within the past five years but subsequently sought treatment and has been asymptomatic since the initial incident. The new broad conduct and behavior questions may require disclosure of these mental health crises despite the individual being stable for years and successfully managing the mental health condition since its initial diagnosis.

# 1. PENALTIES FOR LACK OF CANDOR ON BAR ADMISSION APPLICATIONS WILL PROMPT APPLICANTS TO TEND TOWARDS DISCLOSURE OF MENTAL HEALTH HISTORY

States uniformly enforce high penalties, including denial of admission to the bar or disbarment, for lack of candor or failure to disclose relevant information on bar admission applications.<sup>66</sup> Because of these severe penalties, applicants will tend towards disclosure of mental illness and conduct and behavior related to mental illness on their bar applications.

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61. Lisa D. Hawke, Sagar V. Parikh & Erin E. Michalak, *Stigma and Bipolar Disorder: A Review of the Literature*, J. AFFECTIVE DISORDERS 150, 188 (2013); WHO, *Schizophrenia* (Jan. 10, 2022), <https://www.who.int/news-room/fact-sheets/detail/schizophrenia> [<https://perma.cc/7WHL-Y4JW>].

62. See, e.g., Andrew Mroch, Michael Kane, Douglas Ripkey & Susan Case, *Impact of the Increase in the Passing Score on the New York Bar Examination: February 2006 Bar Administration*, 3, June 19, 2007.

63. See, e.g., *id.*

64. *Bipolar Disorder*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/bipolar-disorder/symptoms-causes/syc-20355955> [<https://perma.cc/W2YS-BTCN>] (last visited Feb. 23, 2022); *Schizophrenia*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions/Schizophrenia> [<https://perma.cc/7LM7-JF98>] (last visited Feb. 23, 2022).

65. *Bipolar Disorder*, *supra* note 64; *Schizophrenia*, *supra* note 64.

66. See, e.g., *In re DeMaria*, 154 A.D.3d 1161 (N.Y. App. Div. 2017); *In re Anonymous*, 172 A.D.3d 1522 (N.Y. App. Div. 2019); *In re Kantor*, 283 A.D.2d 882 (N.Y. App. Div. 2001); *In re Anonymous*, 11 A.D. 3d 877 (N.Y. App. Div. 2004); *In re Anonymous*, 40 A.D.3d 141 (N.Y. App. Div. 2007).

a. Specific Penalties for Lack of Candor or Proper Disclosure on Bar Applications

The most common penalty for lack of candor or failure to properly disclose relevant information on bar applications is denial of bar admission.<sup>67</sup> In New York, this penalty is evident through extensive case law.<sup>68</sup> Case law also supports this proposition in Connecticut, as do the relevant regulations from the state bar examining committee.<sup>69</sup> The Virginia Board of Bar Examiners also emphasizes the importance of candor on bar admission applications.<sup>70</sup> The Michigan bar similarly emphasizes the important role of candor on character and fitness applications.<sup>71</sup> Statutory guidelines in Indiana also detail the importance of candor in the bar application process.<sup>72</sup>

b. Model Rule 8.1: Bar Admission & Disciplinary Matters

Model Rule 8.1 requires proper disclosure on bar admissions applications.<sup>73</sup> Violation of any Model Rule as adopted in a specific state will subject the attorney to discipline from the state disciplinary committee.<sup>74</sup> The text of Model Rule 8.1 is provided below.

Rule 8.1: Bar Admission & Disciplinary Matters <sup>75</sup>	An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.
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67. See, e.g., *In re DeMaria*, 154 A.D.3d at 1161; *In re Anonymous*, 172 A.D.3d at 1522; *In re Kantor*, 283 A.D.2d at 882; *In re Anonymous*, 11 A.D. 3d at 877; *In re Anonymous*, 40 A.D.3d at 141.

68. See, e.g., *In re DeMaria*, 154 A.D.3d at 1161; *In re Anonymous*, 172 A.D.3d at 1522; *In re Kantor*, 283 A.D.2d at 882; *In re Anonymous*, 11 A.D. 3d at 877; *In re Anonymous*, 40 A.D.3d at 141.

69. See, e.g., *Doe v. Conn. Bar Examining Comm.*, 818 A.2d 14 (Conn. 2003); *Scott v. State Bar Examining Comm.*, 22 Conn. 812 (Conn. 1992); see also Connecticut Bar Examining Committee, *Regulations of the Connecticut Bar Examining Committee*.

70. See Virginia Board of Bar Examiners, *Character & Fitness Requirements Section III: Character and Fitness Requirements*; VA. ADMIN. CODE, § 35-10-30 (2021).

71. Diane Van Aken, *Unraveling the Mystery of the Character and Fitness Process*.

72. Ind. R. Att’y Adm. & Discipl. 12.

73. MODEL RULES OF PROF’L CONDUCT R. 8.1 (2018) [hereinafter MODEL RULES].

74. MODEL RULES R. 8.4 cmt. 1.

75. MODEL RULES R. 8.1.

## 2. THE NEW BROAD CONDUCT AND BEHAVIOR QUESTIONS MAY NOT FULLY RESOLVE CONFLICTS WITH THE ADA

Under the DOJ implementing regulations for the ADA, public entities are prohibited from administering “a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”<sup>76</sup> Additionally, “[a] public entity shall not impose or apply any eligibility criteria that screen out or tend to screen out an individual with a disability . . . unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”<sup>77</sup> Evidence has shown that past mental health history cannot effectively predict future misconduct.<sup>78</sup> Consequently, requiring disclosure of mental health conditions on bar applications cannot be considered “necessary.” As they stand, the new conduct and behavior questions still effectively require disclosure of some mental illness. Therefore, the questions do not fully resolve the conflict of previous mental health questions with the ADA.

## IV. JUSTIFICATION FOR INCLUDING MENTAL HEALTH INQUIRIES ON BAR APPLICATIONS

### A. PROTECTION OF THE PROFESSION AND THE PUBLIC

Proponents of including mental health inquiries on bar admission applications justify their position by claiming that the questions are necessary to protect the public and the image of the legal profession.<sup>79</sup> The character and fitness questionnaires necessary for bar admission purportedly protect the public by disqualifying unfit attorneys.<sup>80</sup> Bar examiners claim that maintaining public trust and positive public perception of attorneys necessitates inquiries into mental health on bar applications.<sup>81</sup> In particular, bar examiners claim that screening bar applicants for mental illness is necessary to protect vulnerable clients who would have no way of knowing that their attorney had a history of mental illness until they had suffered some harm attributable to the attorney’s condition.<sup>82</sup>

### B. PAST MENTAL ILLNESS AS A PREDICTOR FOR FUTURE PROFESSIONAL MISCONDUCT

Proponents of mental health inquiries on bar admission applications in particular point to the claim that history of mental illness serves as a predictor for future

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76. 28 CFR § 35.130(b)(6); Dragnich, *supra* note 3, at 680.

77. 28 CFR § 35.130(b)(8); Dragnich, *supra* note 3, at 680.

78. Cisneros, *supra* note 3, at 422.

79. Dragnich, *supra* note 3, at 682–83.

80. *Id.* at 682.

81. Cisneros, *supra* note 3, at 427.

82. *Id.*

professional misconduct.<sup>83</sup> However, the notion that history of mental illness predicts future misconduct as an attorney has been shown to be false.<sup>84</sup> Evidence has long shown that mental health history does not enable bar examiners or mental health professionals to predict problematic future behavior.<sup>85</sup> Studies have shown that even mental health and medical professionals such as psychologists and psychiatrists cannot predict future misconduct based on past mental health history.<sup>86</sup> Given that mental health professionals cannot predict future misconduct from mental health history, it is reasonable to think that bar examiners would not be able to do so based on responses to character and fitness questionnaires.<sup>87</sup>

Proponents of mental illness disclosures on bar applications particularly focus on “serious” mental illnesses such as bipolar disorder and schizophrenia.<sup>88</sup> States with detailed mental health questions on their character and fitness questionnaires even specifically ask whether an applicant has received a diagnosis of bipolar disorder or schizophrenia.<sup>89</sup> States that focus on these diagnoses justify their questions due to a perception that applicants with such diagnoses in particular pose a threat of future misconduct.<sup>90</sup> This justification, however, has been refuted by mental health professionals.<sup>91</sup> While it is possible that untreated serious mental health conditions could render an attorney unfit to practice, highly effective treatments exist for these conditions.<sup>92</sup> Many individuals with diagnoses of bipolar disorder or schizophrenia are able to manage their conditions very well and can perform at a high level in stressful jobs.<sup>93</sup> With proper treatment, attorneys with conditions such as bipolar disorder and schizophrenia can manage their conditions so well that “their coworkers and clients would never know their diagnosis.”<sup>94</sup> Regarding lawyers with bipolar disorder, for example, medical researchers with extensive experience with such patients state that most of these individuals “function quite well in their occupation.”<sup>95</sup> Given that highly effective treatments for even serious mental health conditions exist, the presence of mental illness cannot be considered an effective predictor for future misconduct.

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83. Dragnich, *supra* note 3, at 724.

84. Cisneros, *supra* note 3, at 422.

85. *Id.*

86. *Id.*; Dragnich, *supra* note 3, at 718–19.

87. Cisneros, *supra* note 3, at 423; Dragnich, *supra* note 3, at 719.

88. *Id.* at 705.

89. See, e.g., *Texas Questionnaire*, *supra* note 6; *Florida Questionnaire*, *supra* note 6.

90. Dragnich, *supra* note 3, at 724.

91. Cisneros, *supra* note 3, at 422.

92. See Dragnich, *supra* note 3, at 706.

93. *Id.* at 706–07.

94. *Id.* at 706.

95. *Id.* at 707.

## V. WHY MENTAL HEALTH INQUIRIES ON BAR APPLICATIONS POSE AN IMPORTANT PROBLEM

Mental health in the United States poses an important public health problem, particularly in light of the effects of the COVID-19 pandemic on mental health.<sup>96</sup> Attorneys and law students have been shown to be disproportionately affected by mental health conditions.<sup>97</sup> Questions on bar applications that require disclosure of mental health history contribute to the problem of attorney and law student mental health conditions, as such questions have been shown to discourage law students from seeking mental health treatment.<sup>98</sup> Consequently, removing questions that require disclosure of mental health history on bar applications constitutes not only a legal issue, but also an important public health issue.

### A. MENTAL HEALTH IN THE UNITED STATES GENERALLY

Mental health disorders present a widespread and serious problem in the United States. The prevalence of mental health disorders has increased in recent years.<sup>99</sup> Between 2008 and 2019, adults reporting any mental illness in the past year increased from more than seventeen percent, or nearly forty million people, to more than twenty percent, or more than fifty-one million people in the United States.<sup>100</sup> The percentage of adults who reported serious mental illness—a mental, behavioral, or emotional disorder that substantially interfered with or limited at least one major life activity—in the past year increased from nearly four percent, or more than eight million people, in 2008 to more than five percent, or about thirteen million people, in 2019.<sup>101</sup> Furthermore, access to mental health treatment tends to be lacking in the United States.<sup>102</sup> Only about forty-five percent of adults who had any mental illness in the past year received mental health services in 2019.<sup>103</sup> Of the approximately thirteen million adults with serious mental illness in 2019, only about sixty-five percent received mental health services.<sup>104</sup>

### B. MENTAL HEALTH PROBLEMS ATTRIBUTABLE TO COVID-19

Mental health is of particular concern now, as mental health conditions have been documented to have increased since the beginning of the COVID-19

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96. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, Sept. 2020, at 44 (hereinafter SAMHSA); Nirmita Panchal, Rabah Kamal, Cynthia Cox & Rachel Garfield, *The Implications of COVID-19 for Mental Health and Substance Use*, Feb. 2021.

97. Krill et al., *supra* note 4, at 52; Organ et al., *supra* note 4, at 145.

98. Organ et al., *supra* note 4, at 141–42, 144.

99. SAMHSA, *supra* note 96, at 44.

100. *Id.*

101. *Id.*

102. *Id.* at 59.

103. *Id.*

104. *Id.* at 60.

pandemic.<sup>105</sup> Widespread isolation during the pandemic due to public health efforts to combat the spread of COVID-19 have in particular had an effect on mental health.<sup>106</sup> Worry or stress related to COVID-19 also has been shown to have negative effects on mental health.<sup>107</sup> About four in ten adults in the United States have reported symptoms of anxiety or depressive disorder during the pandemic as opposed to one in ten prior to the pandemic.<sup>108</sup> Forty-one percent of adults reported symptoms of anxiety or depressive disorder in January 2021 as opposed to eleven percent in January through June 2019.<sup>109</sup>

### C. MENTAL HEALTH DISORDERS AFFECTING ATTORNEYS AND LAW STUDENTS

Attorneys and law students are at particular risk for developing mental health disorders.<sup>110</sup> A 2016 study of attorneys' mental health reported significant levels of mental health concerns among attorneys surveyed.<sup>111</sup> In the study, attorneys were asked to report on their experiences with any mental illness during the course of their careers.<sup>112</sup> Sixty-one percent of attorneys surveyed reported experiencing anxiety, and forty-six percent reported experiencing depression.<sup>113</sup> The survey asked participants to report other mental illness as well, including social anxiety, panic disorder, and bipolar disorder.<sup>114</sup> Respondents reported that sixteen percent experienced social anxiety, eight percent experienced panic disorder, and two percent experienced bipolar disorder.<sup>115</sup>

Law students in particular experience challenges with mental health.<sup>116</sup> A 2014 survey of law students conducted at fifteen law schools asked respondents about their experiences with mental health while in law school.<sup>117</sup> The survey screened participants for depression and anxiety.<sup>118</sup> Seventeen percent of respondents screened positive for depression.<sup>119</sup> Eighteen percent of respondents reported having been diagnosed with depression at some point in their lives, with one in six reporting they had been diagnosed during law school.<sup>120</sup> Thirty-seven percent of respondents screened positive for anxiety, and twenty-one percent reported

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105. Panchal et al., *supra* note 74.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Krill et al., *supra* note 4, at 52; Organ et al., *supra* note 4, at 145.

111. Krill et al., *supra* note 4, at 52.

112. *Id.* at 50.

113. *Id.*

114. *Id.*

115. *Id.*

116. Organ et al., *supra* note 4, at 145.

117. *Id.* at 116.

118. *Id.* at 136–37.

119. *Id.*, at 136.

120. *Id.* at 136–37.



that they had been diagnosed with anxiety at some point in their lives, with roughly one in three reporting they had been diagnosed during law school.<sup>121</sup>

#### 1. LAW STUDENTS' ACCESS TO CARE FOR MENTAL HEALTH DISORDERS

The 2014 survey of law students also asked about respondents' access to mental health care.<sup>122</sup> The results raise concerns about the infrequency with which law students are seeking care for mental health conditions. Seventy-nine percent of respondents reported they would be very likely or somewhat likely to seek help from a health professional for a mental health concern.<sup>123</sup> However, although forty-two percent of respondents reported that they thought they needed treatment for a mental health concern in the prior year, only half reported that they actually received help from a health professional.<sup>124</sup>

##### a. Effect of Bar Application Inquiries on Law Students Seeking Care for Mental Health Disorders

The 2014 survey in particular raised concerns about the effect of bar application inquiries on whether law students seek care for mental health disorders.<sup>125</sup> In the survey, forty-five percent of respondents reported that they were discouraged from seeking mental health treatment because of the potential threat to their admission to the bar.<sup>126</sup> Forty-three percent of respondents answered affirmatively to the proposition that "[i]f [they] had a mental health problem, [their] chances of getting admitted to the bar are better if the problem is hidden."<sup>127</sup> When asked what might discourage respondents from informing a campus counseling center, a dean of students, or a state Lawyers Assistance Program about concerns that another student was suffering from a mental health problem, forty-eight percent of respondents replied that potential threat to bar admission would be a factor.<sup>128</sup>

### SOLUTIONS AND RECOMMENDATIONS

#### VI. POTENTIAL STATE ACTIONS RELATING TO NEW BROAD CONDUCT AND BEHAVIOR QUESTIONS

##### A. STATES SHOULD ELIMINATE THE NEW BROAD CONDUCT AND BEHAVIOR QUESTIONS FROM BAR APPLICATIONS

Because mental health history is not an accurate predictor of future misconduct, questions on bar applications that require disclosure of mental illness cannot

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121. *Id.* at 137–38.

122. *Id.* at 140.

123. *Id.*

124. *Id.*

125. *Id.* at 141–42, 144.

126. *Id.* at 141.

127. *Id.* at 142.

128. *Id.* at 144.



be considered necessary to the bar admission process.<sup>129</sup> Consequently, the questions violate the ADA.<sup>130</sup> To resolve this conflict, states must ensure that their bar applications do not require any disclosure of mental illness. Therefore, states should remove the new broad conduct and behavior questions from bar applications.

1. EXISTING PERMISSIBLE SPECIFIC CONDUCT AND BEHAVIOR QUESTIONS ON BAR APPLICATIONS ARE SUFFICIENT FOR DETERMINING FITNESS

Bar application character and fitness questionnaires ask a range of detailed questions, including questions regarding professional and educational discipline, legal proceedings, and criminal history.<sup>131</sup> Several states with broad conduct and behavior questions that may require disclosure of mental illness also include questions that inquire into specific conduct or behavior, including, for example, conduct that specifically resulted in the applicant’s arrest, conduct that specifically resulted in professional or academic discipline, and conduct that specifically endangered others.<sup>132</sup> These more specific questions should be considered sufficient to identify any problematic behavior that could prove important for consideration in an applicant’s admission to the bar. Such specific questions can determine an applicant’s fitness to practice law independent of mental health status. Examples of these more specific conduct and behavior questions from the Connecticut and New York bar applications are included below.

CT <sup>133</sup>	38. Within the past five years, have you engaged in any conduct that: (1) resulted in an arrest, discipline, sanction or warning; (2) resulted in termination or suspension from school or employment; (3) resulted in loss or suspension of any license; (4) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; (5) endangered the safety of others, breached fiduciary obligations, violated the confidentiality of information, or constituted a violation of workplace or academic conduct rules; or (6) resulted in your being asked or encouraged to resign or withdraw by an employer, supervisor, teacher or other educator based on your truthfulness or your excessive absences? If so, explain on Form M2 and include any asserted defense or claim in mitigation or as an explanation of your conduct.
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129. Cisneros, *supra* note 3, at 422.  
130. 28 CFR § 35.130(b)(8); Dragnich, *supra* note 3, at 680.  
131. See, e.g., *NCBE Questionnaire*, *supra* note 6.  
132. See, e.g., *Connecticut Questionnaire*, *supra* note 11.  
133. *Id.*

NY <sup>134</sup>	34. Except as otherwise disclosed on this application, within the past seven years, have you engaged in any conduct or behavior that, as applied to you: (a) resulted in an arrest, discipline, sanction or warning; (b) resulted in termination or suspension from school or employment; (c) resulted in loss or suspension of any license; (d) resulted in any inquiry, any investigation, or any administrative or judicial proceeding by an employer, educational institution, government agency, professional organization, or licensing authority, or in connection with an employment disciplinary or termination procedure; (e) endangered the safety of others, breached fiduciary obligations, or constituted a violation of workplace or academic conduct rules; or (f) resulted in your involuntary hospitalization by court order?
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VII. APPLICATION OF THE MODEL RULES OF PROFESSIONAL CONDUCT

The *Model Rules* provide ethical guidelines for attorneys to guard against attorney misconduct.<sup>135</sup> Several *Model Rules* specifically provide standards for attorney fitness.<sup>136</sup> While character and fitness questionnaires on bar applications seek to preemptively screen out potentially unfit attorneys from admission to the bar, the *Model Rules* provide guidance for when practicing attorneys ought to be disciplined for misconduct.<sup>137</sup> The *Model Rules* can be employed to ensure attorney fitness independent of mental health status and therefore remove the need for overly broad conduct and behavior questions on bar applications that may require applicants to disclose mental illness.

A. MODEL RULE 1.1: COMPETENCE

The Model Rule 1.1 requirement that a lawyer provide competent representation to a client can serve to ensure attorney fitness independent of mental health status.<sup>138</sup> The text of Model Rule 1.1 is provided below.

Rule 1.1: Competence <sup>139</sup>	A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
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134. *New York Questionnaire*, *supra* note 11.  
135. *See, e.g.*, MODEL RULES R. 8.4.  
136. *See, e.g.*, MODEL RULES R. 1.1; MODEL RULES R. 1.3; MODEL RULES R. 1.16.  
137. MODEL RULES R. 8.4 cmt. 1.  
138. MODEL RULES R. 1.1.  
139. *Id.*

B. MODEL RULE 1.3: DILIGENCE

The Model Rule 1.3 requirement that a lawyer act with diligence and promptness can serve to ensure attorney fitness independent of mental health status.<sup>140</sup> The text of Model Rule 1.3 is provided below.

Rule 1.3: Diligence <sup>141</sup>	A lawyer shall act with reasonable diligence and promptness in representing a client.
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C. MODEL RULE 1.16(A)(2): DECLINING OR TERMINATING REPRESENTATION

The Model Rule 1.16(a)(2) requirement that a lawyer cannot represent a client if the lawyer’s mental condition materially impairs the lawyer’s ability to represent the client can serve as an appropriate guard against situations where an attorney’s mental health may actually affect their fitness.<sup>142</sup> Model Rule 1.16(a)(2) guards against attorneys who are actually impaired by mental health conditions from practicing if their condition may affect the client.<sup>143</sup> This Rule provides a more appropriate solution to address potential dangers posed by attorneys’ mental health compared to overly broad required disclosures of mental illness on bar applications. The text of Model Rule 1.16(a)(2) is provided below.

Rule 1.16: Declining or Terminating Representation <sup>144</sup>	(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.
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D. MODEL RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

The Model Rule 8.3 requirement that attorneys report misconduct by another attorney serves as a guard against a lawyer practicing when unfit independent of mental health status.<sup>145</sup> The text of Model Rule 8.3 is provided below.

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140. MODEL RULES R. 1.3.  
141. *Id.*  
142. MODEL RULES R. 1.16.  
143. *Id.*  
144. *Id.*  
145. MODEL RULES R. 8.3.

Rule 8.3: Reporting Professional Misconduct <sup>146</sup>	<p>(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.</p> <p>(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.</p> <p>(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.</p>
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CONCLUSION

The new broad conduct and behavior questions introduced to replace bar application questions that inquire specifically into mental health diagnoses and treatments are overly broad and effectively still require disclosure of some mental illness. Mental health status is not an effective predictor of future misconduct.<sup>147</sup> Requiring disclosure of mental health history on bar applications therefore cannot be considered necessary and violates the ADA.<sup>148</sup> In order to comply with the ADA, the new broad conduct and behavior questions should be removed from bar applications. Furthermore, questions on bar applications that require disclosure of conduct that specifically resulted in, for example, arrest or discipline at school can determine an applicant’s fitness to practice law independent of mental health status. Additionally, the *Model Rules* can be employed to ensure attorney fitness independent of mental health status.

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146. *Id.*  
147. Cisneros, *supra* note 3, at 422.  
148. 42 U.S.C. § 12132 (2008); Dragnich, *supra* note 3, at 680.