ONLINE INVESTIGATIONS AND THE AMERICANS WITH DISABILITIES ACT: THE RESURGENCE OF OVERBROAD AND INEFFECTUAL MENTAL HEALTH INQUIRIES IN CHARACTER AND FITNESS EVALUATIONS

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Online Investigations and the Americans with Disabilities Act: The Resurgence of Overbroad and Ineffectual Mental Health Inquiries in Character and Fitness Evaluations

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Nationally, state board bar examiners’ interest to inquire into mental health has been a hotly contested issue invoking the Americans with Disabilities Act (ADA) for the last two decades.1 After the enactment of the ADA in 1990 a floodgate of litigation resulted in a litany of publications,2 all surrounding the issue of whether mental health based inquiries into character and fitness violated the ADA. 3 Consequently, narrowly tailored mental health inquiries into specific disorders emerged as the trend in a majority of jurisdictions. This comment analyzes whether fitness boards’ mental health inquiries among social networking profiles may cause the resurgence of overbroad and ineffectual investigations previously proscribed by federal courts interpreting the ADA. Conduct-based online investigations are proposed to effectively prevent future violations of the ADA onto applicants with mental health disabilities.

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**INTRODUCTION**

The ADA is the Congressional response to remedy and prevent “what is considered to be serious and widespread discrimination against the disabled.”\(^4\) Scholars argue that mental health disabilities are associated with far greater social stigma in comparison to other disabilities.\(^5\) Thus, the ADA has prohibited licensing agencies, such as bar examiners, from conducting prohibitory screening practices predicated on mental health disabilities, unless a necessity to protect the public is justified.\(^6\) This exclusion to prohibitory screening practices is also known in common law as the ADA’s “necessity exception.”\(^7\)

Over nearly twenty years, a split in ideology has resulted among courts and scholars, alike, in determining the quality of questions that is prohibited under the ADA’s necessity exception. Opponents of mental health inquiries advocate for conduct-based examinations as a reasonable alternative because conduct, unlike past mental health history, is an empirically validated predictor of future fitness.\(^8\) Conduct-based inquiries examine behavior, such as employment history, criminal records, or character references into reliability.\(^9\) However, proponents argue that narrow inquiries into mental health limited to substance abuse, psychotic disorders and Bipolar Disorder, as well as other specific disorders are necessary to protect the

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As the law has developed over the last two decades, the majority of jurisdictions have upheld narrowly tailored inquiries into mental health.\textsuperscript{11} As a result, courts in their respective jurisdictions have reached a peaceful resolution. Modern trends have put to rest ADA based litigation against bar examiner queries by upholding narrowly tailored inquiries into mental health. Previously, courts have rejected investigations that have broadly inquired into “any emotional, nervous or mental disorders.”\textsuperscript{12} Yet, the integration of the internet in character and fitness evaluations of applicants with mental health disabilities threatens to incite a resurgence of broad investigations, reminiscent of days past. Online evaluations pose inherent risks of being characterized as overbroad investigations because of the unlimited access to personal information. Currently, several state bar examiners have turned to the internet in their efforts to gather more information on fitness in response to the onslaught of bar applicants logging onto the web to socially network.\textsuperscript{13} However, if state bar examiners analyze online profiles as indicia of fitness, then they may commit broad inquiries into mental health, along with various unintended constitutional violations.

This comment asserts that online investigations are “overbroad and ineffectual”\textsuperscript{14} in scope and purpose and that they pose an additional burden on targeted applicants with mental health disabilities. This issue is likely to lead to an increase in ADA based claims under the broad inquiry assertion because too much information is accessible within a personal website,

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\textsuperscript{12} In re Applications of Plano and Underwood, 1993 WL 649283, *1 (Me. 1993); Ellen S., 859 F. Supp. at 1491.
\textsuperscript{14} Clark, 880 F. Supp. at 445.
\end{flushleft}
online profile indicia is not a reliable predictor or factor of mental health instability, and the methodology for online investigations is not clearly delineated. Some states already conduct online investigations.\(^{15}\) However, many more may follow if the American Bar Association (ABA) adopts a national guideline, pursuant to recent scholarly proposal.\(^ {16}\) Thus, additionally, this comment offers proposed solutions for bar examining authorities to conduct online investigations without violating the ADA.

Part I explains the duties set out in title II for public entities and the delineated rights of qualified individuals with disabilities. Also, Part I applies title II to state bar examiners as public entities and outlines the character and fitness investigation as it pertains to the ADA. Additionally, Part I traces the development of the ADA’s necessity exception, delving into the precedent upholding conduct-based inquiries, narrow inquiries into mental health, and the current trend upholding narrow inquiries in the majority of jurisdictions. Part II explores the modern trend of state bar examiners extending character and fitness investigations into the online forums. Moreover, Part II explicates title I governing private employers, their duties to refrain from discriminatory pre-screening, and the emerging law of online pre-screening in employment. Additionally, Part II analyzes the Congressional silence of title II regarding screening practices, whether online or offline. Finally, Part II anticipates the future directions of title II’s statutory interpretation in similarly construing title II as prohibiting discriminatory pre-screening practices, in light of title I, save for the forgiveness—and future problems—that the necessity exception may yield to bar examiners in the online forum.

Part III discusses whether a resurgence in broad questions will occur as the subsequent online investigations are “overbroad and ineffectual” in scope and purpose. First, Part III asserts

\(^{15}\) FLORIDA BD. OF BAR EXAM’RS, supra note 13, at 5-6; See also Morris, supra note 13, at 56. (commenting on State Bar of California denying admission to applicant for displaying indicia of unfitness on personal website).

\(^{16}\) Morris, supra note 13, at 56.
that online investigations are overbroad because they exceed the scope in revealing more information than is relevant to demonstrate fitness to practice law.\textsuperscript{17} Second, Part III argues that the online investigations into fitness are ineffectual because online profiles would not necessarily glean insight into past mental health history thereby failing to reveal effective information into one’s functional capacity.\textsuperscript{18} Part IV notes other policy concerns notwithstanding ADA violations, such as deterring applicants from treatment, usage of online forum, networking, and targeting unintended populations. Finally, Part V offers proposed solutions such as conduct-based inquiries into the online profiles, clear and unambiguous methods to conduct conduct-based online investigations, or blanket searches for all bar applicants.

\section*{I. Duties of Public Entities and Rights of Individuals with Disabilities}

Title II provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”\textsuperscript{19} A public entity is defined as any state or local government,\textsuperscript{20} or “any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]”\textsuperscript{21} A disability is defined as: (A) “a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (B) a record of such an impairment, or; (C) being regarded as having such an impairment.”\textsuperscript{22} The disabilities of “physical or mental impairment” include a

\textsuperscript{17} O’Brien, 1998 WL 391019, at *4.
\textsuperscript{18} Applicants, 1994 WL 923404, at *3.
\textsuperscript{20} Id. § 12131(a).
\textsuperscript{21} Id. § 12131(b).
\textsuperscript{22} Id. § 12102(2)(A)-(C).
wide variety of diseases, including psychological disorders such as alcoholism, drug addiction, and emotional disorders.\(^{23}\)

A drug addiction that substantially limits one or more major life activities is a recognized “disability.”\(^{24}\) Public entities are prohibited from discriminating on the basis of illegal drug use against an individual who is not currently engaging in drug use,\(^{25}\) has successfully completed a rehabilitation program,\(^{26}\) is participating in a rehabilitation program\(^{27}\) or is erroneously regarded as engaging in current use.\(^{28}\) However, “current illegal use of drugs” is not a protected status.\(^{29}\) Courts have interpreted current illegal use of drugs to include use “that occurred recently enough to justify a reasonable belief that a person’s drug use is current or that continuing use is a real

\(^{23}\) 28 CFR 35.104 (1)(B)(ii) (2011). Congress has excluded the following psychiatric disorders as protected disabilities because they do not result from physical impairments: 1) “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; [2)] compulsive gambling, kleptomania, or pyromania.” Id. § 35.104(5)(i)-(ii). In proposing these exclusions amidst much heated political discord, Congress relied partly on the American Psychiatric Association’s (APA)’s empirically validated list of psychiatric disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM), now known as the DSM-IV-TR. Robert Burgdorf, The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 451 (1991); See also AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (DSM-IV-TR) 191 (American Psychiatric Association 2000).

Nonetheless, scientific data has recently indicated that gender identification begins in utero upon neurological development of the brain thereby arguably validating that transexualism results from a developmental, physical impairment. Lynn Conway, Theories of the Causes of Transexualism, http://ai.eecs.umich.edu/people/conway/TS TS causes.html (last visited Aug. 20, 2011). Moreover, Impulse Control Disorders, such as kleptomania, pyromania, and compulsive gambling, may arise as consequential impulse behaviors during the manic cycle occurring in Bipolar Disorder. Impulse Control Disorders, http://www.treatmentcenters.net/psychiatry-mental-health/impulse-control-disorders (last visited Aug. 20, 2011). As Bipolar Disorder is a protected disability, then any subsequent disorder flowing naturally from the primary disability should be protected, providing the secondary disorder meets the statutory requirements of a “disability,” as well.


\(^{26}\) Id § 35.131(a)(2)(i); See also Hill v. State Med. Bd. of Ohio, 1996 WL 697957, at *6-*7 (Ohio App. Dec. 5, 1996) (distinguishing that discipline for substance-related misconduct was not valid claim under ADA whereas discrimination for past use would have been actionable).

\(^{27}\) Id. § 35.131(a)(2)(ii).


\(^{29}\) Id. § 35.131(a)(1).
and ongoing problem.”\textsuperscript{30} Furthermore, drug and alcohol-related misconduct is not protected within the ambit of the ADA.\textsuperscript{31}

Congress explicitly authorized the Attorney General to promulgate the regulations within title II.\textsuperscript{32} Thus, a public entity’s regulations are given “substantial deference,”\textsuperscript{33} unless the regulations are “arbitrary, capricious or manifestly contrary to the statute.”\textsuperscript{34} While title II generally prohibits discrimination by public entities, there is no clear language proscribing conduct as discriminatory.\textsuperscript{35}

\textbf{A. State Board Bar Examiners as Public Entities under the ADA}

Judicial interpretation of the ADA has extended public entity liability to licensing agencies in the licensure and certification of attorneys.\textsuperscript{36} State bar examiners have the authority to conduct fitness investigations for the purpose of determining whether an applicant is a direct threat to the public.\textsuperscript{37} However, the bar examiner may not utilize generalizations or stereotypes in its conclusion.\textsuperscript{38} A “direct threat” is defined as “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 as provided by § 35.139.”\textsuperscript{39}

\begin{footnotesize}
\begin{enumerate}
\item Col. State Bd. of Med. Exam’rs v. Davis, 893 P.2d 1365, 1367-68 (Colo. App. 1995). (citing § 35.131, App. A at 454 (1994)) (finding that medical board’s disciplinary hearing for doctor’s recurrent drug abuse was not contrary to the ADA because although the petitioner had refrained from using drugs for approximately five months, the risks of relapse, and short recovery period showed a real and ongoing problem of relapse).
\item 42 U.S.C. § 12134(a) (2006).
\item Ellen S., 859 F. Supp. at 1493.
\item In re Petition and Questionnaire for Admission to R.I. Bar, 683 A.2d 1333, 1334 (1996).
\item Id.
\item 28 C.F.R. 35.104(4) (2011).
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Thus, bar examiners are prohibited from “utilizing criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”40 In addition, a public entity may not “administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.”41 Finally, licensing agencies are prohibited from imposing eligibility criteria that “screen out or tend to screen out” disabled individuals from services or programs, “unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”42 The statute’s conditional clause, also known as the common law’s “necessity exception,”43 has gained infamy among disability rights advocates for creating an improper justification to inquire into mental health.44 Nonetheless, the necessity exception functions in all licensing activities, including character and fitness investigations.45

B. Character and Fitness, Generally

The ABA Comprehensive Guide to Bar Admission Requirements sets out standards in the efforts that they “will afford guidance and assistance and will lead toward uniformity of objectives and practices in bar admissions throughout the United States.”46 The ABA admission requirements serve the purpose of assessing (1) competence and (2) character and fitness.47

40 Id. § 35.130(b)(3)(i).
41 Id. § 35.130(b)(6).
42 Id. § 35.130(b)(8) (emphasis added).
43 Doe v. Jud. Nominating Comm’n for Fifteenth Jud. Cir. of Fla., 906 F. Supp. 1534, 1540 (1995) (reasoning that 28 C.F.R. 35.130(b)(8) is a “necessity exception” to screen out individuals to insure the safe operation of the program).
45 Ellen S., 859 F.Supp. at 1494.
Moreover, the ABA directs that board examiners “frame each question on the application in a manner that renders the scope of inquiry clear and unambiguous.”\footnote{NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDU. & ADMISSIONS TO THE BAR, \textit{supra} note 46, at viii.}

Character and fitness investigation is a requisite part of admission to the Bar.\footnote{Schware v. Bd. of Bar Examiners of the State of New Mexico, 353 U.S. 232, 234 (1957).} Generally, state bar examiners view past conduct as a predictor of future conduct.\footnote{Michael K. McChrystal, \textit{A Structural Analysis of the Good Moral Character Requirement for Bar Admission}, 60 NOTRE DAME L. REV. 67, 67 (1984).} As such, pre-admission conduct may be evaluated, as long as the basis for denying admission has a “rational connection to the applicant’s fitness or capacity to practice law.”\footnote{Schware, 353 U.S. at 240 (Frankfurter, J., concurring).} However, all evidence of wrongdoing must be disclosed in a character and fitness evaluation as a precondition to bar admission.\footnote{Strigler v. Bd. of Bar Exam’rs, 448 Mass. 1027, 1029 (2007).} To date, the methods of obtaining information on fitness have been traditionally self-disclosure and character references, given that the burden is on the applicant to demonstrate good character.\footnote{Konigsberg v. State Bar of Cal., 366 U.S. 36, 41 n. 4 (1961).}

The legitimate interests justifying character and fitness investigations are arguably threefold:\footnote{M.A. Cunningham, \textit{The Professional Image Standard: An Untold Standard of Admission to the Bar}, 66 TUL. L. REV. 1015, 1026 (1992).} “(1) protection of the public; (2) ‘proper, orderly and efficient administration of justice,’”\footnote{\textit{Id.}} and (3) protection of the professional image of the legal profession.\footnote{Deborah L. Rhode, \textit{Moral Character as Professional Credential}, 94 YALE L. J. 491, 505-07 (1985).} Professor Deborah L. Rhode argued that:

The public’s ‘low regard for the profession,’ reflected in recent public opinion polls, is a matter of acute concern to practicing lawyers; ABA members have ranked it as the most urgent issue facing the bar, and ABA presidents have repeatedly pledged to make improving lawyers’ image one of their highest priorities. How exactly that improvement can be secured is a matter of
dispute, but bar examiners frequently present character certification as part of the general campaign.57

Therefore, in certain circumstances, courts have affirmed fitness boards’ decisions to deny certification of bar applicants partly because certification would undermine the integrity of the profession.58 Essentially, the fitness board “serves the public in upholding public confidence” in licensing fit applicants.59

The character and fitness evaluation has been met with some criticism in that, primarily, the standards set out by the ABA have not delineated constructs of “socially acceptable behavior” of moral fitness.60 Moreover, scholars have criticized that the majority of state bars have not formulated any standards of “socially acceptable behavior,” pursuant to the ABA’s lack of guidance.61 The United States Supreme Court noted that the character and fitness evaluation has “shadowy rather than precise bounds[,]” because moral character analysis relied on the applicant’s inherently subjective criteria.62 However, subjective criteria when read in context with other specific factors, such as a history of criminality, employment, and character references substantiating reliability will not render a state’s bar admission evaluation unconstitutionally vague.63 However, even though the authority to license applicants is well-established, state bar examiners are still subject to the ADA’s statutory requirements.64

C. Necessity to Inquire into Mental Health: ADA’s Necessity Exception

57 Id. at 510-11.
58 In re Childress, 561 N.E. 2d 614, 622 (Ill. 1990) (upholding fitness board’s rejection of bar applicant partly because of lack of candor of past criminal conduct).
59 In re Cason, 294 S.E. 2d 523 n.5 (Ga. 1982).
61 Id.
62 Schware, 353 U.S. at 249.
63 In re Application of Oppenheim, 159 P.3d 245, 253 (2007).
The “necessity exception” allows screening of disabled applicants as long as there is a justification to insure the safe operation of the program or “if the individual poses a direct threat to the health or safety of others.” However, mental health examinations trigger ADA analysis upon submitting the disabled bar applicant through two levels of disability based inquiries. The first level is the broad, initial inquiry requiring all applicants to disclose mental health disabilities. The second level is the subsequent investigation, which occurs upon the applicant’s submission of an affirmative answer to the initial inquiry. However, only applicants with mental health disabilities are submitted to subsequent investigations. The subsequent investigation involves identification of the treating professionals and release of records. Moreover, a failure to authorize the release of records will result in a denial of bar admission. Disability advocates call subsequent investigations an “additional burden,” because only applicants with disabilities are subject to these additional screening practices on the basis of disability.

Generally, federal courts have upheld bar examiners’ initial inquiries and subsequent investigations in the jurisdictions upholding narrow inquiries into mental health, provided two requirements are met. First, the initial inquiry must be narrowly tailored to “respect the privacy

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67 Id.
68 Id.
71 Id. at 1491.
72 Banta, supra note 69, at 175.
rights of the individual applicant.”

Second, the subsequent investigation must be narrowly tailored to “allow access only to information relevant to the applicant’s fitness to practice law.”

Initially, however, the courts were split on whether mental health based inquiries were justifiable under the ADA. This split occurred during the widespread litigation of broad inquiries into “any emotional, nervous or mental disorders.” Some courts rejected disability-based investigations under the premise that conduct-based inquiries were a more reasonable alternative in effectively yielding information into mental health. Conduct-based inquiries examine behavior derived from evidence such as criminal and employment records and character references. Other courts upheld narrowly tailored inquiries into specific mental health disabilities, such as Bipolar Disorder, Schizophrenia, paranoia, and other psychotic disorders for the necessity of public protection.

Most of the federal cases were decided between the years of 1993 to 1996, following the enactment of the ADA in 1990. Further litigation followed a decade later, after the case law had been well established by both federal precedent and an ABA proposal endorsing narrow mental health inquiries. Noticeably, there has been a trend in favor of narrow inquiries after the implementation of the ABA proposal.

The following subsections explain the chronological evolution of bar examiner inquiries in ADA jurisprudence. First, the conduct-based jurisdictions are explicated as those that rejected

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75 Id.
80 Jacobs, 1993 WL 413016, at *7.; Ellen S., 859 F. Supp. at 1493; Frickey, 515 N.W.2d at 741.
all types of mental health inquiries and subsequent investigations primarily because conduct-based inquiries elicit the same information without violating the ADA. Second, the jurisdictions that challenged conduct-based inquiries and consequently upheld narrowly tailored inquiries into mental health follow. Finally, an evaluation of the modern trend upholding narrowly tailored inquiries is briefly discussed.

i. No Mental Health Inquiries, Conduct-Based Inquires Preferred

Some jurisdictions upheld conduct-based inquiries as an alternative to inquiries into mental health because conduct, unlike past mental health histories, is an empirically validated predictor of fitness. Moreover, conduct-based inquiries elicit information into mental health, as do direct inquiries into mental health.

In 1993, the court in Medical Society of New Jersey v. Jacobs laid the groundwork for many forthcoming cases in ADA jurisprudence. The District Court of New Jersey in Jacobs held that the New Jersey Board of Medical Examiners, as a licensing agency, was not justified in conducting inquiries and subsequent investigations into disability status. The court further concluded that the inquiries into status did not constitute invidious discrimination by themselves, as it was possible for the medical examiners to inquire into status alone without conducting discrimination against the applicant. However, the true act of discrimination occurred with the subsequent investigations that were triggered by the affirmative answers to the disability based inquiries. The court reasoned that the “essential problem with the [mental health based] questions is that they substitute an impermissible inquiry into the status of disabled applicants for

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84 Applicants, 1994 WL 923404, at *3; Bauer, supra note, 44, at 144.
85 Clark, 880 F. Supp at 445-46.
86 Jacobs, 1993 WL 413016, at *8.
89 Id. at *8.
90 Id.
the proper, indeed, necessary inquiry into the applicant’s behavior.”

Instead, bar examining authorities could have utilized character references, employment records, and current illegal drug use to obtain information into the applicant’s behavior without resorting to disability-based queries.

Basically, only conduct-based inquiries were deemed permissible, as there was no necessity to inquire into mental health.

After the Jacobs court set forth the doctrine and policy to restrict unfettered mental health based inquisition by public entities, the Supreme Judicial Court of Maine addressed Maine’s initial level of inquiry and subsequent investigation in *In re Applications of Underwood* in 1993.

The first question in dispute inquired into whether the applicants had “ever received [a] diagnosis of an emotional, nervous or mental disorder?”

The second question stated: “within the ten (10) year period prior to the date of this application, have you ever received treatment of emotional, nervous or mental disorder?”

Subsequent to affirmative answers, a broad authorization of clinical records from the treating healthcare professional was mandatory to

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91 Id. at *7.
92 Id.
93 Id.; See also Bauer, supra note 44, at 141.
95 *In re Applications of Plano and Underwood*, 1993 WL 649283, *1* (Me. 1993). The aforementioned question was listed as Item 29 on the application for the Bar of the State of Maine. *Id.* The exact wording is as follows:

Have you ever received diagnosis of an emotional, nervous or mental disorder?
Yes No If so, state the names and addresses of the psychologists, psychiatrists or other medical practitioners who made such diagnosis.

*Id.*

96 *Id.* The aforementioned question was listed as Item 30 on the application for Bar of the State of Maine. *Id.* The exact wording is as follows:

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

*Id.*
determine the fitness of the applicant.\textsuperscript{97} The court rejected both the initial level inquiry and the subsequent investigation of the broad medical authorization because the requirements “discriminated on the basis of disability, and imposed eligibility criteria that unnecessarily screen out individuals with disabilities.”\textsuperscript{98}

Notably, other federal courts in different circuits followed the lead of the \textit{Jacobs} court, even though \textit{Jacobs} did not apply to bar examiners.\textsuperscript{99} In 1994, the Southern District Court of Florida extended public entity liability to the Florida Board of Bar Examiners in \textit{Ellen S. v. Florida Board of Bar Examiners}.\textsuperscript{100} The petitioner-bar applicant asserted that the inquiry into her mental health status was tantamount to eligibility criteria predicated on the disability itself.\textsuperscript{101} The challenged inquiry was whether “applicant ha[d] ever sought treatment for a nervous, mental, or emotional condition, ha[d] ever been diagnosed as having such a condition or ha[d] ever taken any psychotropic drugs.”\textsuperscript{102} The Florida Board of Bar Examiners also required a release of all mental health records, follow-up investigations, and hearings, upon an affirmative answer.\textsuperscript{103} Petitioner claimed that the discrimination occurred at the onset of the subsequent investigation: the required release of clinical records upon her affirmative answer.\textsuperscript{104} The court agreed, primarily citing the rationale of the \textit{Jacobs} court insofar as “the questions were used as a screening device to ‘place additional burdens’” on the petitioner.\textsuperscript{105} Additionally, the court

\begin{footnotes}
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at *2.
\textsuperscript{99} \textit{Ellen S.}, 859 F. Supp. at 1493-94.
\textsuperscript{100} 859 F. Supp. at 1493-94.
\textsuperscript{101} \textit{Id.} at 1491-93.
\textsuperscript{102} \textit{Id.} at 1491.
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 1493-94 (citing \textit{Jacobs}, 1993 WL 413016, *7).
\end{footnotes}
agreed with Jacobs that conduct-based inquiries should have been applied because they could have elicited the same information into the applicant’s fitness without violating the ADA.106

Furthermore, another factor courts have considered in proposing conduct-based inquiries is whether the mental health inquiries deter applicants from obtaining professional treatment.107 In 1994, the court in In re Petition of Frickey balanced the bar examiners’ interest to ask fitness questions against the applicants’ interest to seek mental health counseling without the concern of disclosure.108 The court in Frickey found that many students refrained from seeking professional help because of the bar’s mental health questions.109 Thus, conduct-based inquiries were found to be the best, most reasonable, alternative because they could have elicited the same information necessary to the bar examining authority without intruding on the applicant’s privacy.110

In 1995, the District Court for the Eastern District of Virginia analyzed broad mental health inquiries in light of their predictive value to determine future fitness to practice law in Clark v. Virginia Board of Bar Examiners.111 The court evaluated the wording of the following bar examiners’ question: “Have you within the past five (5) years been treated or counseled for any mental, emotional or nervous disorders?”112 Again, pursuant to an affirmative response, the applicant was required to disclose specific information.113 The court heard multiple psychology experts speaking on whether past mental health histories serve as a reliable predictor to the future

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106 Ellen S., 859 F. Supp. at 1494.
107 In re Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994).
108 Id.
109 Id.
110 Id.
112 Id. at 433.
113 Id. Notably, the ABA proposal’s concern to “take steps to ensure” that applicants will not be discouraged to seek counseling resounds with the holding set out in Frickey. In re Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994). Although the holding in Frickey endorses conduct-based inquiries, and the ABA proposal clearly urges a more narrow approach, both entities seem to encourage the mental health of bar applicants while maintaining investigatory access to bar examining authorities. Frickey, 515 N.W.2d at 741; Proposal 110, A.B.A. House of Delegates (August 9, 1994).
fitness to practice law. In fact, the leading expert, Dr. Howard V. Zonana, asserted that past behavior was a more reliable predictor of future fitness based on empirical data. The court denied the bar examiners’ inquiries for failure to demonstrate evidence that “all or most” of the applicants who affirmatively answered the question were a direct threat to the public.

Even though the Clark court found the initial inquiry and subsequent investigation to be “too broad,” the court reasoned that the ADA did not preclude more narrow inquiries into mental health in light of an emerging ABA proposal. The court noted that the ABA urged state bar examiners to balance the applicants’ privacy interests against the public’s safety interests by tailoring “questions concerning mental health and treatment narrowly in order to elicit information about current fitness to practice law, and take steps to ensure that their processes do not discourage those who would benefit from seeking professional assistance with personal problems and issues of mental health from doing so.”

Although ultimately agreeing with precedent that conduct-based inquiry was a more reasonable alternative, the court, in dicta, allowed room for interpretation for narrow inquiries into mental health.

In 1996, The Rhode Island Supreme Court further explicated the state bar examiners’ burden of proof to inquire into applicants’ mental health. The court stated that:

[T]he burden is on those who propose to ask the questions to show an actual relationship such that (1) applicants with mental-health- and substance-abuse-treatment histories actually pose an increased risk to the public, (2) the admission process has effectively protected the public by using [the contested questions] to identify those persons with mental-health- or substance-abuse-treatment

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114 Clark, 880 F.Supp at 435.
115 Id.
116 Id. at 442.
117 Id. at 440-41 (citing to Proposal 110, A.B.A. House of Delegates (August 9, 1994)).
118 Id.
120 In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.3d 1333, 1336 (1996).
histories who are a danger to the public, or (3) attorneys who have become a danger to the public in their practice of law, when retrospectively reviewed, could have been identified with any degree of reliability by such questions.\textsuperscript{121}

In the case at bar, the ACLU appealed the challenged questions\textsuperscript{122} asserting that such inquiries violated the ADA and the individuals’ privacy rights.\textsuperscript{123} The court struck the questions and further instructed for limited inquiry into only current illegal use of drugs.\textsuperscript{124} The ruling was based on the premise that a bar examiner may screen whether an applicant was a direct threat to the public; however, the bar examiner may not utilize generalizations or stereotypes in

\begin{itemize}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} at 1334. The wording of the questions were as follows:
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} In re Petition & Questionnaire for Admission to R.I. Bar, 683 A.3d 1333, 1337(1996). The reworded question, at the direction of the Special Masters, is as follows:
\end{itemize}

\begin{enumerate}
\item 26. Are you or have you within the past five (5) years been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors or been diagnosed as being addicted to or dependent upon said items to such an extent that your ability to practice law would be or would have been impaired? YES --- NO ---.
\item 29(a) Have you ever been hospitalized, institutionalized or admitted to any medical or mental health facility (either voluntarily or involuntarily) for treatment or evaluation for any emotional disturbance, nervous or mental disorder? YES --- NO ---. If yes, state the name and complete address of each hospital, institution or treatment facility; the dates of treatment or evaluation; and the name of each individual in charge of your treatment or evaluation.
\item [29](b) Are you now or have you within the past five (5) years been diagnosed as having or received treatment for an emotional disturbance, nervous or mental disorder, which condition would impair your ability to practice law? YES --- NO ---. If yes, explain, stating the name and complete address of each psychologist, psychiatrist, counselor or other medical practitioner who made such diagnosis or from whom you received treatment, and the relevant dates.
\end{enumerate}

\begin{itemize}
\item \textit{Id.} at 1334.
\item \textit{Id.} at 1333.
\end{itemize}

\begin{itemize}
\item \textit{Id.} at 1334.
\end{itemize}
determining so.\textsuperscript{125} The court reasoned that predictive value of mental health questions was inherently faulty because there was no empirical evidence substantiating that applicants with past mental health treatment endured future disciplinary action.\textsuperscript{126} In fact, any data on disciplinary actions of barred attorneys arose after several years of practice, not from the time of original licensure.\textsuperscript{127} Moreover, accurate predictions and assessments of mental health fitness were unreliable, at best, because members of the fitness board were lay individuals, lacking any mental health training.\textsuperscript{128}

In effect, the Rhode Island Supreme Court created more definitive guidelines on the evidentiary proof needed to establish a correlational relationship between past mental health histories and future fitness. Thus, the aforementioned guidelines could affect whether answers from these questions in similar jurisdictions are even admissible, if contested.

\textit{ii. Narrow Inquiries into Mental Health, Justifiable by Necessity}

Some jurisdictions upholding narrowly tailored mental health inquiries reason that investigations are justifiable because a history of mental health disorders may present itself as future detrimental symptoms preventing an applicant to function in the practice of law.\textsuperscript{129} Unlike the jurisdictions advocating conduct-based inquiries, narrow inquiry jurisdictions do not require a high threshold of evidence demonstrating a correlation between past mental health histories and future fitness.\textsuperscript{130} That is, a past history is not viewed to necessarily predict future fitness.\textsuperscript{131} Instead, a past history will grant insight into the functional capacity of the individual.\textsuperscript{132}

\textsuperscript{125} Id. at 1334.
\textsuperscript{126} Id. at 1336.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
The first court to challenge the ADA based restraints on bar examiner inquiries into mental health was the District Court of the West District of Texas in *Applicants v. Texas State Board of Law Examiners* in 1994.\(^{133}\) The court upheld reasonable and narrowly tailored inquiries into mental health for the necessity of the public safety.\(^{134}\) The court reasoned that inquiry into Bipolar Disorder, Schizophrenia, paranoia, and any other psychotic disorders was necessary to determine whether the applicant was fit to practice law.\(^{135}\) Unlike *Clark* and other jurisdictions advocating conduct-based inquiries, the Texas court noted that any information elicited from narrow mental health inquiries would not necessarily predict future fitness.\(^{136}\) Instead, the knowledge of applicant’s current symptomatology, level of insight into his or her illness, and cooperation with treatment were reasoned as factors that would glean insight in assessing functional capacity to practice law.\(^{137}\)

Furthermore, the District Court of the Northern District of Illinois in *McCready v. Illinois Board of Admissions to the Bar*, reasoned, in dicta, that the purpose of character and fitness questionnaires is to accumulate a “comprehensive picture” complete with landmark events in the applicant’s life.\(^{138}\) As for the ADA, the court reasoned that disabled individuals were intended to be mainstreamed, and, as such, bar applicants should be screened for fitness “despite [a] disability,” not “but for” a disability.\(^{139}\)

After Texas recorded its precedent, other previously conduct-based jurisdictions changed its law to uphold narrow inquiry into mental health, as well. In 1995, the Southern District Court of Florida in *Doe v. Judicial Nominating Commission for the Fifteenth Judicial Circuit of*...


\(^{134}\) *Applicants*, 1994 WL 923404, at *3.

\(^{135}\) *Id.*

\(^{136}\) *Id.*

\(^{137}\) *Id.*


\(^{139}\) *Id.* at *5.*
Florida, extended the necessity exception to judicial candidates.\textsuperscript{140} Notably, the court in Doe was the same one that decided Ellen S., a conduct-based outcome just one year earlier in 1994.\textsuperscript{141} In Doe, the plaintiff was a judicial applicant asserting that inquiries into mental health status were a violation of the ADA and the defendants were only allowed to inquire into behavior.\textsuperscript{142} However, the court in Doe cited Applicants v. Texas State Board of Law Examiners reasoning that “when . . . questions of public safety are involved, the determination of whether an applicant meets ‘essential eligibility requirements’ involves consideration [of] whether the individual with a disability poses a direct threat to the health and safety of other[s].”\textsuperscript{143} Furthermore, the court reasoned that screening judicial candidates for mental health disorders was even more important than screening bar applicants because judges are “vested with extraordinary power” in deciding cases of life, death, imprisonment, and child custody, among other issues.\textsuperscript{144}

In 1998, the decision in O’Brien v. Virginia Board of Bar Examiners marked the transition of a once conduct-based jurisdiction in Virginia to one now upholds narrow inquiries into mental health.\textsuperscript{145} The transition was arguably the result of the dicta in Clark.\textsuperscript{146} The petitioner-applicant in O’Brien sought a preliminary injunction against the Board for denying bar admission for failure to answer mental health questions and release of medical records.\textsuperscript{147} The court reasoned that the challenged question was not as overbroad as in Clark, as it had since been rewritten to address ADA concerns.\textsuperscript{148} The court argued that screening for mental health issues

\textsuperscript{141} Id.; See also Ellen S. v. Fla. Bd. of Bar Exam’rs, 859 F.Supp. 1489, 1493 (S.D. Fla. 1994).
\textsuperscript{142} Doe, 906 F. Supp. at 1540.
\textsuperscript{143} Id. at 1541 (quoting Applicants, 1994 WL 776693, at *5).
\textsuperscript{144} Id. at 1541.
\textsuperscript{146} Clark, 880 F. Supp. at 444.
\textsuperscript{148} Id. at *3. The rewritten question was worded as follows:
that distort reality was justified by a public necessity to ensure that clients received competent representation. As to the initial inquiry, the court found that the rewritten question was narrowly tailored so as not to intrude on the privacy rights of the applicant. The subsequent investigation of the medical release was also narrowly tailored in scope as it only pertained to the relevant information of fitness to practice law.

Almost a decade later in 2007, the Seventh Circuit’s holding in Brewer v. Wisconsin Board of Bar Examiners addressed the extent that the bar examining authority may require a psychological evaluation as a subsequent investigation. Petitioner-applicant sued for loss of her “diploma privilege” for admission into the Wisconsin Bar without the requirement of sitting for the bar examination. The petitioner was denied her diploma privilege because the fitness board never received her release of medical records of chronic depression and fatigue. As a result, the fitness board requested a psychological evaluation and the petitioner consequently refused. However, the court reasoned that the request for the psychological evaluation was reasonable as it was “rationally related to its interest in ensuring that only competent persons are admitted to practice law in Wisconsin.”

Within the past five years, have you been diagnosed with or have you been treated for any of the following: schizophrenia or any other psychotic disorder, delusional disorder, bipolar or manic depressive mood disorder, major depression, antisocial personality disorder, or any other condition which significantly impaired your behavior, judgment, understanding, capacity to recognize reality, or ability to function in school, work or other important life activities?

Id. at *4.
Id.
Id.
Id.
270 Fed. Appx. 419 (7th Cir. 2007).
Id.
Id.
Id. (citing Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001)).
The disputes in the aforementioned cases resulted in amended questions that focused on a narrow inquiry into mental health.\textsuperscript{157} The scope of inquiry was influenced both by the widespread litigation and the formation of the ABA proposal urging narrow mental health inquiry.\textsuperscript{158}

iii. Current State of State Bar Examiners’ Mental Health Questions

The courts have addressed and thoroughly quelled the nearly twenty-year-old debate on fashioning the initial level of inquiry.\textsuperscript{159} Thus far, case law has established that Virginia,\textsuperscript{160} Florida,\textsuperscript{161} and Illinois\textsuperscript{162} narrowly inquire into mental health disorders. As a result, more federal circuits have seemed to uphold the approach into narrow investigations into mental health.\textsuperscript{163}

However, federal analysis into ADA jurisprudence has not yet peered into the breadth of the subsequent investigation of intangible documents, such as online profiles. Although federal precedent has ruled on subsequent investigations of medical records,\textsuperscript{164} the required release of usernames and passwords to personal websites raises nostalgic issues of overbroad inquiries, reminiscent of nearly two decades ago.

II. THE ONLINE PRESENCE OF BAR APPLICANTS AND STATE BAR EXAMINERS

Online social networking has permeated the legal field.\textsuperscript{165} The majority of law students maintain an online presence, as shown in a Suffolk University Law School survey conducted in

\textsuperscript{158} Id.
\textsuperscript{159} See generally Bauer, supra note 44; Banta, supra note 69; But see Morris, supra note 13, at 56.
\textsuperscript{162} McCready, 1995 WL 29609, at *6.
\textsuperscript{163} Brewer, 270 Fed. Appx. 418, 419.
2009.\textsuperscript{166} The Suffolk University Law School Survey demonstrated that 84\% of students activated a Facebook account, 44\% had a LinkedIn account, 17\% had a Twitter account, and only 10\% have never had any online social networking accounts.\textsuperscript{167} Moreover, the survey showed that 81.8\% of law students had active Facebook accounts, 4.9\% had inactive Facebook accounts, and 13.2\% reported never activating Facebook accounts.\textsuperscript{168} Although many students activate sites such as Facebook to “stay connected” and socialize in a casual manner with their peers, research has shown that maintaining an online presence has the secondary purpose of networking with professors and legal professionals.\textsuperscript{169}

The ABA may adopt general cyber discovery as a national guideline for character and fitness investigations pursuant to recent scholarly proposals.\textsuperscript{170} University of Virginia Professor Michelle Morris in 2007 proposed that bar applicants should provide a “three year history of online aliases, email addresses, IP addresses, blogs, and social networking site profile information on both law school and bar application forms.\textsuperscript{171} Other states have followed suit on the emerging trend of online investigations. The State Bar of California Committee of Bar Examiners denied an applicant for displaying unfit indicia on a webpage.\textsuperscript{172} On July 21, 2009, Florida Board of Bar Examiners instituted a policy investigating personal websites of certain bar applicants on a case-by-case basis, among the applicants were those with a history of substance

\textsuperscript{168} Fink, \textit{supra} note 166, at 333-34.
\textsuperscript{170} Morris, \textit{supra} note 167, at 56.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
abuse or dependence. Sober individuals with a history of substance abuse or dependence could qualify as rehabilitated addicts under the ADA if proper records of treatment in a rehabilitation facility are presented.

Thus, inquiry into the scope of the state bar examiners’ subsequent investigation is relevant as it pertains to the new methodology that is being utilized: online personal websites. The general rule remains that a subsequent investigation, as in the initial level of inquiry, is reasonable in scope, if the investigation is narrowly tailored only to yield access to information relevant to the fitness to practice law. Until recently, the methodology of information-gathering has been restricted to self-disclosure, release of records, face-to-face hearings with applicants, and even psychological evaluations in determining fitness.

However, the integration of online investigations among bar examiner inquiries yields access to personal information. Nonetheless, statutory construction is silent as to whether bar examiners may even conduct online investigations as a licensing function. This is a particularly

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173 FLORIDA BOARD OF BAR EXAMINERS, supra note 13, at 5. The Florida Board of Bar Examiners have a new policy to conduct investigations on those:

. . . who are required to establish rehabilitation under rule 3-13; applicants with a history of substance abuse/dependence; applicants with significant candor concerns . . . ; applicants with a history of UPL allegations; applicants who have worked as a Certified Legal Intern, reported self-employment in a legal field, or reported employment as an attorney pending admission; and applicants who have positively responded to Item 27 of the bar application regarding involvement in an organization advocating the overthrow of the government[.]

Id.

174 28 C.F.R. § 35.131(a)(2)(i)-(ii) (2011) (stating that a qualified individual with a disability includes one who has completed a supervised rehabilitation program, is rehabilitated successfully, or one who is currently engaged in a rehabilitation program).


177 Id.

178 Id.

thorny issue because title II’s statutory interpretation generally incorporates title I’s prohibited acts, duties and rights governing private employers.\(^{180}\)

A. Employers Can Conduct Pre-Screening Inquiries, Lest for Disabilities

Under title I of the ADA prohibiting disability-based discrimination in employment,\(^{181}\) employers are entitled to screen potential job applicants for their ability to perform job-related functions.\(^{182}\) However, the employer is prohibited to inquire into disabilities or the severity thereof.\(^{183}\) Seemingly, character and fitness examinations are the loophole for medically based, psychiatric inquires, whereas such questions may be deemed illegal, beyond the scope, or unnecessary, in employment law.\(^{184}\)

Currently, no case law has decided whether employers can conduct online investigations on potential job applicants.\(^{185}\) Therefore, scholars have commented that employers’ review of applicants’ online social networking sites is an “emerging area of law.”\(^{186}\) Scholars further anticipate future litigation primarily because online investigations yield access to information irrelevant to job-related fitness, such as race, sexual orientation, and religious affiliation.\(^{187}\)

B. Public Entities Do Not Have a Clear Mandate for Pre-Screening Licensing Activities

Title II, on the other hand, does not clearly delineate prohibitory pre-screening licensing activities.\(^{188}\) Rather, the House Education and Labor Committee chose “not to list all the types of actions that are included within the term ‘discrimination,’ as was done in titles I and III,

\(^{183}\) \textit{Id.} at § 12112(d)(2)(A).
\(^{184}\) Bauer, \textit{supra} note 44, at 129.
\(^{185}\) Byrnside, \textit{supra} note 181, at 459.
\(^{186}\) \textit{Id.} at 448.
\(^{188}\) Jacobs, 1993 WL 413016, at *10; Ellen S. 859 F. Supp. at 1493.
because this title . . . simply extends the anti-discrimination prohibition . . . to all state and local governments.”189 Therefore, courts have concluded that title II was meant to incorporate enumerated discriminatory acts within titles I and III.190

C. The Future of Title II: Anticipating Statutory Interpretation of Online Pre-Screening

But for the necessity exception, titles I and II would be read congruently. If employers are entitled to screen applicants for job-related fitness, absent inquiry into disabilities, then it stands to reason that public entities would be prohibited from the same level of inquiry. However, courts have interpreted the necessity exception as granting bar examiners the right to a narrowly tailored inquiry into specific mental disorders.191 Therefore, until an ADA claim is litigated under either titles I or II, mental health screening of online profiles remains an emerging area of law under both titles I192 and II.

Nonetheless, a narrowly tailored inquiry cannot feasibly and reasonably be executed in its methodology through the internet, for the same reason that scholars have criticized employers’ review of job applicants’ online profiles. Namely, online investigations yield access to personal information that is irrelevant to the fitness to practice law, akin to job-related fitness.

III. Assessing Fitness Online: Overbroad and Ineffectual Mental Health Inquiries

Online investigations are “overbroad and ineffectual”193 in assessing indicia of mental health illness. First, online investigations are overbroad because they access information that is outside the scope of relevance to the fitness to practice law. Second, they are ineffectual because an online profile page is a poor substitute for a medical record in determining if the applicant is

192 Byrnside, supra note 181, at 448.
193 Clark, 880 F. Supp. at 435.
cooperating with treatment or is suffering from detrimental symptoms. The online investigation is required because a bar applicant affirmatively answered to the initial narrowly tailored mental health inquiry. Thus, the online investigation is, procedurally, a subsequent investigation into mental health. Therefore, the online investigation must be narrowly tailored so that it only yields access to information relevant to the fitness to practice law.\textsuperscript{194}

\textit{A. Overbroad}

First, the investigations are “overbroad” in that the scope is seeking more than the relevant information towards the fitness to practice law. If the investigation’s purpose is to seek evidence of fitness based on the presence of symptoms of mental illness, then online investigations are intrusive because bar examiners seek evidence of detrimental symptoms where none is likely to exist. A release of medical records would lead to reasonable inferences of mental health stability and fitness, whereas personal website investigations yield access to personal information. Because of this, an applicant’s online profile, regardless of its public domain, is likely to trigger the guarded “privacy interests” discussed by the courts.\textsuperscript{195}

Courts, both upholding conduct-based\textsuperscript{196} and narrow mental health inquiry\textsuperscript{197} have balanced the applicants’ privacy interests against their respective state bar examiners’ legitimate interest to seek information on fitness. The balancing test has sought, among other factors, whether another reasonable alternative to attain information is available to the bar examiner and, if so, whether the alternative would yield the same information.\textsuperscript{198} A reasonable alternative already exists for the bar examiner to acquire mental health information: the authorized release

\textsuperscript{195} In re Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994); \textit{O’Brien}, 1998 WL 391019, at *4.
\textsuperscript{196} \textit{Frickey}, 515 N.W.2d at 741.
\textsuperscript{198} \textit{Id.}
of medical records. \textsuperscript{199} As such, the fitness boards can gather mental health information through medical records without intruding into the personal information posted online.

Moreover, state bar examiners could conduct random, systematic, or isolated investigations on the disabled applicant’s online profile. Personal websites do not remain stagnant; they are continuously updated and can even be updated without the user’s knowledge if other people add photographs to the site. Thus, it is possible that the state bar examiners’ awareness that new information is available every day would create a new legitimate interest for the bar examiner to “periodically check-up” on the applicant. In contrast, a fixed, tangible medical record is restricted to the printed word and could be read only once with the knowledge that no new information will develop thereafter, unless another evaluation should occur. Therefore, if a bar examiner has discretionary, unfettered, access to an applicant’s website, not only could unrestricted information be available, but continuous access may be an issue.

Bar examiners are limited in what they can directly ask of an applicant. \textsuperscript{200} Nonetheless, the investigations create a slippery slope because the bar examiners could access information that they are prohibited from directly requesting. \textsuperscript{201} Bar examiners could readily discern protected and personal information displayed on an online profile, such as sexual orientation, race, creed, and religion. \textsuperscript{202} Or, bar examiners could discover information about other bar applicants that do not fall within the targeted populations. Unfortunately, Facebook “friends” of targeted bar applicants could be subject to investigations that the bar examiner did not delineate at the outset of investigation policies.

\textsuperscript{199} Ellen S., 859 F. Supp. at 1491.
\textsuperscript{200} In re Stolar, 401 U.S. 23, 28 (1971) (holding that questions of affiliations to organizations is a violation of the First and Fifth Amendments of the Constitution).
\textsuperscript{202} Id.
Ultimately, an online investigation, in addition to the medical records release, is intrusive, excessive, and overbroad. However, state bar examiners’ greatest legitimate interest may lie in monitoring the candor of bar applicants. State bar examiners may be verifying affirmative answers with medical records, and then online profiles, to determine if applicants are, in fact, being candid about their initial responses to the mental health queries. If so, then this practice is calling into question the validity of applicants’ mental health status and their candor in disclosing it, in addition to utilizing licensing practices that violate the ADA. Thus, in effect, bar examiners are submitting the applicants to tertiary investigations, or the “additional, additional burden,” for the purpose of candor.

In Clark, the court discovered that the Virginia Board of Bar Examiners was utilizing a similar practice by “verify[ing] [the applicants’] affirmative answers” with the disclosed mental health professionals. The subsequent investigation was denied for its breadth because it violated the ADA on the basis that it was predicated on the applicant’s disability. If bar examiners hold to this current practice with online investigations, then the applicants are not only having their answers verified at one level, through authorized release of records, but at an additional level, through perusal of their online profiles. Arguably, online investigations are an “additional, additional burden.” First, the initial inquiry gathers information on the mental health disorders as the first investigation. Then, the subsequent investigation, or the additional investigation, requires a medical records release for the purpose of information-gathering on mental health and candor. Thus, online investigations are a tertiary level of investigation for the purported purpose of checking candor on the disclosure of the mental health disorder, violating

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203 Clark, 880 F. Supp. at 434.
204 Id.
the ADA. Regardless if the search for candor is a motivating factor, seeking out the truth on the basis of one’s disability on multiple levels, will not likely pass scrutiny under the ADA.

B. Ineffectual

Second, the online investigations are “ineffectual” because there is no determination that an online profile could render better, more reliable indicia of mental health stability and fitness to practice law than a medical record signed by a certified, licensed professional. Peering into an online profile is nothing short of eavesdropping into a conversation midway or reading a private journal. A glimpse into someone’s life may be learned, but certainly any information would be read out of context. In fact, blurbs, photographs, and phrases on a personal website would hardly reveal effective information into one’s fitness, functional capacity, or even if the applicant was cooperating with his or her treatment.205 The diagnostic impressions of the treating professional are a far superior indicator of the applicant’s mental health and fitness because the professional can offer data into psychological assessment, method of evaluation, the applicant’s cooperation in treatment sessions, subsequent diagnosis, and prognosis.

Moreover, any indicia that the state bar examiners would attempt to interpret as mental health instability may be to the detriment of the applicant if no one on the character and fitness board has any training in mental health, psychology, social work, or psychiatry.206 Members of the fitness board still rely on assessments, medical records and evaluations prepared by professionals in concluding the applicant fitness even though board members rarely ever have mental health or psychological training when conducting investigations. Furthermore, even if anything on the online profile were to be used only as a factor for the “comprehensive

picture," the investigation still fails because of the breadth of the scope that could access other material not relevant to fitness.

State bar examiners have an interest to gather information on fitness. However, this does not mean that they have an unfettered interest to do so in whatever manner they deem fit to determine fitness. Naturally, the bar authority, in keeping with the times, is maintaining an online presence along with bar applicants to check on candor and other relevant issues. However, the scope of the investigation is that much more important if the investigation is occurring online because of the personal information that is posted.

IV. POLICY CONCERNS NOTWITHSTANDING ADA VIOLATIONS

Other policy concerns are apparent aside from those raised under the ADA. First, future bar applicants may choose not to disclose mental health information due to fear of stigmatization. Most importantly, future bar applicants with mental health problems might refrain from seeking treatment for fear of bar denial, as the court in *Frickey* noted.

Second, the investigation prevents communications in a less expansive manner because personal website investigations discourage the use of online forums. Bar applicants may attempt to disable or refrain from using their personal websites altogether upon notice of the online investigations. Scholars argue that those who utilize blogs benefit from group collaboration, updates on politics and academia, and the development of interpersonal relationships. Legal blogs, or “blawgs,” provide a forum for students and lawyers to discuss pertinent and relevant

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208Cunningham, *supra* note 54, at 1026; Rhode, *supra* note 56, at 505-07.
210In re Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994).
legal issues.212 “Blawgs” are so commonplace and advocated that the ABA Journal sponsors them on its website.213 However, personal website investigations could result in self-censorship, decreased use of online forums, and deprivation of social networking benefits.214

Applicants are at a greater professional advantage if they stay current and socially network on the internet.215 Thus, an issue may arise in erroneously regarding a rehabilitated addict as currently using drugs or alcohol. Usually, networking functions are held at casual venues with food and alcohol where law students and local attorneys mingle. Nonetheless, a bar applicant who is a rehabilitated alcoholic could be erroneously regarded as currently using alcohol if a friend “tags”216 a photograph onto the applicant’s page and the friend is holding an alcoholic drink from, ironically, a law function. However, removing other people’s photographs from the personal website may be out of the applicant’s control or scope of knowledge.217 Thus, analysis of website indicia in such a context would be a harsh remedy for the bar applicant.

V. PROPOSED SOLUTION: CONDUCT-BASED ONLINE INVESTIGATIONS

Even though the internet is now an emerging factor in determining fitness, the same issues continue to resonate within bar examiner inquiries into mental health and its impact on the ADA. That is, online investigations are overbroad in their scope and ineffectual in yielding determinative evidence of fitness. Thus, in proposing solutions to conducting online investigations a referral to federal precedent is necessary: conduct-based investigations.

Conduct-based online investigations would be feasible if fitness boards enumerated clear and unambiguous methods of inquiry. First, fitness boards should enumerate clear definitions of

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214 Epstein, supra note 60, at 716.
215 Vinson, supra note 167, at 377.
216 Id. at 371.
217 Id. at 363. (commenting that many Facebook users find it difficult to operate the default and privacy settings).
“conduct” and, analogously, “misconduct,” within the purview of online indicia. Second, unambiguous methodology of online investigations should be delineated within the online investigation policies in order to limit the inquiry to targeted individuals and relevant indicia. If so, conduct-based online investigations into the mental health of targeted populations would be in compliance with ABA guidelines to render the scope of inquiry “clear and unambiguous.”

First, clear policy identification of which website information qualifies as evidence of “conduct” and “misconduct” may narrowly tailor the scope of the investigations. Generally, current illegal use of drugs is not a protected status within the ADA. Moreover, the ADA does not protect alcohol or drug-related misconduct. Hence, if online investigations are limited to indicia of conduct-based offenses, including current illegal use of drugs, then the ADA would not be violated. However, determining whether photographs and blurbs are, in fact, evidence of misconduct or current illegal use of drugs can be difficult to discern without the user’s explanation. This is particularly an issue in cases where Facebook “friends” post photographs onto another user’s page. Thus, fitness boards may consider incorporating into their policies whether non-targeted peoples’ postings onto the targeted applicants’ page are discoverable indicia of “misconduct” for purposes of the targeted applicants’ online investigation. Moreover, the viewing of a non-targeted bar applicant’s online indicia during a targeted bar applicant’s investigation raises concerns of excessive scope particularly if the non-targeted bar applicant did not warrant a subsequent investigation into mental health. Clearly delineated policies may reduce the possibilities of analyzing targeted applicants’ and non-targeted applicants’ personal information, while maintaining compliance with the ADA.

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218 NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDU. & ADMISSIONS TO THE BAR, supra note 46, at vii.
220 Id.
Second, enumerated unambiguous online investigation methods would assist in preventing future broad-based litigation issues. A primary concern is whether board examiners will enter online forums daily, or periodically, since online profiles are updated at the user’s discretion. Fitness boards may consider providing some form of short-term notice prior to the investigations. Limited notice may nullify concerns of applicants’ disabling personal websites. A fitness board in its policy-making discretion can tailor the scope of the investigation to determine who is evaluated, which indicia is evaluated, and set out the definitions of conduct to meet the modern needs of the internet.

In the alternative to conduct-based inquiries into mental health, a blanket search of all bar applicants should be utilized as a valid subsequent investigation for licensure. Regardless of statutory interpretation of bar examiners’ duties to screen, a blanket search would not run afoul of the ADA as it would not target qualified individuals with disabilities. Furthermore, as candor is such a legitimate interest, then it is one that should not be used to conduct online investigations on only bar applicants with mental health disabilities. State bar examiners’ failure to investigate into all bar applicants’ online profiles obstructs the discovery of candor of all bar applicants and purports to imply that only those with mental health issues fail to disclose issues related to mental health. However, state bar examiners who choose to utilize online investigations may be able to prevent future ADA violations if blanket searches are implemented.

VI. CONCLUSION: RESURGENCE VS. PEACEFUL RESOLUTION

Bar examiner inquiries into mental health have been debated thoroughly in the scope of the ADA over the past two decades. 221 After extensive litigation from conduct-based inquiries 222

221 See generally Bauer, supra note 44; Banta, supra note 69; But see Morris, supra note 13, at 56.
to narrow mental health inquiries into specific disorders, the majority of jurisdictions have decided on the latter resolution. However, online investigations raises concerns of whether the internet will be the reason for the re-litigation of “overbroad and ineffectual” bar examiner inquiries.

Ironically, the “more things change, the more they remain the same.” Regardless of the introduction of the internet, the solution of conduct-based inquiries seems to be the most reasonable solution. Hopefully, a peaceful resolution will remain amidst the potential controversy that may arise in light of the emerging technological trends in bar examining practice today.

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224 Bauer, supra note 44, at 149 n. 178.
225 Clark, 880 F. Supp at 445.