AMERICANS WITH DISABILITIES ACT OF 1990

LICENSE APPLICATION QUESTIONS: A HANDBOOK FOR MEDICAL BOARDS

THE FEDERATION OF STATE MEDICAL BOARDS
OF THE UNITED STATES, INC

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INTRODUCTION

Since passage of the Americans with Disabilities Act, state medical boards have wrestled with the limits of their abilities to ask questions touching on the disabilities of applicants for initial or renewal licensure.[1] Questions that previously were incorporated in license applications, such as inquiries about the lifetime mental health or chemical dependency histories of an applicant, now generally are considered unacceptable.

How far can a state medical board go in inquiring directly of an applicant about past (or current) mental and physical diagnoses and treatment? What information about diagnosis, treatment, or behavior is sufficient to demonstrate an impairment in ability to practice medicine? What evidence of a current, past, or potential impairment in the practice of medicine will suffice to show impairment? Will expert opinion/scientific documentation be required or will a reasonable person standard be sufficient? Are there differences in acceptable questions in cases of mental health, physical health, or chemical dependency histories? What factors should a board take into account in drafting acceptable questions for its license applications?

Because the ADA is still young, there are no definitive answers to these questions. This publication discusses background of the issues, reviews the current case law, and offers recommendations to state boards about drafting license application questions.

Although intended to be helpful and informative as a reference, this publication is not to be considered as offering or providing legal advice and cannot serve as a substitute for advice regarding ADA compliance that boards should receive through their legal representatives. Neither shall the Federation of State Medical Boards or others associated with preparation or distribution of this handbook be deemed thereby to assume liability for the contents, any errors therein, or any consequences following therefrom.

1. See Appendix A.1, letter dated April 6, 1993, from John L. Wodatch, Chief, Public Access Section, Civil Rights Division, Department of Justice to Mark R. Speicher, Assistant Director, Arizona Board of Medical Examiners, opining on propriety of Arizona's open time frame questions.

LICENSE APPLICATION QUESTIONS UNDER THE ADA

BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 is aimed at creating full and equal opportunity for those with disabilities in the United States by prohibiting discrimination on the basis of disability in employment, public services and accommodations, and telecommunications. The ADA also imposes affirmative obligations on business and government to accommodate the needs of people with disabilities and to promote their independence.

The protections of the ADA apply to "a qualified individual with a disability." To be considered so qualified, an individual with a disability, with or without reasonable modifications to rules, policies, or practices, must meet "essential eligibility standards" of the program. An agency may determine that a person does not meet essential eligibility standards if he poses a direct threat to the health or safety of others.

Agencies improperly discriminate if they unnecessarily place additional burdens on a qualified individual with a disability. Agencies may not ask unnecessary questions, for example, that tend to screen out qualified individuals who have disabilities.

Professional licensing agencies traditionally have asked questions in broad terms, arguing that to carry out their important mission of protecting the public from unsafe practice, they need broad authority to learn as much as possible about each applicant appearing before them. In the past, licensing boards consistently have asked questions as far-reaching as: "Are you now, or have you ever been, addicted to the use of alcohol or controlled substances?" or "Have you ever been diagnosed and/or treated for a mental illness and/or serious physical illness?" Many boards did not examine regularly the need for such information.

The passage of the ADA has forced boards to reexamine their policies. The Justice Department, as the agency charged with administering the ADA, has clearly articulated its position: Broad questions regarding an applicant's status or condition amount to an unacceptable "screening out" of individuals based upon their disability. The Justice Department argues that boards are unable to show that such questions are necessary to administer licensing programs and maintains that only questions about an applicant's *conduct* and *behavior* are permissible in assessing that individual's current competence to practice medicine.[2]

Many boards have responded that this position does not correspond with their own experience. These boards believe that certain aspects of an applicant's past (as opposed to current) mental and physical diagnoses and treatment may be highly relevant to that individual's current ability to practice medicine. These boards believe that some of those who respond positively to these questions may pose a direct threat to the public that would not be identified by other questions. These boards do not believe that they

2. In a letter to the Connecticut Bar Examining Committee dated September 28, 1994 (See Appendix A.2.), the Public Access Section of the Civil Rights Division of the Justice Department itemized questions that had been approved for some licensing boards. The questions seek to identify consequences resulting from behavior, eg, have you ever been disciplined for . . . , terminated or granted a leave of absence . . . within the last year, have you been reprimanded, disciplined or demoted by an employer . . . . See also Appendix A.3, Justice Department form letter and attachments, re: Proposed Inquiries on Appointment and Reappointment Medical Staff Application Forms.

should wait until unacceptable or dangerous conduct occurs to identify potentially dangerous practitioners. Many boards that are willing to review and modify their time-frame questions, nevertheless, believe that, given the high stakes involved in the delivery of medical care by physicians, professional licensing boards cannot adequately protect the public if they cannot ask about some portions of an applicant's health history. In fact, the argument continues, a professional licensing board would be derelict in its duty if it did not attempt to learn about applicants' mental and physical health histories prior to licensure.

CASE LAW

In 1993, the Medical Society of New Jersey sought to enjoin the New Jersey Board of Medical Examiners from asking questions which the Medical Society argued violated the ADA *(Medical Society of New Jersey v. Jacobs*, CA No. 93-3670, (D.N.J. 1993). In the course of the litigation, the Justice Department filed an amicus curiae brief in support of the Medical Society's position and clearly articulated its position that only questions about an applicant's conduct are permissible in assessing the applicant's current competence to practice medicine. The Justice Department faulted the Board for seeking "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."

The case was resolved through a settlement by which the board agreed to significant revisions in its application forms. The questions and definitions agreed to by the New Jersey board (see Appendix B for pertinent excerpts) have come to represent a "safe harbor" for boards concerned about their latitude in phrasing questions. New Jersey's new questions

- Eliminate the broad "have you ever" language for disabilities encompassed under the ADA
- Suspend the use of a temporal window ("have you in the past five years . . .), except in the case of a two-year window for "current" illegal use of controlled substances (not considered a disability under the ADA)
- Include a notice that when considering an answer to the question about current illegal use of controlled dangerous substances, an applicant may choose not to answer and assert in writing the Fifth Amendment privilege against self-incrimination
- Offer a definitions section which includes a definition of "the ability to practice medicine." This section begins to establish some of the essential eligibility criteria necessary for an applicant to receive a license. Given ADA definitions and standards, in the future, state licensing boards may be pushed further toward defining essential eligibility standards for the practice of medicine.

In conjunction with this litigation, the New Jersey board began sending detailed questionnaires to each applicant's prior deans, supervisors, and employers, requesting information about the applicant's conduct and behavior during each portion of his adult history.

The New Jersey experience further highlights the potential problems faced by boards when sued under Title II of the ADA. Unlike the situation involving alleged employment violations under Title I, where administrative remedies must be exhausted before proceeding to court and where reconciliation is the norm, the remedies for alleged Title II violations by public entities include direct filing of lawsuits by aggrieved parties. Attorney's fees can be awarded against defendant boards, as happened in New Jersey, and no state immunity is available for purposes of defense.

Since the New Jersey case, two federal district courts have rendered opinions which directly address the question of permissible questions by professional licensing boards. The cases both involve boards of bar examiners.[3]

In *Applicants v. Texas State Board of Bar Examiners*, No. 93 CA 740SS (W.D. Tex. 1994), the court held that the Texas Bar did not violate the ADA in asking applicants about their diagnoses of or treatments for certain specified major mental illnesses[4] over the past 10 years. This case is noteworthy because the question on the Texas application asked only whether the applicant had such diagnosis or treatment and did not link reporting to any current or past ability to practice his profession. The court agreed that while a diagnosis of bipolar illness, for example, 10 years ago is not necessarily predictive of an applicant's future behavior, in light of the chronic nature of severe mental illnesses and the safety concerns of the board, the board could consider such information in assessing an applicant without violating the ADA. The court acknowledged the impossibility of crafting a question that would identify only those individuals suffering mental illnesses affecting their fitness to practice law, and concluded that the Board had tailored its conduct in the least intrusive, least discriminatory way.[5] Finally, the court noted, the Board's use of the question and its subsequent investigation "are necessary to ensure the integrity of the Board's licensing procedure."

On the other hand, in the Virginia case, *Clark v. Virginia Board of Bar Examiners*, CA No. 94-211-A (E.D. Va. 1995), the court ruled against the Virginia Bar's ability to ask an applicant a question more open-ended in content but more limited in time: whether the applicant had been treated or counseled for a mental, emotional, or nervous disorder in the past five years. In this case, the court reviewed expert testimony refuting a link between mental health counseling and the practice of law. This evidence, along with inconsistent Bar practices, led the court to rule that the Bar had "presented no evidence of correlation between obtaining mental counseling and employment dysfunction." Thus, the Bar had not carried its burden of showing that the applicant did not meet the essential eligibility requirements much less that he posed "a direct threat to the health or safety of others." The Virginia court distinguished the Texas case as applying only to "specific behavioral disorders found relevant to the practice of law."

It is difficult to reconcile these two cases. The attitudes of the courts toward the litigants are inapposite, with the Texas court exercising considerable deference to the important work (the "awesome responsibility") of the administrative agency and the Virginia court applying an equal dose of skepticism toward the agency and favorability toward the plaintiffs. In both cases, the facts supported a finding that the bar organizations rarely, if ever, denied licensure to applicants who answered the mental health questions affirmatively. The Texas court found that the Bar's failure to actually deny an application after investigation of a "yes" answer indicated a careful, individualized review of each applicant's case; whereas, the Virginia court used similar statistics to argue that the questions were overbroad and did not serve the function they were designed for. Nonetheless, comparison of the cases can be instructive in helping boards avoid obvious pitfalls in designing and asking questions.

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3. It is possible to argue that the practice of medicine poses a greater potential threat to the public than the practice of law and, therefore, that boards of medical examiners should be allowed greater latitude in seeking information. See, eg, *In re Polk License Revocation*, 90 N.J. 550, 449 A2d 7, 18-19 (1982).
4. In the version of questions used by the Bar at the close of the litigation, the Bar had confined its inquiry to the following mental illnesses: bipolar disorder, schizophrenia, paranoia, and "any other psychotic disorder."
5. The court cited favorably that the Board had limited its inquiry to "only those serious mental illnesses that experts have indicated are likely to affect present fitness to practice law," and to a specified time frame (spanning late adolescence and adult life), and that affirmative answers did not result in automatic disqualification of the applicant but triggered an individualized inquiry and dialogue.

ASPECTS OF QUESTIONS

Certain recurrent themes arise in considering whether particular questions run afoul of the ADA. This section discusses the various arguments about each theme and the posture taken by the courts and makes observations about the issue that may be helpful to boards tackling this evolving area of law.

Conduct/Behavior vs. Condition/Status

The Department of Justice, supported by several experts including the American Psychiatric Association (APA)[6], argues that boards should be permitted to ask objective[7] questions about behavior only and not about an applicant's condition or status. These parties believe that the only information about an individual's mental health status of use to a board is evidence related to impairment in the practice of medicine. Questions about prior misconduct are agreed to be relevant to a licensing body but should be directed to all applicants, without singling out a group because of their mental or chemical dependency histories. In contrast, rather than relying solely on behavioral manifestations of an impairment, many boards would like to ask broader questions about past diagnoses and treatment, particularly for chemical dependency and mental illness. They argue that diagnosis and/or treatment for mental illness or chemical dependency indicate conditions that may recur at any time and would be likely to impair the individual's practice whenever they arise.

The fundamental question in deciding this issue is whether there is predictive value in information about past diagnosis and/or treatment. Expert opinion on this subject is sparse and must be developed further. The Texas court, when faced with a question about severe mental illnesses,[8] found squarely that there was such predictive value. In the Virginia case, even the plaintiff's expert conceded that, because many mental illnesses may adversely affect or even preclude a person's ability to practice law, at some stage in the license application process, inquiry into an applicant's mental health is appropriate.

Boards should examine carefully whether inquiry about past behavior will satisfy their concerns. A board may review its history of action taken in response to "yes" answers and determine that the only time the board actually took action was in situations where the individuals' illness was so severe that they practiced medicine while impaired. Furthermore, behavior questions have the advantage of identifying individuals who may never have received a diagnosis of mental illness or chemical dependency.

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6. Council on Medical Education and Career Development, Work Group on Disclosure. "Recommended Guidelines Concerning Disclosure and Confidentiality." Washington, DC: American Psychiatric Association; 1992.
   The APA's position was enunciated in an exhibit introduced in the Virginia case:
   1. Prior psychiatric treatment is, per se, not relevant to the question of current impairment. It is not appropriate or informative to ask about past psychiatric treatment except in the context of understanding current functioning. A past history of work impairment, but not simply of past treatment or leaves of absence, may be gathered.
   2. The salient concern is always the individual's current capacity to function and/or current impairment. Only information about current impairing disorder affecting the capacity to function as a physician, and which is relevant to prevent practice, should be disclosed on application forms. Types of impairment may include emotional or mental difficulties, physical illness, or dependency upon alcohol or other drugs.
   3. Applicants must be informed of the potential for public disclosure of any information they provide on applications.
7. So-called "subjective" questions relating to an individual's self-assessment have been approved by the Justice Department so long as they are tied to an applicant's current ability to practice medicine. ("Do you currently suffer any mental disorder which impairs your ability to practice medicine?")
8. One problem with listing specific mental illnesses is that some potentially problematic illnesses may be missed. The Virginia court appeared to agree with the plaintiff's expert that a comprehensive list of mental illnesses would not be a good solution.

However, boards may wish to ask both behavior and status questions. If so, status and condition questions can be tailored in ways to make them less objectionable. For example, the serious mental illnesses identified by the Texas Bar involve life-long diagnoses that may manifest themselves at any time with potentially dire consequences.[9] It is important that a board be prepared to show support in the literature for the likely recurrence with dire consequences of the listed conditions. Boards are also strongly advised to temper their status inquiries by limiting the time period within which they seek information. Finally, boards should be conscious of using the information they gain, rather than risking the charge that they request the information gratuitously. Evidence that a general status inquiry leads to an individualized investigation with actual consequences for some applicants may convince a court that the board is sensitive to individual rights and is attempting to limit its interference.[10]

Temporal Window

As long as application questions focus on an applicant's behavior or conduct and do not target individuals with disabilities, the Justice Department likely would agree that a board may request information for whatever time period it wishes.[11] The Justice Department objects to all questions about status or condition, unless tied, usually through the applicant's self-assessment, to current impairment to practice medicine.[12] "Current" has been interpeted to mean one year or two years in different cases.

Boards that do not acquiesce to the Justice Department's interpretation must identify a period of time prior to the application which is relevant to the applicant's ability to practice medicine. Boards may wish to know several categories of information over time, including status or condition (eg, Have you been addicted to drugs or alcohol over the past five years?), status or condition which impaired the applicant's ability to practice medicine (eg, Have you had any physical or mental illness which impaired your ability to practice medicine over the past five years?), or behavior tied to disability or impairment (eg, Have you received inpatient treatment for any mental disorder over the past five years?). Most boards probably would choose a single period of time to query in all of these situations, ranging from 2 to 10 years.

The Texas court approved questions about diagnosis or treatment of certain serious mental disorders within the past 10 years. The Virginia court disapproved a general status question soliciting counseling information from the past five years, although the primary rationale for the court's rejection of the question was not the length of time.

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9. The temptation exists to expand the list of mental illnesses about which a board inquires. For example, one approach has been to list bipolar disorder, hypomania, schizophrenia, paranoia, major depression, depressive neurosis, delirium, any disruptive behavior disorder, any organic mental disorder, any dissociative disorder, kleptomania, pathological gambling, pyromania, or any psychotic disorder. Boards utilizing such an approach must be prepared to defend their specific choices.
10. In the Virginia case, one possible reason that the bar agency failed to take action on the adverse information received in response to its mental illness question may be that, under its statute, it could only deny, not condition, licensure. In most situations of chemical dependency or impairment, the preferred course of action by a board would be to place the applicant in a monitoring agreement. Boards subject to statutes similar to Virginia's may wish to work with their legislatures to expand the range of options available at the time of initial licensure.
11. See Appendix A, which lists as an approved question: Have you ever been involved in, reprimanded for or disciplined by an employer or education institution for misconduct including: (a) acts of dishonesty, fraud, or deceit; (b) lying on a resume, or misrepresentation; . . . ."
12. But see approved question, Appendix A.2: "In the past year, have you suffered memory loss or impaired judgment for any reason?"

If a board chooses to consider more than two years, it should recognize that a good chance exists that the Justice Department will join opposition to the question. Nonetheless, many boards will not be satisfied with inquiries into past conduct or conditions limited to the two prior years. In choosing an amount of time to consider, boards should be conscious to request no more information than they will actually use. Boards should match the amount of time they consider to their practices regarding licensees. For example, if a board requires a recovering alcoholic to successfully complete a five-year probation agreement, it should not request that initial applicants report diagnosis or treatment for chemical dependency if they have been in recovery longer than five years. Prior to adopting a temporal window, boards should review reports and studies about the likelihood of recurrence of mental illnesses and the recidivism of chemically dependent physicians and should adjust their requests to reflect what is substantiated in the literature. After reviewing the literature, boards may choose to establish different periods of time for which they request information about chemical dependency history and mental illness diagnoses. Different periods of time may be appropriate for different mental illnesses. Whatever course of action a board takes, it should be informed by the best research and analysis possible.

Evidence of Relation to Practice of Medicine

The responsibility of professional medical licensing boards is to ensure that the public is well served by licensees who practice medicine. To protect the public from impaired physicians, medical boards must have a way to identify licensees who are impaired or likely to be impaired in the practice of medicine. Boards may determine a link between status or condition and the ability to practice either by asking the applicant directly or by deriving a conclusion of impairment from an applicant's answers to objective questions about diagnoses or treatment. Boards currently feel most constrained about following the latter approach.[13]

The Justice Department has generally taken the position that the only acceptable status or condition questions are those explicitly linked to the ability to practice medicine (eg, Do you have a medical condition which impairs your ability to practice medicine?). Obviously, boards are interested in any response from an applicant indicating that he suffers from a medical condition which impairs the ability to practice of medicine. Most boards ask such a question. However, many boards are reluctant to rely on the applicant's own assessment of his impairment and are interested in objective questions about an applicant's status or condition. Such questions clearly imply a link to the practice. However, as discussed above, to ask such questions, the board must be prepared to demonstrate that such a link exists. It may be significant that the Virginia court noted the bar's reluctance to rely on self-assessment of impairment provided by the applicant. The court rejected the bar's argument because the agency did not provide sufficient objective support for the very broad question it asked. The court left open the possibility that, with such objective support, a mental health question might be acceptable.

13. The New Jersey board agreed in the settlement of its litigation to limit all questions about covered disabilities to those which, in the assessment of the applicant, impaired his or her ability to practice medicine. Many boards reluctantly have adopted the New Jersey approach. In a survey of boards conducted in August 1995 by the Federation of State Medical Boards, more than 70% of boards responding said that there are questions they would like to ask but do not because of concerns about the ADA.

Evidence of "Direct Threat"

The ADA says that boards may consider that individuals do not meet the essential eligibility standards for a service if they pose a "direct threat to the health or safety of others."[14] To make such a determination, boards argue, they must ask questions about the health histories of applicants. The ADA prohibits the use of licensing procedures that "screen out or tend to screen out" individuals defined as disabled under the ADA unless the screening criteria are necessary to the service being offered. In the Virginia case, the court stated bluntly that the bar examiners had offered no evidence that applicants answering the suspect questions in the affirmative posed a direct threat to the public, and further, the bar was not persuasive in arguing that the questions were necessary to determine the eligibility of the applicant for licensure. On the other hand, in the Texas case, which permitted inquiry about diagnoses of serious mental illness, the court acknowledged the possibility that an applicant responding affirmatively to one of the questions might pose a direct threat to the public and then determined that the questions were necessary to the effective functioning of the agency. Therefore, it appears critical that a board pass the hurdle of showing that an affirmative answer to the questions it asks might indicate a direct threat to the public. Neither court discussed in detail the nature of showing "direct threat." Boards should monitor the case law for further discussion of the elements for showing a "direct threat," particularly when health care professionals are involved.[15]

14. 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. The determination of direct threat must be individualized and may not be based on generalizations or stereotypes.
15. A recent case from the Southern District Court of New York discussed the bounds of the "direct threat" exception in the context of an employment case. The court found that a hospital was not obligated to return a chemically dependent physician to his supervisory position after detoxification, citing the "potential severity of the harm which [he] could . . . inflict . . . were he to . . . relapse after being reinstated as Chief of Medicine." *Altman v. New York City Health and Hospitals Corporation*, (SDNY 1995).

Risk Analysis of Application Questions Under the ADA

Analysis of the current interpretation of the law leads to the following ranking from lower risk to higher risk for application question with respect to the relative likelihood for successful challenge under the ADA:

Inquiries about behavior related to essential practice qualifications, including questions concerning

- Criminal convictions
- Prior board disciplinary history
- Credentialing decisions, including privilege limitations and restrictions
- Other government agency sanctions relating to the practice of medicine
- Civil suits related to practice or liability carrier actions

Inquiries about behavior less clearly related to essential practice qualifications, including questions concerning

- Past conduct or actions not directly related to practice
- Leaves of absence/lapses in practice, including deviations from the normal career track, so long as the question applies to all leaves, not just leaves related to a disability

Inquiries about current status or condition directly linked to impairment in practice of medicine, including questions concerning

- Memory loss or impaired judgment
- Medical conditions, including physiological, mental, or psychological conditions or disorders which limit or impair ability to practice
- Medical conditions likely to recur which would limit or impair ability to practice

Inquiries about current status or condition or status or condition within an immediately prior (one to two years) temporal window, including questions concerning

- Illegal use of drugs falling within the one to two-year temporal window interpreted as "current" by the Department of Justice
- Addiction and ongoing treatment
- Current use of drugs (not illegal) or alcohol and frequency of use

Inquiries about behavior which has been charged or alleged but not finally adjudicated, including questions concerning

- Investigations for and charges of criminal conduct
- Ongoing or past investigations for misconduct by licensing boards or employers

Inquiries about status or condition with an extended temporal window prior to application, including questions concerning

- Diagnosis or treatment for alcohol or drug abuse reaching back more than two years, whether or not related to practice of medicine
- Mental health diagnosis or treatment reaching back more than two years, whether or not related to practice of medicine.

Inquiries about status or condition with no temporal window, including questions phrased, "have you ever . . . " which concern

- Past diagnoses or treatment for alcohol or drug abuse
- Past mild psychological or mental conditions, psychological counseling

Concerns for Drafting Application Questions

When a board considers the questions to ask on initial and renewal license applications, it should first perform a thorough review of the current state of the law regarding licensure questions. The board should then study and discuss carefully the types and amount of information it needs to perform its duties. In addition to the suggestions offered in the sections above, boards should consider the following caveats:

1. **Be aware of the judicial climate.**
   Consider the judicial attitude of the federal and state courts in your jurisdiction. For instance, has the federal court in your area rendered any decision addressing an ADA issue? Is it favorable or unfavorable to governmental agencies? What is the view of local courts toward governmental agencies and toward individual liberties? What is your agency's record in court?

2. **Be concise in drafting questions.**
   As the New Jersey and Virginia cases demonstrate, the broader the scope of the question, the more likely it will be challenged as a violation of the ADA.

3. **Ask for only the information that actually will be used in considering licensure eligibility.**
   If having certain mental disorders will not adversely affect the applicant's ability to safely practice medicine, refrain from asking about them. Likewise, if the information obtained from questions is not used in determining licensure eligibility, then it should not be solicited.

4. **Consider the marginal utility of each question.**
   If the question elicits information of little or no value, it may violate the ADA. For instance, in the Virginia case, the court found that affirmative responses to the mental health question in dispute had not prevented any applicant from being licensed.

5. **Be aware of any internal inconsistencies.**
   When you review your need for and use of information, consider whether you are consistent among different types of questions and different types of applicants. For instance, do you consider the information gained from the question equally among all applicants who similarly responded? Do you treat the responses of examination applicants the same as those of applicants applying for endorsement? Similarly, if you request information about one mental disorder, do you have a justification for failure to ask about more serious disorders?

6. **Consider using definitions.**
   Preceding your questions, it may be beneficial to define certain terms such as "chemical substances," "illegal use of controlled substances and dangerous substances," "medical condition," and "the ability to practice medicine." Follow the definitional language provided by the Act, where appropriate, but don't be afraid to establish expectations in the form of definitions.

7. **Consider a Fifth Amendment warning.**
   If you inquire whether an applicant engages or, in the past year, has engaged in the illegal use of controlled or dangerous substances, you may wish to inform the applicant that the information supplied may be used in legal proceedings (administrative, civil, or criminal). In fact, some states may require reporting of violations of the law to appropriate authorities. Warning the applicant in the body of the application may be prudent.

8. **Be sensitive to the deterrent effect your questions may have.**
Plaintiffs have argued that one insidious effect of questions about an applicant's disability is that they may actually discourage those who need help from seeking it. Applicants may be less likely to obtain treatment for their chemical dependency, for example, if they know they will have to report it on future license applications. You may smooth some of these nerves by including a notice in your application that affirmative responses are not automatic disqualifications, that an individualized assessment follows this application, and that you encourage individuals to obtain professional help when necessary.

9. **Consult other licensing agencies in your state that may have addressed these issues.**
You may wish to consult with other professional licensing boards and your Attorney General to coordinate responses. It would be unfortunate to have your own case undermined by a sister board or to have a negative impact on some other board's important questions.

10. **Remember, there probably is no such thing as a perfect question.**
The judge in the Texas case was very matter-of-fact about stating that "no perfect question can be formulated that will ensure that all individuals suffering mental illnesses affecting their fitness to practice will be detected." Questions are likely to take in too many applicants or too few. Boards must do the best they can and be prepared to justify and defend their choices.

Conclusion

Drafting license application questions that satisfy the needs of the professional licensing boards without treading on the rights of qualified individuals with disabilities is a delicate task. The law is young, the interests of both applicants and boards are important, the stakes can be high. Boards do not wish to discriminate against individuals with disabilities and should take every opportunity to assure those individuals and the public that they support the goals of the Americans with Disabilities Act. Boards should be expected to review carefully their need for sensitive information and be prepared to make serious and thoughtful justifications for all of the information they request. However, the Act is too new for boards to assume that the issues have been decided and their hands are tied. Unfortunately, development of a conscientious position may be expensive for the pioneers, particularly in light of the provisions of the Act covering attorneys' fees and immunity. Ultimately, the public expects and deserves a balanced, fair, thorough review of the qualifications of those granted the opportunity to practice medicine in the states.

Appendix A.1

Letter received April 6, 1993, from John L. Wodatch, Chief, Public Access Section, Civil Rights Division, US Department of Justice, addressed to Mark R. Speicher, Arizona Board of Medical Examiners

[text]:

This letter responds to a request for assistance by Dr. Jane Jarrow of AHSSPPE in replying to your letter of May 20, 1992. Specifically, Ms. Jarrow has asked for guidance regarding the Arizona Board of Medical Examiners' future use of certain questions on the application form for licenses and renewal of licenses to practice medicine. We regret the delay in not responding to your inquiry sooner.

The Americans with Disabilities Act (ADA) authorizes the Department of Justice to provide technical assistance to individuals and entities having rights or obligations under the Act. This letter provides informal guidance to assist you in understanding the ADA's requirements. However, it does not constitute a legal interpretation and it is not binding on the Department.

As requested, we have reviewed the list of possible medical license/renewal application questions for conformity with ADA requirements. We recommend that the questions be revised consistent with the general parameters discussed below.

Under the ADA, public entities are prohibited from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. 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. See 28 C.F.R. § 35.130(b) (6) of the enclosed title II regulation at pages 35704 and 35705.

Generally, a public entity is prohibited from applying eligibility criteria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying any service, program, or activity. A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the provision of the service, program, or activity being offered. See 28 C.F.S. § 35.130(b) (8). This provision of the Department's regulation prohibits attempts by state or local governments to identify unnecessarily the existence of a disability.

With respect to your particular inquiry, the Arizona Board of Medical Examiners is permitted to impose eligibility criteria (ie, ask questions) that screen out, or tend to screen out, individuals with disabilities if the criteria are "necessary" to ensure that the Board is licensing persons fit to practice medicine. It is somewhat difficult for us to review the license/renewal application questions you have proposed because we are unaware of the justification for individual questions. Also, we do not know how the information will be used once it is obtained. We can, however, state that, as presently formulated, the questions appear to be overbroad, ie, they seek information about the nature and severity of a person's disability that is unrelated to the safe operation of the practice of medicine.

We urge you to review your objectives for asking each question. Specifically, you should consider whether the information sought is necessary to the safe practice of medicine. We also recommend that you take into account the following comments regarding specific questions.

"1) Have you ever been treated for the use or misuse of any chemical substance or substances?"

This question is overbroad both in terms of time period and nature of the substances. The time period should be limited to the recent past (perhaps within the last five years). Also, the term "chemical substance" appears to be overinclusive. The question might be more narrowly tailored to respond to your specific concerns by limiting it to the use or misuse of prescription drugs and illegal chemical substances. We also note that your question would identify only individuals who have been treated, while others who have had problems with the use of illegal drugs but go without treatment, are not required to identify themselves. It is the latter group that may pose a greater concern to you.

"2) Have you ever been hospitalized or a patient in a mental or other institution of confinement, or have you ever been treated or received medication for a mental or behavioral condition?"

As with Question 1, use of the phrase "have you ever been" presents a problem. The question should be limited in time to the recent past, eg, within the last five years. The question is particularly troublesome because it includes persons with very disparate conditions. For example, someone who once received a prescription for Valium and a person who was recently hospitalized for schizophrenia would both be required to answer this question in the affirmative. The question should be narrowly tailored to seek information that responds directly to legitimate concerns about granting licenses to or renewing licenses of persons whose serious mental or behavioral impairments would affect their ability to practice medicine such that others would be exposed to significant health and safety risks. The inquiry needs to focus on the present ability to meet essential eligibility requirements.

"3) Are you suffering from any ailment communicable to others?"

This question also raises problems. The significance of an applicant's response to this question would vary dramatically according to type of medical practice. For persons seeking to practice psychiatry, for example, the question might be important for airborne diseases, such as tuberculosis, but with no meaning for blood-borne diseases, such as HIV infection. Quite a different result would hold for applicants seeking to practice surgical medicine. The Board therefore should tailor this question more narrowly. For example, the Board could consider requiring an answer only from applicants planning to practice clinical medicine, or for those who will work in research settings where persons with communicable illnesses would endanger the safe operation of the practice of medicine.

Presumably, applicants with short-term contagious illnesses such as fevers, influenza, or the common cold are not expected to answer this question in the affirmative: You may want to revise this question to avoid such a result. In any event, common, short term illnesses that predictably resolve themselves within a matter of days do not "substantially limit" a major life activity, and individuals with such illnesses are not covered by the ADA. In setting requirements regarding communicable diseases, you might wish to obtain further guidance from the Centers for Disease Control and Prevention (200 Independence Avenue, S.W., Room 714B, Washington, DC 20201, 202-690-7134).

"4) Are you presently in good physical and mental health?"

We recommend that the question be more closely tied to the safe operation of the practice of medicine. Such a result could be accomplished, for example, by asking whether an individual's physical or mental health would affect his or her ability to practice medicine such that others could be exposed to significant health and safety risks.

"5) Have you been hospitalized or treated with medication for any psychiatric, neurological, or communicable illness for a period exceeding 30 days?"

Once again, we would suggest that this question be more narrowly tailored. Again, perhaps the question should be limited in time to the recent past (within five years). It should reflect that the relevancy of communicable illnesses depends upon the type of practice engaged in by an individual applicant. Further, as discussed above in the comments regarding Question 2, the question should be revised to distinguish between persons treated for minor conditions and those treated for more serious psychiatric or neurological illnesses that might affect their ability to practice medicine such that others would be exposed to significant health and safety risks.

Enclosed you will find a copy of the Department's title II regulation and the Department's title II Technical Assistance Manual. We hope this information will be useful to you.

APPENDIX A.2

Letter received September 28, 1994, from Sheila M. Foran, Attorney, Public Access Section, Civil Rights Division US Department of Justice, addressed to Connecticut Bar Examining Committee, Attn: R. David Stamm.

[text]:

Re: Public Hearings Concerning Mental Health History Inquiry
on Connecticut Bar Association Forms

On July 7, 1994, the United States filed a motion for leave to participate as amicus curiae in *Chrysler Szarlan, et al., v. The Connecticut Bar Examining Committee,* Civ. No. 3:94 CV-00160 (AHN). As you know, the litigation was subsequently suspended pending the outcome of two public hearings held this month. The hearings invited public comment concerning what inquiries, if any, the Connecticut Bar Examining Committee should make of applicants to the Bar concerning their mental health history. This letter is directed to your attention as the person designated to receive written comments.

The purpose of this letter is twofold. First, we wish to bring to your attention the United States' brief as amicus curiae in a similar case against the Florida Board of Bar Examiners. A copy is attached. As explained in the brief, title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. II 1990), prohibits unnecessary inquiries into disability status as well as the placement of additional burdens on individuals with disabilities in the course of the bar admission process. The United States' position as set forth in the brief supports the plaintiffs' claim that the inquiries and investigations into mental health history undertaken by the Florida bar examiners, which are similar to those at issue here, discriminate on the basis of disability in violation of title II of the ADA. See *Ellen S. v. Florida Board of Bar Examiners,* et al., No. 94-0429-CIV-KING (S.D. Fla., Aug. 1, 1994); *Medical Society of New Jersey v. Jacobs,* 1993 WL 413016 (D.N.J. Oct. 5, 1993); *In re Underwood and Plano,* 1993 WL 649283 (Me. Dec. 8, 1993). See also *In re Petition of Frickey,* 515 N.W.2d 741 (Minn. 1994).

The second and perhaps even more important objective of this letter is to offer our assistance. The Department is authorized by the ADA to provide what is called "technical assistance" to aid persons or entities in their compliance efforts.* We understand that your Committee will be revising your State's bar application form based on the outcome of the public hearings. We would be happy to aid your Committee's efforts to revise the application form consistent with the ADA.

Following the text of this letter, you will find a list of questions drafted by various licensing boards and revised by the Department to comply with the ADA. These licensing entities approached the Department for assistance in revising their inquiries consistent with the ADA. You will note that many of the questions focus on applicants' behavior and conduct, while others ask whether applicants have any condition that would currently impair their ability to practice the profession in question. While we do not endorse these as "model questions," we have concluded that the questions do not on their face violate the ADA.

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* 42 U.S.C. § 12206. Technical assistance is provided separate and apart from the Department's enforcement function and would have no impact on the suspended litigation.

It is our belief that the requirements of the ADA will not impede in any way your Committee's ability to carry out its important mission of licensing only those persons who can carry out the duties of an attorney in a competent and ethical manner. We hope that the list of questions approved for other licensing boards provide[s] you with useful examples. Please feel free to call me at 202-616-2314 if you wish to meet or otherwise propose that the Department give your committee technical assistance regarding your State's revised application form.

[attachment text]:

SAMPLE QUESTIONS

Q. Do you have any condition or impairment that currently impairs your ability to practice law? If the answer to the above is "yes," please set forth the specifics, including dates, the name, and the address of any treating physician or mental health counselor.

"Medical condition or impairment" means any physiological, mental or psychological condition, impairment or disorder, including drug addiction and alcoholism.

"Ability to Practice Law" is to be construed to include the following:

a. The cognitive capacity to undertake fundamental lawyering skills such as problem solving, legal analysis and reasoning, legal research, factual investigation, organization and management of legal work, making appropriate reasoned legal judgments, and recognizing and resolving ethical dilemmas, for example.
b. The ability to communicate legal judgments and legal information to clients, other attorneys, judicial and regulatory authorities, with or without the use of aids or devices; and
c. The capability to perform legal tasks in a timely manner.

The Board understands that mental health counseling or treatment is a normal part of many persons' lives and such counseling or treatment does not of itself disqualify an applicant from the practice of law. Furthermore, the Board does not wish to pry into the private affairs of applicants. However, the Board is obligated to determine whether an applicant is physically and mentally fit to practice law and, therefore, must inquire into such matters to the extent necessary to make such determination. The Board is not seeking disclosure of counseling or treatment for a dramatic or upsetting event such as death, breakup of a relationship, or a personal assault, even if such event does affect the applicant's ability to practice law for a limited time.

Q. Have you ever been involved in, reprimanded for, or disciplined by an employer or education institution for misconduct including:

a. acts of dishonesty, fraud, or deceit;
b. lying on a resume, or misrepresentation;
c. academic misconduct, including such acts as cheating;
d. misconduct involving student activities;
e. theft;
f. excessive absences;
g. failure to complete assignments in a timely manner;
h. actions in disregard of the health, safety and welfare of others;
i. sexual harassment;
j. neglect of financial responsibilities.

If the answer to any of the above is "yes," please set forth the specifics, including date of the action, by whom taken, the name and address of the employment supervisor or academic advisor involved, if applicable, and any person involved in the investigation of your conduct.

Q. Have you ever been terminated or granted a leave of absence by an employer or withdrawn from an education institution?

If the answer to the above is "yes," please set forth the specifics, including date of the action, by whom taken, and the name and address of the employee's supervisor or academic advisor involved.

Q. Are you currently engaged in the illegal use of drugs?

"Illegal Use of Drugs" means the use of controlled substances obtained illegally as well as the use of controlled substances which are not obtained pursuant to a valid prescription or taken in accordance with the directions of a licensed health care practitioner.

"Currently" does not mean on the day of, or even the weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact.

You have a right to elect not to answer those portions of the above questions which inquire as to the illegal use of controlled substances or activity you have reasonable cause to believe that answering may expose you to the possibility of criminal prosecution. In that event, you may assert the Fifth Amendment privilege against self-incrimination. Any claim of Fifth Amendment privilege must be made in good faith. If you choose to assert the Fifth Amendment privilege, you must do so in writing. You must fully respond to all other questions on the application. Your application for licensure will be processed if you claim the Fifth Amendment privilege against self-incrimination.

Q. In the past year, have you illegally used drugs? If "yes," provide details. (Illegal use of drugs means the unlawful use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by federal law provisions.)

Q. In the past year, have you ever been reprimanded, demoted, disciplined, terminated, or cautioned by an employer? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of persons who took such action, and the background and resolution of such action.

Q. Since the age of 18, or within the last five years (whichever period is shorter), have you ever been reprimanded, demoted, disciplined, cautioned, or terminated by an employer for alleged tardiness, absenteeism, or unsatisfactory job performance in your employment? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of persons who took such action and the background and resolution of such action.

Q. Have you ever been accused of mishandling, mismanaging, or misappropriating the money or property of others? If so, please state the date of such accusation, the person(s) making such accusations, the specific accusations made, and the background and resolution of such accusations.

Q. In the past year, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

Q. In the past year, have you failed to meet any personal or business related deadlines for any reason? If so, explain in full.

APPENDIX A.3

Justice Department form letter and attachments "Re: Proposed Inquiries on Appointment and Reappointment Medical Staff Application Forms"

[text]:

This letter responds to your inquiry regarding the series of questions (attached) which you propose to include on medical staff application forms (appointment and reappointment).

As you and I discussed, the Department of Justice finds that the questions do not on their face appear to violate the ADA.

[attachment]:

QUESTIONS FOR APPOINTMENT AND REAPPOINTMENT
MEDICAL STAFF APPLICATIONS

Questions:

1. Do you currently use any illegal drugs or misuse prescription drugs??

2. Do you currently engage in any form of substance abuse which currently impairs your ability to perform the privileges requested?

3. Do you currently suffer any mental, emotional, or behavioral disorders impairing your current ability to perform the privileges requested?

4. Do you suffer from any condition or engage in any behavior which impairs your current ability to carry out the duties and responsibilities of a physician?

5. The Centers for Disease Control and Prevention (CDC) define exposure-prone invasive procedures as follows:

   > "Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the health care worker's (HCW) fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the HCW, and if such an injury occurs, the HCW's blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes." CDC. *MMWR.* Vol. 40/No. RR-8, July 12, 1991.

   If your privileges include the performance of exposure-prone invasive procedures as defined by the CDC, do you suffer from any infectious disease or bloodborne pathogen which would pose a health or safety risk to patients?

(If the answer to question 5 is "yes," prior to rendering a decision regarding your application, the hospital will request from the _____ Medical Association's Expert Review Panel a written opinion concerning your scope of practice and its recommendations for specific practice restrictions or modifications, if any.

Declarations:

I declare that I suffer from no physical or mental condition which would impair normal and proper fulfillment of my medical duties or would impair my current ability to practice medicine or perform the privileges requested.

I declare that I suffer from no physical or mental condition which would, by my practice of medicine or performance of the privileges requested, pose a direct threat to the health or safety of any patient or hospital staff.

APPENDIX B

Letter received March 16, 1994, from Sheila M. Foran, Attorney, Public Access Section, Civil Rights Division, US Department of Justice, addressed to State of New Jersey, Department of Law and Public Safety.

[text]:

Re: Proposed Questions for Initial and Renewal Applications to Practice Medicine

This letter responds to your inquiry regarding the attached series of questions which the State of New Jersey proposed to include on initial and renewal applications to practice medicine in the State.

As you know, as amicus curiae in *The Medical Society of New Jersey v. Fred M. Jacobs, MD, JD, and the New Jersey Board of Medical Examiners,* Civ. No. 93-3670 (D.N.J.), the Department of Justice supported plaintiff medical society's position that certain questions on the current State Board of Medical Examiner's biennial license renewal application for physicians discriminate on the basis of disability in violation of title II of the ADA. It is our understanding that you propose to replace the questions challenged in the *Medical Society* case with those attached. Although we do not endorse these as "model questions," the questions on their face do not appear to violate the ADA. It is our understanding that the "limitations or impairments" referred to in Questions 3 and 4 refer to those identified in response to Questions 1 or 2.

[attachment text]:

For purposes of these questions, the following phrases or words have the following meanings:

"Ability to practice medicine" is to be construed to include all of the following:

1. The cognitive capacity to make appropriate clinical diagnoses and exercise reasoned medical judgments and to learn and keep abreast of medical developments; and
2. The ability to communicate those judgments and medical information to patients and other health care providers, with or without the use of aids or devices, such as voice amplifiers; and
3. The physical capability to perform medical tasks such as physical examination and surgical procedures, with or without the use of aids or devices, such as corrective lenses or hearing aids.

"Medical condition" includes physiological, mental or psychological conditions or disorders, such as but not limited to orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional or mental illness, specific learning disabilities, HIV disease, tuberculosis, drug addiction, and alcoholism.

"Chemical substances" is to be construed to include alcohol, drugs, or medications, including those taken pursuant to a valid prescription for legitimate medical purposes and in accordance with the prescriber's direction, as well as those used illegally.

"Currently" does not mean on the day of, or even in the weeks or months preceding the completion of this application. Rather, it means recently enough so that the use of drugs may have an ongoing impact on one's functioning as a licensee, or within the past two years.

"Illegal use of controlled dangerous substances" means the use of controlled dangerous substances obtained illegally (eg, heroin or cocaine) as well as the use of controlled dangerous substances which are not obtained pursuant to a valid prescription or not taken in accordance with the directions of a licensed health care practitioner.

1. Do you have a medical condition which in any way impairs or limits your ability to practice medicine with reasonable skill and safety? If "yes," please explain.
2. Does your use of chemical substance(s) in any way impair or limit your ability to practice medicine with reasonable skill and safety? If "yes," please explain.
3. Are the limitations or impairments caused by your medical condition reduced or ameliorated because you receive ongoing treatment (with or without medications) or participate in a monitoring program? If "yes," please explain.*
4. Are the limitations or impairments caused by your medical condition reduced or ameliorated because of the field of practice, the setting or the manner in which you have chosen to practice? If "yes," please explain.
5. Have you ever been diagnosed as having or have you ever been treated for pedophilia, exhibitionism, or voyeurism? If "yes," please explain.
6. Are you currently engaged in the illegal use of controlled dangerous substances?
7. If "yes," are you currently participating in a supervised rehabilitation program or professional assistance program which monitors you in order to assure that you are not using illegal controlled dangerous substances? If "yes," please explain.

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* If you receive such ongoing treatment or participate in such a monitoring program, the Board will make an individualized assessment of the nature, the severity and the duration of the risks associated with an ongoing medical condition so as to determine whether an unrestricted license should be issued, whether conditions should be imposed or whether you are not eligible for licensure.