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# BAR MENTAL FITNESS QUESTIONS: PERPETUATING THE STIGMA

SARA JOSSELYN<sup>†</sup>

*In order to be admitted to the practice of law, all applicants to provincial Barristers' Societies must respond to a series of questions aimed at ensuring that they are of good character and are generally "fit" to practice. Some applicants must also demonstrate their medical fitness by responding to various mental disability-related questions. This article examines whether the medical fitness questions currently asked of Bar applicants in many provinces are discriminatory and whether they serve to perpetuate the stigma associated with mental illness.*

*The author will evaluate the propriety of broadly worded mental fitness questions in order to show that the inquiries are counterproductive, are of dubious predictive power, and unreasonably impinge upon individuals' privacy rights. A subsequent assessment of narrowly tailored mental fitness inquiries will reveal that they are not a preferable alternative. Ultimately, the author will show that while Bar Societies' goals are laudable, the questions come at too great an expense insofar as they discourage applicants from seeking needed mental health treatment, and potentially violate both the Canadian Charter of Rights and Freedoms and provincial human rights legislation.*

## INTRODUCTION

Across the country, it is the mandate of provincial Barristers' Societies to act as evaluators and administrators of the certification process for individuals seeking admittance to the practice of law. Within all of the provinces, applicants must respond to a series of questions aimed at ensuring that they are of good character and are generally "fit" to practice. Some Bar Societies, however, also require applicants to demonstrate their *medical* fitness, a criterion which compels applicants to respond to a series of (intrusive) mental disability-related questions and which proceeds to require applicants to provide the Society oftentimes unlimited access to their medical records in the event that any positive disclosures are made. Ultimately, whether an applicant will be admitted to the practice of law in spite of her mental disability is left to the discretion of the Society, a move which effectively endorses the unlicensed practice of psychiatry by Bar examiners.<sup>1</sup>

Although the issue of medical fitness disclosures as a barrier to entry into the legal profession has not received much attention in Canada, this should in no way suggest that the topic is innocuous. On the contrary, the prevalence of medical fitness inquiries on Bar application forms is very controversial. While Bar Societies have the responsibility to *only* admit people to the profession who have the ability to function properly and effectively as lawyers, individual applicants have a constitutional

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<sup>1</sup> Gail Edson. "Mental Health Status Inquiries on Bar Applications: Overbroad and Intrusive" (1995) 43 U. Kan. L. Rev. 869 at 896 (HeinOnline).

right not to be discriminated against based on the enumerated ground of disability under both the *Canadian Charter of Rights and Freedoms* and under provincial Human Rights legislation. Further, while Bar Societies contend that medical fitness inquiries are necessary as a means to protect the public and to promote the integrity of the legal profession by excluding “unfit” persons from the practice of law, on the other hand it has been argued that medical fitness questions unreasonably impinge upon applicants’ privacy interests and fuel social stigmas regarding the supposed incompetence of persons with mental disorders. What remains to be determined in appraising these opposing positions is whether Barristers’ Societies’ rationales supporting mental fitness disclosures ought to prevail.

In this paper, I will argue that the medical fitness questions currently asked of Bar applicants in many provinces across the country are discriminatory and serve to perpetuate the stigma associated with mental illness. In order to do so, I will evaluate the prevalence of mental illness both generally as well as within the legal profession, and will show that medical fitness requirements for Bar admission are merely a form of character requirements that have tended to fluctuate according to the dominant political and social consciousness in order to keep perceived social “deviants” out of practice. Next, I will outline Bar Societies’ rationales for medical fitness questions, followed by an assessment of the questions currently asked of applicants throughout both Canada as well as the United States. I will proceed to evaluate the propriety of broadly worded mental fitness questions in order to show that the inquiries are counterproductive, are of dubious predictive power, and unreasonably impinge upon individuals’ privacy rights. A subsequent assessment of narrowly tailored mental fitness inquiries will reveal that they are not a preferable alternative to broadly-worded mental health questions. Finally, the general problems associated with medical fitness questions will be canvassed, and I will explain why the questions are unjustifiable insofar as they inordinately discriminate against women, and potentially violate both the *Canadian Charter of Rights and Freedoms* and provincial human rights legislation.

## I. BACKGROUND

### Mental Illness in Canada

#### *What is Mental Illness?*

Mental illness is a broad category of conditions that encapsulates behavioural, emotional, cognitive, and organic disorders which are, in turn, related to neurological and medical conditions affecting the brain.<sup>2</sup> According to the Public Health Agency

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2 John Parry and F. Philips Gilliam. “Mental Disabilities: Key Definitions and Terms”, Part II in *Handbook on Mental Disability Law*, The American Bar Association, Commission on Mental and Physical Disability Law (undated) at 3. Note, however, that the medicalized definition of disability is by no means unanimously accepted. Many scholars argue that disability is socially constructed, explaining that “disability is not fundamentally a question of medicine or health, nor it is just an issue of sensitivity and compassion; rather it is a question of politics and power(lessness), power over, and power to.” See Richard Devlin & Dianne Pothier. “Introduction: Towards a Critical Theory of Disitizenship” in R. Devlin & D. Pothier eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2005) 1. Arguably, the medicalized conception of disability erases the “social, political and environmental dimensions of disability” and perpetuates the (faulty) conception of “normalcy” which (erroneously) convinces persons with a mental disability into thinking that it is their impairment which is the problem, rather than the social construction of impairment. See Kari Krogh & Jon Johnson. “A Life without Living?: Challenging Medical and Economic Reductionism in Home Support Policy for People with

of Canada, mental illnesses are characterized by “alterations in thinking, mood or behaviour” and are caused as a result of “a complex interplay of genetic, biological, personality and environmental factors.”<sup>3</sup> Typically, mental illnesses bring about some level of distress and impaired functioning, although the symptoms associated with the illnesses may vary in intensity from person to person depending on the type of disorder and the patient’s socio-economic circumstances.<sup>4</sup> Despite that mental disorders may take many forms – anxiety disorders, eating disorders, attention deficit hyperactivity disorder, and schizophrenia are but a few examples – the majority of mental disabilities may nevertheless be treated effectively.<sup>5</sup> Arguably, then, the most harmful aspect of mental illness is the *stigma* associated with it insofar as it poses a considerable barrier in terms of social acceptance.<sup>6</sup>

### *How Common is Mental Illness?*

Mental illness is extraordinarily common and will affect approximately one in five Canadians at some point in their lives.<sup>7</sup> Even though not every individual will experience a mental illness personally, every Canadian will be impacted by mental illness *indirectly* through either a friend, family member, or work colleague.<sup>8</sup> Clearly, then, no one is immune from mental illness: mental disorders affect people “in all occupations, educational and income levels, and cultures.”<sup>9</sup>

### **Mental Illness Among the Legal Profession**

Given the prevalence of mental illness within the general population, it is not surprising and, indeed, it is to be expected that members of the legal profession are likewise affected by mental health issues. What is somewhat surprising, however, is that studies have shown that clinical levels of depression, anxiety and phobia are actually estimated at being five to fifteen times *higher* among members of the legal profession than among the general population.<sup>10</sup> Lawyers are said to experience uncharacteristically high rates of substance abuse, suicide, and career dissatisfaction.<sup>11</sup> Moreover, an American study indicated that lawyers not only experience exorbitantly high rates of depression – the highest in the nation – but that the overall likelihood that lawyers will experience a major depressive disorder is 3.6 times higher than among individuals who belong to any other profession.<sup>12</sup> It has been

Disabilities” in R. Devlin & D. Pothier, eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: UBC Press, 2005) 151.

3 Public Health Agency of Canada, “A Report on Mental Illnesses in Canada”, online: [http://www.phac.aspc.gc.ca/publicat/miic-mmacc/chap\\_1\\_e.html](http://www.phac.aspc.gc.ca/publicat/miic-mmacc/chap_1_e.html) (last updated 3 October 2002).

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Ibid.* See also “Understanding Mental Illness”, online: Canadian Mental Health Association [http://www.cmha.ca/bins/content\\_page.asp?cid=3&lang=1](http://www.cmha.ca/bins/content_page.asp?cid=3&lang=1). Notably, there are similar statistics in the United States where approximately twenty-two percent of the population is believed to suffer from a mental illness. See Phyllis Coleman & Ronald A. Shellow, “Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution” (1994) 20 J. Legis. 147 at 158.

8 Public Health Agency of Canada, *supra* note 3.

9 Public Health Agency of Canada, *supra* note 3.

10 Kennon M. Sheldon & Lawrence S. Krieger, “Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-Being” (1994) 22 Behav. Sci. Law 261 at 262.

11 *Ibid.*

12 Hannah V. Averitt, “A Mental Bar: Should Past Psychological Problems Affect Bar Admission?” (2004) 28 Law & Psychol. Rev. 97 at 99. See also Sheldon & Krieger, *supra* note 10, at 262 explaining that, as per a John Hopkins research study, “lawyers have the highest incidence of major depressive disorder among 104 occupational groups”.

suggested that the prevalence of mental disability among the practicing Bar may stem in large part from stresses which begin in law school. Gail Edson explains that, generally speaking, law students experience more stress than other graduate students and that their stress only increases throughout the course of their degree.<sup>13</sup> Citing similar statistics, Sheldon and Krieger write that the higher incidence of psychiatric symptomology (including anxiety, depression, hostility, and paranoia) among law students reflects “more than merely hard work”; studies have shown that the overall mental health of law students is far worse than their counterparts in other professional fields, including medicine.<sup>14</sup> Nevertheless, mental illnesses do not typically begin to manifest themselves among legal professionals until *after* they have been in practice for some time.<sup>15</sup> Regardless, for the purposes of this paper it is worth noting that mental illness is not only common, but that it is particularly widespread among members of the practicing Bar.

### An Historical Overview of Character Requirements

Before moving on to consider the basis for medical fitness inquiries and the questions that are currently asked of individuals applying to the Bar in Canada, it is interesting to briefly review the history of “character” and “fitness” requirements. This review is critical because it evidences that the legal profession’s entry requirements have tended to include (and exclude) groups of individuals based upon prevailing social mores and the dominant political consciousness.

Questions concerning individuals’ so-called “character” and “fitness” to practice law have had a protracted historical lineage, although “fitness” has not always involved inquiries into individuals’ mental health status.<sup>16</sup> In the eighteenth century, fitness to practice was “largely a matter of wealth and social standing” where certain groups of people were afforded immediate certification – including sons of powerful and influential members, for example – and other “presumptively unfit” groups were automatically excluded from membership – including tradesmen, journalists, and Catholics.<sup>17</sup> The nineteenth century saw the implementation of more procedural and formal demands for Bar admission, including the requirement that applicants “obtain references from two [practicing] barristers.”<sup>18</sup> Nevertheless, there is no evidence to suggest that these new requirements served any purpose other than to maintain and reinforce the prevailing caste-based approach to Bar admission.<sup>19</sup> During this period, the only group who was *explicitly* excluded on the grounds of character was women insofar as the “natural and proper timidity and delicacy which belongs to the female sex” precluded women from practice.<sup>20</sup>

Concerns regarding ethical character came to the forefront of public concern during the late nineteenth century when many professional groups started implementing

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13 Edson, *supra* note 1 at 894.

14 Sheldon & Krieger, *supra* note 10 at 262.

15 Deborah L. Rhode. “Moral Character as a Professional Credential” (1985) 94 Yale L.J. 491 at 515.

16 *Ibid.* at 493.

17 *Ibid.* at 494. There was not really any specific “procedure” involved in the eighteenth century. Occasionally, however, the court might have examined an applicant to ensure he was “virtuous and of a good name.” *Ibid.* at 496-7.

18 *Ibid.* at 495.

19 *Ibid.* at 495.

20 *Ibid.* at 497.

more rigorous entry standards.<sup>21</sup> The legal profession was certainly no exception, particularly in light of the recently-founded American Bar Association's mission to implement "higher professional standards" by heightening requisite educational criteria.<sup>22</sup> Notably, however, there was a great deal of dissension within the profession regarding whether increased educational standards would be sufficiently discerning, prompting some members of the Bar to recommend "rigorous character investigations" as a means to preclude unethical and undesirable individuals from gaining admittance.<sup>23</sup> On this basis, Bar Societies started inquiring into the applicant's character, although character assessments did not become entirely commonplace until the early twentieth century.<sup>24</sup> If it can be said that there is a unifying theme throughout the history of character requirements, then, it may well be that Bar Societies' conceptions of "fitness" and "virtue" have tended (and arguably still *do tend*) to "shift with the national mood" in order to keep perceived social "deviants" out of practice.<sup>25</sup> Whereas in the past applicants have been precluded from legal practice on the basis of class, socio-economic status and gender, some applicants are currently barred from practice on the basis of their mental (un)fitness.

## II. THE BASIS FOR MENTAL FITNESS QUESTIONS

Bar examiners have suggested that medical fitness questionnaires are not only appropriate but are also *necessary* in order to "safeguard the public" from unfit lawyers.<sup>26</sup> Proponents say that inquiries into medical fitness are merely "logical extensions" of moral character questions,<sup>27</sup> and that background investigations, although somewhat helpful, are severely limited: typical investigations that rely on reference letters obtained from former employers and from other character referees are insufficient in assessing an applicant's fitness to practice because the referees may have only had "superficial contact with the applicant" or the referees may not be entirely candid in their referrals.<sup>28</sup> On this basis, proponents argue that more direct and pointed medical fitness questions are essential. Arguably, there are no other practical alternatives available to sufficiently assess an applicant's overall "fitness," and applicants *must* be fit in order to both protect the public and uphold the integrity of the legal profession.<sup>29</sup> Each of these justifications will be considered in turn.

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21 *Ibid.* at 498-9. The legal profession was not the only profession to tighten entry standards. So too did "barbers, beauticians, embalmers, engineers, veterinarians, optometrists, geologists, shorthand reporters, commercial photographers, boxers, piano tuners, trainers of guide dogs for the blind, and – ironically enough – vendors of erotica."

22 *Ibid.* at 500.

23 *Ibid.* at 500.

24 *Ibid.* at 502.

25 *Ibid.* at 502.

26 Stuart C. Gauffreau. "The Propriety of Broadly Worded Mental Health Inquiries on Bar Application Forms" (1996) 2:42 Bull Am Acad Psychiatry Law 199 at 201.

27 Allison Wielobob. "Bar Application Mental Health Inquiries: Unwise and Unlawful" (1997) 24 Human Rights Magazine 12, online: <http://www.abanet.org/irr/hr/winter97/welobob.html>. See also Hilary Duke. "The Narrowing of State Bar Examiner Inquiries Into the Mental Health of Bar Applicants: Bar Examiner Objectives are Met Better Through Attorney Education, Rehabilitation, and Discipline" (1997) 11 Geo. J. Legal Ethics 101 at 104 (HeinOnline). Note that in suggesting that medical fitness questions are merely a logical extension of character references, Bar examiners' implicit assumption is that individuals with mental disabilities would be unable to fulfill either their professional or ethical obligations.

28 Stanley S. Herr. "Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities" (1997) 42 Vill. L. Rev. 635 at 639 (HeinOnline).

29 Gauffreau, *supra* note 26, at 201.

## Protection of the Public

One of the primary reasons for inquiries into Bar applicants' medical fitness is to protect the public, with proponents citing legal "malpractice cases involving mentally unstable counsel" and mental disability-related breaches of professional responsibility as primary examples of the so-called need for mental health inquiries.<sup>30</sup> One theorist actually likened Bar Societies' responsibility to the public to a sort of "social contract," suggesting that the public "relinquish[es] its right to judge" the day-to-day administration of the legal profession and grants the profession "the right to self-govern" in exchange for the profession's "responsibility of conducting their affairs for the benefit of society."<sup>31</sup> On the basis of this "contract," it has been argued that the profession must judiciously self-discipline and control its members "in every respect."<sup>32</sup> Proponents say that only by inquiring into applicants' character and mental health status can the Bar ensure that clients will be appropriately shielded from lawyer abuses, including but not limited to "misrepresentation, misappropriation of funds, [and] betrayal of confidences."<sup>33</sup> After all, admission to the practicing Bar is a "privilege,"<sup>34</sup> and in determining whether applicants should be granted this privilege it is necessary to ensure that their admission to the Bar will not come at the expense of the public's greater interests.<sup>35</sup>

## Preserving Professionalism

Another common justification for mental fitness inquiries is that by excluding applicants based on unsavoury (mental) characteristics, Bar Societies are able to "establish the boundaries of a moral community", thereby preserving and promoting the integrity of the legal profession.<sup>36</sup> Certainly, it can be admitted that incompetent and substandard legal services are capable of injuring the public interest and have the potential to bring disrepute onto the legal profession. As Gannage explains, these days incompetent service "is more and more likely to bring the profession into disrepute,"<sup>37</sup> so it is imperative to regulate the quality of service provided by lawyers in order to maintain a professional image and "an appearance of moral

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30 Herr, *supra* note 28 at 638.

31 Mark Gannage. "Mental Incapacity Rendering A Professional Unfit to Practise: The Approach of the Medical and Legal Professions in Ontario" (1983) 21 U.W.O.L. Rev. 29 at 29 (HeinOnline).

32 *Ibid.* at 29. It is interesting to note that this sort of justification that serves to make proponents' support for mental health inquiries *less* persuasive. Certainly, protecting the public is a laudable end, but when inquiries into the mental health status of admitted lawyers is entirely lacking, it is both inappropriate and inconsistent to use mental health status as a basis for admission. For more, see *infra*, Part V: The Propriety of Broadly Worded Mental Fitness Questions - Differential Treatment.

33 Rhode, *supra* note 15 at 508.

34 Jennifer McPherson Hughes. "Suffering in Silence: Questions Regarding an Applicant's Mental Health on Bar Applications and their Effect on Law Students Needing Treatment" (2004) 28 Journal of the Legal Profession 187 at 193.

35 Notably, it is on this basis that the Nova Scotia Barristers' Society justifies asking applicants medical fitness questions. See Medical Fitness Task Force, "Report of the Medical Fitness Task Force" prepared for the Nova Scotia Barristers' Society (Halifax, Nova Scotia, 2006) [unpublished] at 3. The NSBS also justifies medical fitness inquiries based on s.4(1) of the *Legal Profession Act*, R.S.N.S. 2004, c. 28, which reads that the Society has a responsibility to "uphold and protect the public interest in the practice of law." It is believed that inquiring into applicants' mental health status is relevant because a mental disability could "render you incapable of practicing law competently", thereby putting "clients' interests at risk." See Nova Scotia Barristers' Society, "Applicant's Questionnaire - Part 2: Application for Enrollment in Bar Admission Course and as an Articled Clerk" at Pre-amble to Part 2 (last updated April 2006).

36 Rhode, *supra* note 15 at 509.

37 Gannage, *supra* note 31 at 29.

exclusivity.”<sup>38</sup> The question remains, however, whether excluding applicants based upon their mental health status can actually further these ends, not to mention whether the goal of preserving professionalism is even a sufficient grounds upon which to require medical fitness disclosures in the first place. Of course, proponents maintain that the integrity of the legal profession *requires* the appearance of moral exclusivity, and that precluding the admittance of applicants on the grounds that they would be unable to effectively discharge their duties as lawyers (whether due to mental illness or otherwise) effectively serves these ends. Whether this is actually the case will be evaluated in more detail as this paper progresses.

## Optics

The final justification which, I think, Bar Societies give for inquiries into applicants’ mental health status relates to mere optics. While most proponents would likely argue that inquiries into medical fitness *actually* serve to protect the public and to uphold the integrity of the profession, the more common (unintentional) justification is that the questions *appear* to fulfill these ends. Jon Bauer makes a similar observation in his article, noting that although the officially sanctioned rationale for medical fitness screening is public protection, it is really upholding the *image* of the profession that seems to be the foremost concern.<sup>39</sup> Likewise, Deborah Rhode explains that regardless of whether Bar Societies’ admission certification procedures *actually* decrease future lawyer misconduct by excluding certain mentally “unfit” candidates, it is the public’s *perception* that disreputable individuals are excluded that is essential in order to ensure a credible Bar.<sup>40</sup> Rhode elaborates that improving societal perceptions of the legal profession is particularly important in light of the public’s increasingly low regard for the legal profession.<sup>41</sup> It is for this reason that questions regarding applicants’ character and mental health status have become part of Bar Societies’ general “campaign” to ameliorate the reputation of the practicing Bar.<sup>42</sup>

## III. CURRENT PRACTICES

Before moving on to consider the various harms that may accrue as a result of inquiries into applicants’ medical fitness, it is first helpful to review the current questions that are asked of applicants in Nova Scotia, as well as in other jurisdictions across the country.

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38 Duke, *supra* note 27 at 105. Duke notes that, historically, the Bar’s interest in maintaining a professional public image has prompted Bar examiners to assess applicants’ abilities to practice law based on oftentimes irrelevant characteristics, including sex, sexual orientation, and religion, and immigration status.

39 Jon Bauer. “The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act” (2001) 49 UCLA L. Rev. 93, at 203.

40 Rhode, *supra* note 15 at 511. Interestingly, justifications based on optics seem to date back to at least the nineteenth century. According to G. Sharswood in “An Essay on Professional Ethics” 172 (3rd ed. Philadelphia 1869), “since our fortunes, reputations, domestic peace nay, our liberty and life itself rest in the hands of legal advocates, their character must be not only without a stain, *but without suspicion.*” [emphasis added]

41 Rhode, *supra* note 15 at 509-11.

42 Rhode, *supra* note 15 at 511. As an aside it is worth questioning if and to what extent investigating applicants’ mental health histories actually furthers this end. As will become apparent, this question is particularly important in light of the fact that some provinces have done away with mental health inquiries altogether. Based on proponents’ reasoning, does this mean that the integrity of the legal profession in those provinces will necessarily deteriorate?



## Nova Scotia

According to the *Legal Profession Act*,<sup>43</sup> it is the mandate of the Nova Scotia Barristers' Society to "establish standards for the qualifications of those seeking the privilege of membership in the Society."<sup>44</sup> Section 5(2) of the *Legal Profession Act* explains that individuals cannot be admitted to the profession unless they comply with the Regulations, and subsection 5(8)(b) gives Council the authority to draft regulations "establishing requirements to be met by members, including educational, good character and other requirements, and procedures for admitting or reinstating persons as members of the Society." Regulation 3.3.2 sets out the qualifications for membership as an articulated clerk, namely that the applicant has a law degree, that she is of good character, that she is "medically fit", and that the applicant is lawfully permitted to be employed in Canada.<sup>45</sup> Pursuant to Regulation 3.1.1, a person is "medically fit" if her "physical and mental health are suitable for being an articulated clerk or a practicing lawyer." The means by which individuals' "medical fitness" is assessed is via their responses to Part 2 of the "Application for Enrollment in Bar Admission Course and as an Articled Clerk" questionnaire.<sup>46</sup> The current inquiries, recently amended in April 2006, ask applicants to provide a "yes or no" response to the following question:

Based upon your personal history, your current circumstances or any professional opinion or advice you have received, are you currently experiencing any condition which is reasonably likely to substantially impair your ability to perform the duties of an articulated clerk?<sup>47</sup>

Providing an affirmative answer to the above-noted question is the effective catalyst for further investigation into the applicant's medical fitness. If answered affirmatively, the applicant is required to "provide a general description of the impairment" at issue along with her application.<sup>48</sup> Upon receipt of the Application, the Barristers' Society would then contact the individual and ask her to provide additional information from her treating physician, including the physician's treatment records, prognosis, and a written report.<sup>49</sup> A Credentials Committee, a group wholly comprised of lawyers, would then meet to determine, based on the appli-

43 *Legal Profession Act*, *supra* note 35.

44 *Legal Profession Act*, *supra* note 35 at 4(2)(a).

45 According to both Regulations 3.9.6 and 5.6.5, if there are any "issues" regarding an applicant's "fitness" (medical or otherwise), they may be referred to the Credentials Inquiry for further investigation.

46 Certainly, on its face the Nova Scotia Barristers' Society is not *intending* to discriminate against mental health consumers by asking medical fitness questions. According to the Questionnaire's Preamble:

The Society will endeavour to deal with issues of capacity without causing unnecessary pain and anxiety for applicants... The Barristers' Society recognizes that everyone experiences pressures in life, and we all respond to those pressures differently. You may be quite capable of practicing law competently, in spite of your past difficulties. It is the Society's goal... to determine if an applicant has an impairment which effectively disables that individual from carrying out the functions normally required of a lawyer... The fact that you may have sought professional assistance for a problem is not a bar to enrollment. In most cases, evidence of having sought professional assistance is positive evidence...

See Nova Scotia Barristers' Society, "Applicant's Questionnaire", *supra* note 35 at Preamble to Part 2. Whether the questions are discriminatory in *effect*, however, is another matter altogether. For more, see *infra* Part VII: Are Mental Fitness Questions Discriminatory?

47 *Ibid.* at question 4. Notably, the Questionnaire clarifies that "the Society is not concerned with issues which have been satisfactorily resolved and do not affect your present ability to practice law competently."

48 *Ibid.* at question 4.

49 Interview of Jacqueline Mullinger, Director of Admissions and Professional Development, Nova Scotia Barristers Society (8 November 2006).

cant's Application, medical records and physician's report, whether she is "fit" to practice law, whether additional investigation is required, or whether the applicant should be admitted to the Bar conditionally (on the grounds that she continue to receive counselling, for example). Notably, there were no affirmative responses to the medical fitness questions this past year, but prior to the new medical fitness questions which were enacted in 2006, it is estimated that there were between five and ten affirmative responses on an annual basis.<sup>50</sup> There has never been an applicant to the Nova Scotia Bar who has been denied admission on the basis of her responses to medical fitness inquiries,<sup>51</sup> a fact which only seems to underscore the futility of the questions.

## A Cross-Canadian Perspective

Although the procedure for admission is practically the same across all of the provinces and territories, the medical fitness questions themselves vary across jurisdictions in regards to both subject matter and temporal scope. Because many of the arguments regarding the propriety of medical fitness questions depend upon the breadth of the inquiries, it is helpful to get a sense of the nature of the questions which are currently asked of aspiring Canadian lawyers.

Across the country, the inquiries which are made of applicants in the Yukon and Prince Edward Island cast the widest nets insofar as they are limited neither in terms of duration nor in terms of breadth: the questions are broad enough so as to capture every medically recognized mental disability that an applicant may have experienced. The Law Society of the Yukon asks:

Have you ever been under treatment for any mental illness, or have you been or are you under treatment for alcoholism or the use of drugs? If answered in the affirmative, give full details.<sup>52</sup>

Although the Law Society of Prince Edward Island only asks applicants one "medical fitness" question, the breadth of the inquiry is equally staggering. It asks: "Have you ever received regular treatment for psychiatric problems?"<sup>53</sup> Notably, the Law Society of British Columbia's medical fitness questions are not much better, and are only nominally more pointed than those in Prince Edward Island and the Yukon insofar as British Columbia's questions target certain mental disorders:

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50 *Ibid.* Notably, the questions which were in effect prior to May 2006 were far broader in scope. A yes or no response was required to the following questions:

Have you at any time been diagnosed or treated for schizophrenia, a psychotic disorder, a mood disorder described as a major depressive disorder, or a bipolar disorder? Were you ever involuntarily admitted to a psychiatric facility for mental health reasons? Is there, to your knowledge or belief, any medical, psychological, or psychiatric matters condition not disclosed in your replies to the preceding questions that touches or may concern your fitness to practice law?

Upon an affirmative response to any of the above-noted questions, an applicant would be required to "give full details" and "attach relevant documents" to the application. See: Nova Scotia Barristers' Society, "Applicant's Questionnaire – Part 2: Old Form" (last updated December 2004, relevant to May 31, 2005) at questions 6-8.

51 Medical Fitness Task Force, *supra* note 35 at 6. Notably, one applicant was, however, required to provide regular medical reports to the NSBS regarding the psychiatric for which the applicant was receiving treatment. No applicant has ever been required to provide continued disclosures *after* being called to the Bar.

52 Law Society of Yukon, "Form 6: Admission Application, Questionnaire & Undertaking Student-at-Law" at question 18 (undated).

53 Law Society of Prince Edward Island, online: <http://www.lspei.pe.ca/>.

Do you now have or have you ever had a dependency on alcohol or a drug? If “yes”, are you now under treatment or counselling, or have you ever received treatment or counselling for that dependency? Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder or manic depressive illness?<sup>54</sup>

It is noteworthy that the above-noted mental disability-related questions fall into the category of broadly worded medical fitness questions, a category which will be considered in more depth in the following section.

Although it is debatable whether they are any more appropriate, some provinces ask more narrow and pointed medical fitness questions of their applicants in lieu of the broadly worded questions discussed above. The Law Society of Alberta's questions, for example, are similar to those in Nova Scotia insofar as applicants have some degree of discretion in regards to whether a disclosure is necessary. In Alberta, a “yes or no” answer is required to the following, accompanied by “full particulars” in the event of an affirmative response:

There are events, circumstances or conditions... that are potentially relevant to my competence to practice law... including, without limitation, circumstances relating to mental or physical disability or substance abuse.<sup>55</sup>

Alberta's and Nova Scotia's questions are regarded as being narrow in approach because they are predominantly concerned with *current* impairments (as opposed to past and or present impairments), and only require disclosure of disabilities that would affect one's ability to practice law (as opposed to the disclosure of *any* disability that a person may have). The Law Society of Manitoba's approach is similar. Although it does not inquire about mental health status directly, there is certainly an implied reference to mental disability by referring to “any condition”:

Have you ever suffered from or been treated for, or are currently being treated for, any condition which may compromise your ability to practice safely and effectively? [If yes], full details of your history must be provided on a separate sheet attached to your application... Is there to you knowledge or belief any event, circumstance, condition or matter not disclosed in your replies... that touches on or may concern your conduct, character and reputation...?<sup>56</sup>

Neither the Law Society of Saskatchewan nor the Law Society of Upper Canada make any medical fitness inquiries of prospective lawyers.<sup>57</sup>

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54 Law Society of British Columbia, “Application: Law Society Admission Program Enrollment” at Part E: Medical Fitness at questions 1-3 (last updated July 2005). In the event of an affirmative answer, applicants are then required to “provide full particulars on a separate sheet.”

55 Law Society of Alberta, “Form 2-1: Application for Admission as a Student-at-Law” at question 23(b) (last updated July 2004).

56 Law Society of Manitoba, “Application for Admission to the Manitoba CPLED Program and as an Articling Student” at questions 14 and 20 (last updated March 2004).

57 Law Society of Saskatchewan, “Form A-1: Application for Admission as Student-At-Law (Rule 150)” (last updated June 2004); and Law Society of Upper Canada, “Articling: Articles of Clerkship” (last updated June 2006). Notably, there were no Application forms available for review in either Newfoundland, New Brunswick or Quebec.

## The American Approach

Although the intent of this paper is to evaluate the legitimacy of medical fitness questions in the Canadian context, it is helpful to evaluate their status in the United States because, since the enactment of the *Americans with Disabilities Act*,<sup>58</sup> there has been a swell of jurisprudence and academic literature focusing on the propriety of mental illness inquiries.<sup>59</sup>

For background purposes, it is noteworthy that the *ADA* was enacted in order to provide a “clear and comprehensive national mandate” for the “elimination of discrimination against persons with disabilities.”<sup>60</sup> One of the more specific aims of the *ADA* is to prohibit the “limit[ing] or exclud[ing] [of] those with disabilities from employment and other opportunities,”<sup>61</sup> where “disability” either relates to an *actual* diagnosed impairment,<sup>62</sup> to a *record* of impairment,<sup>63</sup> or to an individual who is *regarded* as having an impairment.<sup>64</sup> It is under this rubric that the *ADA* applies to applications for Bar admission: as public entities, Bar Societies may be discriminating against persons with disabilities and excluding them from employment by looking into their mental health status. As will become apparent, although the breadth of medical fitness questions in America varies from state to state (just as they vary from province to province in Canada), proponents of the *ADA* have generally condemned mental fitness inquiries for being “unnecessarily broad” and for being “of little if any value in assessing [individuals’] fitness to practice law.”<sup>65</sup>

## IV. THE PROPRIETY OF BROADLY WORDED MENTAL FITNESS QUESTIONS

Having surveyed both Bar Societies’ justifications for medical fitness disclosures and the inquiries which are currently asked of applicants across the country, it is necessary to assess the problems which have been linked to broadly worded medical fitness questionnaires. Ultimately, these concerns will have to be balanced against the interests which they aim to protect (namely the public’s interest and the interest of the profession’s reputation) in order to determine whether and to what extent it is appropriate to ask applicants to disclose their mental health status.

### Overinclusive

#### *Overinclusive Regarding Breadth*

One of the foremost concerns with broadly worded medical fitness questions is that

58 42 U.S.C. § 12132 (Supp. V 1993). [*“ADA”*]

59 Although there is no Canadian counterpart to the *ADA*, the American jurisprudence and literature is entirely relevant because the same concerns and debates apply in both jurisdictions.

60 42 U.S.C. § 12, 101(b)(1) (1994).

61 *Americans with Disabilities Act*, *supra* note 58. Also relevant is Title II of the *ADA* which prohibits discrimination by a public entity: “[N]o qualified individual with a disability, may 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.”

62 *Americans with Disabilities Act*, § 12102(2)(A).

63 *Americans with Disabilities Act*, § 12102(2)(B). An individual is said to have an *actual* impairment if she has been diagnosed with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”

64 *Americans with Disabilities Act*, *supra* note 58 at § 12102(2)(C).

65 Bauer, 97.

they are overly inclusive insofar as they look into every “mental illness”<sup>66</sup> or “psychiatric problem”<sup>67</sup> that an applicant may have experienced, an inquiry which has the potential to uncover treatment or diagnoses that have “nothing [whatsoever] to do with...[an applicant’s] fitness to practice law.”<sup>68</sup> For example, an applicant may have undergone mental health treatment for bereavement or family relationship issues, topics which are irrelevant to legal practice but which would nevertheless call for disclosure under broadly worded medical fitness questionnaires.<sup>69</sup>

Another reason medical fitness inquiries are said to be overly inclusive is because they require over-disclosure.<sup>70</sup> Recall that an affirmative response to medical fitness questions immediately requires applicants to “provide full details”<sup>71</sup> or to “give full particulars”<sup>72</sup> of their condition. In light of the fact that the questions are broad enough so as to capture mental health issues which are entirely irrelevant to legal practice, surely it can be conceded that the *details* of these issues are also irrelevant? The same can be said for the supplementary information which is invariably requested of applicants’ treating physicians. It is quite plausible that an applicant’s mental health issue has no bearing on her fitness to practice law, and yet comprehensive medical documentation is required nevertheless.<sup>73</sup>

### *Overinclusive Regarding Time*

Just as the medical fitness questions asked by some Bar Societies are overinclusive in regards to breadth insofar as they target diagnosable mental disabilities regardless of their relevance to legal practice, broadly-framed medical fitness questions may also be overinclusive in regards to temporal scope because they target more than individuals’ current mental impairments. By framing the questions in terms of “have you ever...,”<sup>74</sup> the questions go beyond their purported goal of identifying *current* mental illness which could impact upon applicants’ fitness to practice law and, instead, extend to any mental disability an individual may have experienced in her (distant) past. This is problematic not only because it unduly burdens applicants by compelling them to divulge potentially traumatic, personal and sensitive information, but also because the additional disclosures are merely gratuitous. As explained by Edson, there is no evidence to suggest that past mental health problems are in any way a valid predictor of future conduct.<sup>75</sup>

66 Law Society of Yukon, “Admission Application”, *supra* note 52 at question 18.

67 Law Society of Prince Edward Island, *supra* note 53.

68 Duke, *supra* note 27 at 106. As will become increasingly apparent, the existence of a mental illness is not an accurate indicator of an individual’s skills or abilities. See Edson, at 885.

69 Memorandum of the United States as Amicus Curiae at 4, *Medical Society v. Jacobs*, No. CIV.A.93-3670, 1993 WL 413016 (D.N.J. Oct. 5, 1993).

70 Jocelyn Downie. “Law Societies as Arbiters of Mental Fitness” (2001) 24.4 *Advocates’ Q.* 467 at 472.

71 Law Society of Yukon, “Admission Application”, *supra* note 52 at question 18.

72 Law Society of Alberta, “Application for Admission”, *supra* note 55 at question 23(b).

73 In her paper, Jocelyn Downie uses an example of an applicant who underwent successful psychiatric treatment following a sexual assault at a young age. Downie notes that even though her mental health history would in no way affect her current ability to practice, the applicant would not only be obliged to disclose her past impairments, but would also be required to consent to the release of her entire medical history. See Downie, *supra* note 70 at 472. Note that Downie uses this example in reference to the broadly-worded medical fitness questions formerly asked of applicants by the Nova Scotia Bar. However, this example would likewise apply to the questions currently asked of applicants in British Columbia, Prince Edward Island and the Yukon.

74 Law Society of Yukon, “Admission Application”, *supra* note 52 at question 18; Law Society of Prince Edward Island, *supra* note 53; Law Society of British Columbia, “Application”, *supra* note 54 at questions 1-3.

75 See Edson, *supra* note 1, at 885.

## Counterproductive

### *Chilling Effect*

Perhaps the most unsettling effect of medical fitness inquiries is that they discourage prospective Bar applicants from seeking needed psychiatric counselling: applicants fear that undergoing mental health treatment could make them “a target of future inquiry” and could irreparably damage their application record.<sup>76</sup> Law students’ rationale, regardless of its reasonableness, is incredibly distressing, particularly since law students experience higher levels of stress and more resulting mental health problems than students in any other discipline; in other words, as a group, law students actually have the *greatest* need for professional psychiatric counselling, despite that they are the *least* likely group to seek it.<sup>77</sup>

There is a wealth of recent evidence which supports the argument that disability questions deter Bar applicants from seeking necessary mental health treatment.<sup>78</sup> Perhaps the most telling evidence is based on a nation-wide study of law students in the United States regarding whether they would seek mental health assistance if they believed they had a substance abuse problem. While ten percent of students answered that they would seek necessary treatment with an unqualified yes, forty-one percent said they would only seek treatment “if they were assured that Bar officials would not have access to the information”<sup>79</sup>. Effectively, then, the prevalence of medical fitness inquiries seems to prompt law students to consider potential barriers in their professional futures before seeking much needed treatment for prevailing (and oftentimes debilitating) “mental or emotional difficulties.”<sup>80</sup> Although this is clearly problematic from the standpoint of the students who need treatment, it should also be a concern from Bar Societies’ perspectives: postponing mental health treatment has the potential to lead to more injurious mental health issues, issues which could begin to bear upon lawyers’ fitness to practice law if they are not treated promptly and efficiently.<sup>81</sup>

### *Discourages Forthright Disclosures in Treatment*

A related yet separate concern is that if law students with mental health problems decide to seek needed psychological counseling, they may not be entirely forthright with their counsellor knowing that they may be required to disclose the details of

76 Duke, *supra* note 27 at 110.

77 McPherson Hughes, *supra* note 34 at 189. Recall that the rates of depression, alcoholism, and substance abuse are higher among law students and legal professionals than other members of the general population, largely as a result of lawyers’ elevated stress levels.

78 See Averitt, *supra* note 12 at 104; McPherson Hughes, *supra* note 34 at 189; Bauer, *supra* note 39 at 150; Duke, *supra* note 27 at 116; Herr, *supra* note 28 at 644; and Wielobob, *supra* note 27.

79 Bauer, *supra* note 39 at 151, citing “Report of the AALS Special Committee on Problems of Substance Abuse in Law Schools” (1994) 44 J. Legal Educ. 35 at 55. See also McPherson Hughes, *supra* note 34 at 189 [emphasis added].

80 McPherson Hughes, *supra* note 34 at 189.

81 Averitt, *supra* note 12 at 104-5. Interestingly, in *In re Frickey*, 515 N.W.2d 741 (Minn. 1994), the Bar Society of Minnesota was forced to eliminate all medical fitness inquiries from their Applicants’ Questionnaire based on the finding that mental health questions served to deter law school students from acquiring necessary treatment. Also noteworthy is the case of Vincent Foster, an Arkansas lawyer who did work for the federal government. Foster knew he required mental health treatment and abstained for fear that it would “jeopardize his White House security clearance.” Foster eventually reached a breaking point and committed suicide. Partially as a result of his case, the American federal government no longer requires mental fitness disclosures of its employees. See Herr, *supra* note 28 at 644.

their treatment to the Bar Society at a later date.<sup>82</sup> The obvious result here is that patients' disinclination to report all of their issues and concerns may compromise the integrity of the treatment process. In addition, patients' "lack of candour" may result in other unfavourable consequences, including but not limited to inaccurate diagnoses and sub-standard treatment.<sup>83</sup>

It is noteworthy that just as patients may withhold relevant information from their therapists during the treatment process, therapists may also avoid discussing certain subjects with their patients: therapists may avoid discussing certain issues knowing that their patients, to whom they owe a "protective obligation", may be required to make medical fitness disclosures and may be "punished" by Bar Societies for any controversial revelations that are made during therapy.<sup>84</sup> As an aside, it is interesting that requiring therapists to comply with Bar Societies' requests for information regarding applicants' medical fitness effectively forces medical treatment providers to choose between two equally unappealing alternatives: first, the therapist could disclose the content of a patient's treatment without consent, a choice which may not be in the patient's best interests and which, arguably, violates both the principle of doctor-patient confidentiality and the treatment provider's professional ethics; or second, the therapist could refuse to disclose the patient's treatment records, a decision which, again, may not be in the patient's best interests insofar as it could either "delay or defeat the patient's application to the Bar."<sup>85</sup>

Before moving on to consider the remaining concerns regarding medical fitness inquiries, it would be remiss not to point out the profound irony that stems from the requirement for applicants to disclose their mental health status. Whereas medical fitness questions are (purportedly) in place in order to protect the public from "unfit" applicants who have serious mental health impairments, the chilling effect of the questions is entirely counterproductive to this purpose: because applicants do not want to tarnish their record by responding affirmatively to mental health inquiries, they are prompted to either avoid necessary counselling or to act evasively during their treatment sessions, the end result being the admittance to the Bar of some applicants who have unresolved mental health issues, who may be ill-prepared to survive the pressures of legal practice, and who may (arguably) be more apt to pose a "danger to clients."<sup>86</sup> In other words, medical fitness inquiries serve to deter treatment that would otherwise enable applicants to be stronger, healthier, more successful, and generally "fit" lawyers.

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82 Bauer, *supra* note 39 at 151.

83 Duke, *supra* note 27 at 110. See also Wielobob, *supra* note 27.

84 Edson, *supra* note 1 at 894. Similarly, potential disclosures could discourage some health professionals from keeping detailed records and chart notes. See *R. v. Carosella*, [1997] 1 S.C.R. 80.

85 Edson, *supra* note 1 at 894-5. See also Grainne Neilson. "CPA Position Paper: The 1996 CMA Code of Ethics Annotated for Psychiatrists" 47:6 *The Canadian Journal of Psychiatry* at 6, citing s.24 of the CMA regarding confidentiality:

Upon a patient's request, [a psychiatrist must] provide the patient or a third party with a copy of his or her medical record, *unless there is a compelling reason to believe that information contained in the record will result in substantial harm to the patient or others.*

Arguably, being judged based on one's mental disability and accompanying medical records and, consequently, being precluded from entering your profession of choice is harmful to the extent that the disclosures should not be required.

86 Bauer, *supra* note 39 at 150.

## Questionable Predictive Power

### *Statistically Irrelevant*

Another major concern regarding the requirement to be medically “fit” in order to be called to the Bar is that there is no evidence linking the presence (or absence) of mental health impairments to individuals’ professional skills or abilities.<sup>87</sup> This is consistent with the American Psychiatric Association’s position that “psychiatric history is not an accurate predictor of fitness to practice law,”<sup>88</sup> as well as with Hilary Duke’s assertion that “questions about past mental health are not an effective indicator of future conduct.”<sup>89</sup> In her paper, Gail Edson takes this argument one step further by explaining that just as a history of psychiatric treatment is incapable of identifying an “unfit” applicant, likewise the *absence* of mental health treatment is incapable of identifying a “fit” one.<sup>90</sup> Accordingly, in spite of Bar Societies’ laudable goal of protecting the public by only admitting competent lawyers into the profession, it is improbable that their objective will be served by inquiring into applicants’ mental health status: medical fitness inquiries are wholly incapable of eliciting meaningful information regarding applicants’ competence and “fitness.”<sup>91</sup> In fact, data shows that there is a higher incidence of disciplinary problems among lawyers with *no* history of mental disability than among lawyers who experienced mental health problems in the past.<sup>92</sup> In the vast majority of cases, then, even (improperly) assuming a positive correlation between mental health and professional competence, it is unlikely that screening procedures for medical “fitness” would be able to identify applicants who would be prone to future professional problems.<sup>93</sup>

### *Not all Applicants will Report*

Medical fitness inquiries are not only lacking in predictive power because of the disconnect between mental health history and professional competence, but also because it is unlikely that all applicants who have medical “fitness” issues will report them. Stanley Herr suggests that very few candidates will answer mental health questions affirmatively, even if they ought to.<sup>94</sup> This is likely because applicants fear that a positive response would bar them from practice. The fact that the questionnaires rely on self-reporting makes it relatively easy for applicants to conceal information that they believe would reflect negatively upon their ability to practice law.<sup>95</sup> Further, it is conceivable that not all applicants with mental disabilities realize they have a problem and, consequently, would not report their so-called

87 Edson, *supra* note 1 at 885. Notably, there is an abundance of evidence refuting the assumption that mental health history is somehow correlative with professional character and competence. To believe otherwise would be to buy into “an outdated myth”. See Coleman & Shellow, *supra* note 7 at 147.

88 McPherson Hughes, *supra* note 34 at 194. See also Duke, *supra* note 27 at 109.

89 Duke, *supra* note 27 at 105. Bauer makes a similar point in his paper, noting that “there is no empirical evidence demonstrating that lawyers who have had psychiatric treatment have a greater incidence of subsequent disciplinary action.” See Bauer, *supra* note 39 at 140.

90 Edson, *supra* note 1 at 885.

91 Coleman & Shellow, *supra* note 7 at 147.

92 McPherson Hughes, *supra* note 34 at 194.

93 McPherson Hughes, *supra* note 34 at 194.

94 Herr, *supra* note 28 at 642.

95 It should be noted that the relative ease with which applicants are able to conceal mental health issues should in no way intimate that doing so would be without consequences. If no disclosures are made and the applicant’s problems are subsequently identified, she would be sent to the Society’s discipline process for having breached her professional ethics.



“fitness” issue. Accordingly, it is doubtful that the questionnaires would procure entirely useful information: applicants with serious mental impairments may be inclined to conceal them for fear that disclosure would preclude them from practice, and applicants who are in denial of their problems would not respond affirmatively either, not realizing that they have a fitness issue to report.

## Unreasonable Invasion of Privacy

The final major concern with broadly worded medical fitness inquiries is that they unreasonably intrude upon applicants’ privacy interests, not only by compelling applicants to make disclosures regarding their mental health status but also by requiring applicants to release their (private) medical treatment information. According to the Supreme Court of Canada in *R. v. Mills*,<sup>96</sup> the therapeutic relationship is largely characterized by trust, an element of which is confidentiality. Confidentiality, then, is also a fundamental component of the doctor-patient relationship, a relationship where there is a high expectation of privacy and where the disclosure of medical records could not only intrude upon patients’ privacy interests but could also prejudice patients’ dignity and personal security.<sup>97</sup>

Bar examiners submit that it is appropriate to require applicants to disclose their medical records in spite of their privacy interests because the disclosures are necessary in order to identify lawyers who are unfit to practice and to promote the public’s greater interests.<sup>98</sup> Proponents also suggest that applicants’ privacy rights must be considered and evaluated in the contexts in which they arise. They say that since individuals do not have a constitutional right to be admitted to the Bar insofar as the practice of law is a privilege, applicants’ privacy rights are diminished because they voluntarily submit to medical fitness screening.<sup>99</sup> However, in considering the overall context and in balancing patients’ rights to privacy with the public’s interest in having the documents disclosed, shouldn’t the *efficacy* of the mental fitness questions also be considered? Assumedly, the fact that mental health history has little (if any) bearing on professional competence and the fact that few (if any)<sup>100</sup> applicants are ever denied admission based on medical un-fitness are also relevant considerations. Accordingly, it must be conceded that the balance tips in applicants’ favour: even if applicants’ privacy rights *are* diminished because of their voluntary compliance with Bar Societies’ screening procedures, their residual privacy rights are surely enough to protect them from intrusions which have no relevance to their ability to practice law. If Bar examiners are going to intrude on applicants’ privacy rights, perhaps they should limit their intrusions to inquiries which, at the very least, have some bearing upon applicant’s actual fitness to enter into the profession.

As a final point, it is interesting that Bar Societies insist that they are not actually

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96 [1999] 3 S.C.R. 668.

97 *R. v. Dymnt* [1988] 2 S.C.R. 417. Note that the requirement for physicians to safeguard their patients’ confidentiality is also outlined in the Hippocratic Oath which reads: “Whatsoever things I see or hear concerning the life of man, in any attendance on the sick or even apart therefrom, which ought not to be voiced about, I will keep silent thereon...” See “Oath of Hippocrates” (visited 22 November 2006), online: W. H. Kellogg Health Sciences Library <http://www.library.dal.ca/kellogg/Bioethics/codes/hippocraticoath.htm>.

98 Herr, *supra* note 28 at 639.

99 McPherson Hughes, *supra* note 34 193.

100 Recall that there have never been any applicants who have been denied admission in Nova Scotia based on their mental health status. See *supra* Part III: Current Practices - Nova Scotia.

impinging upon applicants' privacy rights by requesting access to applicants' mental health information because the records are only disclosed with applicants' consent.<sup>101</sup> As noted by Rhode, however, Bar Societies' position in regards to mental health disclosures is entirely at odds with lawyers' typical stance on confidentiality, a fact which one would be remiss not to consider in more depth. In her paper, Rhode explains that whenever solicitor-client privilege is at issue, lawyers are quick to insist that compelled disclosures are *inappropriate* because they have the effect of chilling the kind of forthright exchanges that are necessary in order to afford clients the best and most informed assistance.<sup>102</sup> This is noteworthy because, by contrast, Bar Societies apparently think it is reasonable to require patients seeking psychological counselling to waive privilege over their mental health histories, a demand which could likewise serve to chill the kind of frank and candid dialogue that is so essential to a successful patient-psychologist relationship.<sup>103</sup> It is surprising that Bar Societies are not more sympathetic to patients' privacy rights in this regard, particularly in light of the centrality of confidentiality within the legal profession. It seems wrong and, frankly, audacious for Law Societies to expect mental health professionals to reveal patient confidences when, if the tables were reversed, they would certainly not comply with the same demands.

## V. NARROWLY WORDED MENTAL FITNESS QUESTIONS: A PREFERABLE ALTERNATIVE?

In light of the above-noted problems inherent in broadly worded medical fitness questions and in light of theorists' almost unanimous disapproval of broadly worded mental health inquiries,<sup>104</sup> the issue remains whether more narrowly framed questions would afford Bar Societies a reasonable alternative or whether they, too, are problematic. Before considering the efficacy of narrowly construed questions regarding applicants' "fitness", recall that there are two defining characteristics of narrowly framed inquiries: first, they are typically constricted in terms of temporal scope insofar as they tend to focus on *current* impairments; and second, the questions tend to be limited regarding the extent of information they hope to elicit.<sup>105</sup>

Some theorists have suggested that narrowly framed mental fitness questions are not only an appropriate alternative to more broadly worded questions, but are also desirable because they fulfill Bar Societies' mandate to protect the public without unduly impinging upon the privacy rights of qualified applicants.<sup>106</sup> Although it may be conceded that the questions would certainly elicit responses from fewer

101 Disclosure is, indeed, permitted providing that the patient provides a waiver. As explained in *Frenette v. Metropolitan Life Insurance Co.*, (1992) 89 D.L.R. (4th) 653 (S.C.C.) at 665, "health care establishments are allowed to impart communications of the contents of their records to parties with the express or implied consent of the beneficiary of the services...When such consent has been given, the duty to keep the records of their beneficiary confidential no longer remains."

102 Rhode, *supra* note 15 at 582-3.

103 Rhode, *supra* note 15 at 582-3.

104 Herr, *supra* note 28 at 640.

105 The Bar Society of Hawaii, for example, asks applicants, "Do you know of any factors that would impair your ability to competently practice law or to carry out your ethical responsibilities to clients or an as officer of the court?" See Herr, *supra* note 28 at 651. Hawaii's questions are only concerned with current mental impairments, and only seek disclosure of mental impairments which bear upon applicants' competence to practice. This is to be contrasted with broadly worded questions which cast a wide enough net so as to capture *any* mental health problem an individual may have experienced.

106 Herr, *supra* note 28 at 651.

applicants,<sup>107</sup> most of the concerns regarding more broadly framed questions still apply. Regardless of how narrowly the questions are framed, their presence on Bar application forms may still have a chilling effect on law students who need mental health treatment yet who do not want to blemish their application record.<sup>108</sup>

Similarly, the existence of the questions would still have the potential to discourage patients from making candid and forthright disclosures to their treatment counselors for fear that their records will be accessed in the future.<sup>109</sup> Further, regardless of the scope of the questions, affirmative responses to inquiries would still be of dubious predictive power insofar as there is no positive correlation between mental illness and professional competence.<sup>110</sup> Moreover, the questions would continue to constitute an unreasonable invasion of applicants' (albeit *fewer* applicants') privacy rights.<sup>111</sup> In addition to these issues, some commentators have recognized an *additional* problem with narrowly framed mental health questions, namely that of underinclusiveness.

It has been suggested that if mental health-related questions were to be narrowed, then the remaining questions may be underinclusive insofar as they "may not adequately screen out applicants [who] pose a threat to the public."<sup>112</sup> For example, many narrowly framed questions fail to ask about certain *physical* disabilities that could theoretically impact upon applicants' fitness to practice.<sup>113</sup> Addison's disease, narcolepsy, and epilepsy are all physical impairments which could, in certain instances, render an individual "unfit" to practice law.<sup>114</sup> Accordingly, the underinclusiveness of the questions could go against Bar Societies' mandate to protect the public; it is conceivable that not all "unfit" individuals would be identified, thereby misleading the public into thinking that none of the applicants who are called to the Bar possess any mental or physical impairments which could preclude them from practicing effectively.<sup>115</sup> Notably, however, not *all* narrowly framed questions will necessarily have this problem. Nova Scotia's questions, for example, may be broad enough so as to capture debilitating physical disabilities insofar as they ask about "*any* condition" which may render an applicant unfit to practice law.<sup>116</sup> Although a valid concern, then, not all narrowly-framed medical fitness questions are underinclusive insofar as they may fail to capture potentially harmful (physical) impairments.<sup>117</sup>

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107 Duke, *supra* note 27 at 120-21.

108 See Averitt, *supra* note 12 at 104; McPherson Hughes, *supra* note 34 at 189; Bauer, *supra* note 39 at 150; Duke, *supra* note 27 at 116; Herr, *supra* note 28, at 644; and Wielobob, *supra* note 27.

109 Bauer, *supra* note 39 at 151.

110 See Edson, *supra* note 1 at 885; Coleman & Shellow, *supra* note 7 at 147; McPherson Hughes, *supra* note 34 at 194; Duke, *supra* note 27 at 109; and Edson, *supra* note 1 at 885.

111 Rhode, *supra* note 15 at 582-3.

112 Duke, *supra* note 27 at 102.

113 Herr, *supra* note 28 at 642.

114 Downie, *supra* note 70 at 471.

115 Duke, *supra* note 27 at 102.

116 Nova Scotia Barristers' Society, "Applicant's Questionnaire", *supra* note 35 at question 4. [emphasis added]

117 Note that although the questions themselves may be broad enough to encompass physical impairments, it is questionable whether any impairments (physical or otherwise) would actually be disclosed. Recall that narrowly tailored questions tend to leave disclosure up to the discretion of the applicant (for example, in Nova Scotia applicants are only required to disclose conditions which they believe are "reasonably likely" to impair their fitness). Accordingly, even if the questions are broad enough to encapsulate a wide range of impairments, the applicant may unilaterally decide *not* to reveal her disability because she does not deem it to be relevant. Granted that I do not think that applicants should have to disclose their mental health status in the first place, I nevertheless

Although narrowly tailored medical fitness questions may succeed in requiring disclosure of physical impairments that could render an applicant unfit to practice law, Stanley Herr explains that the questions may still be underinclusive in regard to the public's protection. Herr suggests that if Bar Societies' actual goal was to protect the public, then surely mental fitness inquiries would also be directed towards practitioners in order to identify any post-admission mental health concerns.<sup>118</sup> Certainly, I am in no way suggesting that practicing lawyers should be required to respond to mental health inquiries on an habitual basis. It is merely worth noting that if Bar Societies truly believe that mental health impairments warrant investigation, then their decision to *only* focus their inquiries on applicants is underinclusive, particularly since practicing lawyers are more likely to experience mental health issues than applicants, issues which could, in turn, pose risks to the public.<sup>119</sup>

## VI. PROBLEMS WITH MENTAL FITNESS QUESTIONS GENERALLY

After having considered the problems inherent in both broadly worded and narrowly framed medical fitness assessments, it is necessary to consider the *general* implications of requiring Bar applicants to disclose their mental health history.

### Perpetuates Stigma

Probably the foremost social concern associated with medical fitness disclosures is that they liken mental disabilities to (im)moral character, thereby perpetuating the stigma associated with mental illness.<sup>120</sup> This is consistent with a report prepared by the Public Health Agency of Canada which indicates that the stigma associated with mental disabilities is "among the most tragic realities facing people with mental illness in Canada."<sup>121</sup> According to Bauer, this stigma is only intensified by placing medical fitness inquiries "amidst a sea of questions that are overwhelmingly focused on uncovering evidence of dishonesty, irresponsibility, or bad behaviour."<sup>122</sup>

Averitt makes a similar point, explaining that by requiring applicants to disclose their mental health status, Bar Societies are effectively intimating that psychological

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find this problematic. If narrowly tailored questions enable applicants to avoid providing affirmative responses altogether, then what is the point of the inquiries? If no affirmative responses are provided then obviously *nothing* is gained from the questions, forcing one to consider why they are even necessary. As has already become apparent, the existence of mental health inquiries comes at a grave expense to applicants, an expense which surely isn't worth it if no relevant (or any!) information is to be gleaned from them.

118 Herr, *supra* note 28 at 642.

119 McPherson Hughes, *supra* note 34 at 194. See also *In re Questionnaire for Admission to the Rhode Island Bar*, 683 A.2d 1333 (R.I. 1996) where the Court endorsed findings that there is "no empirical evidence" to suggest that lawyers who have a history of mental illness are more prone to disciplinary action than other lawyers.

120 According to Averitt, "a social stigma is the use of a negative label to identify a person with a mental illness." See Averitt, *supra* note 12 at 105. The Public Health Agency of Canada's "Report on Mental Illnesses in Canada" explains that stigma has existed throughout history, and tends to arise from "superstition, lack of knowledge and empathy, old belief systems, and a tendency to fear and exclude people who are perceived as different." See Public Health Agency of Canada, "A Report on Mental Illnesses in Canada", *supra* note 3. The social stigma associated with mental illness is incontrovertible and was recognized by the Supreme Court of Canada in *R. v. Swain*, (1991) 5 C.R. (4th) 253, [1991] 1 S.C.R. 933.

121 Public Health Agency of Canada, "A Report on Mental Illnesses in Canada", *supra* note 3.

122 Bauer, *supra* note 39 at 195-6. Note that on Bar applications, mental health inquiries are typically found among questions dealing with moral character, questions that would attempt to ascertain, for example, whether the applicant has a criminal record or whether she has ever been expelled from an educational institution.

symptoms pose a threat to the profession, an assumption which clearly lacks empirical foundations because it assumes that people with mental health problems are less competent and less capable than those without them.<sup>123</sup> On this basis, then, Bar Societies' inquiries into applicants' mental health status not only reflects "outdated" biases against persons with mental health impairments, but the so-called necessity of the questionnaires also "propel[s] social stigmas about the dangerousness and overall inferiority of people suffering from a mental disorder," and leads to a generalized mistrust of persons with mental illnesses, a mistrust based on nothing more than fear and outmoded morality.<sup>124</sup>

## Differential Treatment

### *Only Asked Upon Admission*

Another general problem associated with medical fitness disclosures for Bar applicants is one that was hinted at previously, namely that practicing lawyers are immune from mental fitness assessments. Again, it is worth reiterating that I am in no way endorsing medical fitness disclosures among either Bar applicants or practicing lawyers; it is merely worth noting this blatant inconsistency.

The problem with focusing exclusively on the mental health status of Bar applicants is that Bar applicants are *not*, in fact, the group who is most in need of monitoring. As very aptly noted by Coleman & Shellow, "even if there were some causal relation between mental illness and competence to practice... current questions target the wrong people for heightened scrutiny."<sup>125</sup> For the most part, mental health impairments do not begin to manifest themselves among members of the Bar until *after* they have been practicing for some time.<sup>126</sup> One would think, then, that medical fitness inquiries would also be made of practicing lawyers, particularly since the inquires would be more relevant from a temporal perspective. One would be mistaken. Only *prospective* lawyers are targeted within the current system, ostensibly because, unlike Bar applicants, practicing lawyers have an ethical and professional obligation to self-report if they believe their capacity to practice becomes an issue.<sup>127</sup> Despite lawyers' duties to self-report, however, the question remains why this necessitates delving into the mental health status of the prospective lawyers, lawyers who are least likely to have any problems? This query is especially pertinent given that there is no causal link between mental fitness and professional competence, that practicing lawyers are more likely to pose a problem, and that so few Bar applicants actually report that the efficacy of the questions is dubious at best. Taken together,

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123 Averitt, *supra* note 12 at 105. See also Wielobob, *supra* note 27 and Rhode, *supra* note 15 at 583. Notably, it is rather ironic that Bar Societies tend to view psychological problems as a "threat" to the profession because, as explained by Daicoff, psychological symptoms are *not* necessarily "maladaptive or dysfunctional". In fact, some psychiatric symptomology may be a *benefit* to the profession. See Susan Swain Daicoff, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses* (Washington D.C.: American Psychological Association, 2004).

124 Averitt, *supra* note 12 at 104-5.

125 Coleman & Shellow, *supra* note 7 at 147.

126 Duke, *supra* note 27 at 121.

127 Interview of Jacqueline Mullinger, *supra* note 49. See also provincial Legal Handbooks regarding the competence and duties of lawyers. A possible rejoinder to Bar Societies' argument that applicants must disclose their mental health status because, unlike practicing lawyers, they do not yet have a professional duty to report is the suggestion that Bar Societies simply wait until *after* the applicants are admitted to the Bar; immediately upon admission, newly-called lawyers would have a duty to self-report if their capacity to practice is an issue, thereby avoiding any purported risks to clients.

these facts “underscore the perversity of current procedures.”<sup>128</sup>

### *Why only Law?*

It is interesting to note that within the licensing processes of professional bodies in Canada, mental fitness inquiries *only* appear to be asked among prospective lawyers: mental health status is not an issue among aspiring dentists,<sup>129</sup> mental health inquiries are not made within the nursing field,<sup>130</sup> and although broad *physical* health questions are asked of aspiring physicians, none of the questions are specifically targeted towards identifying mental disabilities.<sup>131</sup> Likewise, in the United States, employees who hold positions involving high levels of public trust are no longer required to make disclosures regarding their mental health status. For example, in *National Federation of Federal Employees v. Greenberg*, the DC District Court struck down the mental fitness questions that appeared on a Department of Defence security clearance application, questions which were remarkably similar to the (broad) questions currently asked by Canadian Bar Societies.<sup>132</sup> The Court reasoned that in spite of the compelling state interest of national security, the inquiries nevertheless violated employees’ rights to privacy.<sup>133</sup>

In contemplating the efficacy of medical fitness questions among the legal profession, Stanley Herr reviewed the DC District Court’s decision in *Greenberg* and speculated “[i]f the government could adopt such changes in the face of security concerns about employees entrusted with the nation’s secrets of nuclear arsenals, surely Bar examiners can limit their own fishing expeditions into a candidate’s mental health status and any treatment records.”<sup>134</sup> Gail Edson does likewise in her paper, remarking that Bar Societies’ “interest in maintaining a fit Bar is not nearly as compelling as its interest in national security.”<sup>135</sup> The fact that no other professions appear to inquire into applicants’ mental health status as a prerequisite to the licensing process should, at the very least, force one to consider whether the questions are actually necessary. Certainly, it would be difficult to make a case that the questions are necessary in order to protect the public and to uphold the integrity of the legal profession when the failure of other professions to ask medical fitness questions has not come at the expense of either the public’s protection or the profession’s integrity.

## **Inconsistent Outcomes**

### *Subjective Assessments*

A further problem with medical fitness assessments is that they are largely subjective, leaving open a great deal of room for inconsistency and subjective outcomes. Decisions about medical fitness may not only vary from province to province (or from state to state) insofar as different jurisdictions have different “fitness” require-

128 Rhode, *supra* note 15 at 583.

129 Provincial Dental Board of Nova Scotia, “Registration & Licensing Requirements - General Dentists,” online: [www.pdns.ca/dentists/asp](http://www.pdns.ca/dentists/asp).

130 College of Registered Nurses of Nova Scotia, “Registration in Nova Scotia,” online: <http://www.crns.ca/default.asp?id=190&pagesize=1&sfid=content.id&search=1168&mn=414.70.82.229>.

131 College of Physicians & Surgeons of Nova Scotia, “Application Form”, online, [http://www.cpsns.ns.ca/Registration.defined\\_license\\_package.htm](http://www.cpsns.ns.ca/Registration.defined_license_package.htm). See Applications questions 10.9 to 10.23 for more.

132 *National Federation of Federal Employees v. Greenberg*, 789 F. Supp. 430, 434-5, 438 (D.D.C. 1992).

133 *Ibid.*

134 Herr, *supra* note 28 at 643.

135 Edson, *supra* note 1 at 876.

ments, but the decisions may also vary from within each Bar Society: although Societies may try to ensure that the members of their Credentials Committees remain the same for every decision, this is not always possible.<sup>136</sup> Moreover, since Credentials Committees are not bound by precedent in making their certification decisions, the subjective views of different Committee members may have a significant impact on the outcomes of each decision.<sup>137</sup>

In addition to the potential for fitness decisions to reflect individuals' subjective determinations across jurisdictions, fitness decisions are also subjective insofar as they are based upon subjective information. In *R. v. Mills*, the Supreme Court of Canada explained that medical records are subjective insofar as they are simply a psychologist's attempt to record the emotional and psychological state of her patient.<sup>138</sup> Typically, the patient does not review the medical records for accuracy, and the records are certainly not *verbatim* recordings, so at best they are the psychiatrist's *interpretation* of the situation based on what the patient *chooses* to reveal. Of course, there is also room for error given the potential for the concerns which patients express in therapy to be taken out of context.<sup>139</sup> Accordingly, as noted by Bauer, "vague and subjective standards provide ample scope for bias to operate in hidden ways."<sup>140</sup> This is particularly problematic in light of Bar examiners' lack of expertise in dealing with mental health impairments, a problem which will now be considered.

### *Lack of Expertise*

One of the most unsettling aspects of allowing Bar Societies to judge medical fitness is that they are entirely unqualified to do so. As explained by Weilobob, Bar examiners' assessments of applicants' mental health status "are unfair because they are frequently made by nonexpert lawyers who are not qualified to determine if an applicant's condition or history would actually impede attorney work performance."<sup>141</sup> Edson goes so far as to suggest that allowing lawyers to assess applicants' medical fitness is "analogous to giving a psychiatrist a criminal law hornbook and expecting him or her to successfully defend a client in a murder trial."<sup>142</sup> She explains that "although the hornbook may contain most of the necessary information" to make a successful defence, the psychiatrist "would still lack the requisite training, skill or experience to adequately perform the task."<sup>143</sup> The same would be true here: even if members of Bar Societies' Credentials Committees were to educate themselves regarding mental disorders which could (ostensibly) impact upon applicants' fitness to practice law, they would nevertheless lack the skill, training and experience required to make such assessments.

Permitting Bar Societies to project applicants' potential psychological instability becomes even more troublesome when it is considered that even licensed psychiatrists find this task almost impracticable.<sup>144</sup> Because mental illness does not follow

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136 Interview of Jacqueline Mullinger, *supra* note 49.

137 *Ibid.*

138 *Mills*, *supra* note 96.

139 *R. v. Oslin*, [1993] 4 S.C.R. 595.

140 Bauer, *supra* note 39 at 207.

141 Wielobob, *supra* note 27.

142 Edson, *supra* note 1 at 896.

143 Edson, *supra* note 1 at 896.

144 In assessing a particular case, it is conceivable (and sometimes even likely) that members of the psychiatric community would draw varying conclusions. Psychiatrists have been known to disagree regarding appropriate diagnosis, what forms of behaviour may impair the individual, and the likelihood that the problem would recur. See Rhode, *supra* note 15 at 559.

a typical pattern of development, because it manifests itself differently in every patient, and because its symptoms, intensity and duration vary from person to person, it has been shown that “even trained clinicians cannot accurately predict psychological incapacities based on past treatment.”<sup>145</sup> As a result, even assuming a positive correlation between mental health and professional competence, “[t]here is no precise list of questions that will reveal a person’s fitness to practice law”; after all, there is “no uniformity among people who suffer from various conditions.”<sup>146</sup> On this basis, in making their decisions Bar examiners must either be “creating their own interpretations of mental fitness”, or attempting to analyze intricate and complex interpretations of mental illness.<sup>147</sup> Either way, Edson is correct to conclude that it results in the “unlicensed practice of psychiatry by [Bar] examiners.”<sup>148</sup>

### Deterrent from Practice

Although it has already been mentioned that the existence of mental health questions could have a deterrent effect on law students in need of psychiatric counseling, the questions could also have a deterrent effect on law school graduates insofar as they may be discouraged from applying to be admitted to the Bar.<sup>149</sup> Certainly, this could be because the presence of medical fitness questions on Bar Applications intimates that Bar Societies view individuals with mental health issues as being both morally and intellectually suspect.<sup>150</sup> However, the deterrent effect could also stem from the fact that no provinces and only a few states make information available to applicants regarding the *type* of behaviour or disabilities that may generate investigation.<sup>151</sup> Few jurisdictions explain, for example, that a history of eating disorders is unlikely to preclude admittance, whereas current episodes of mania may (unreasonably) warrant further investigation. These facts, combined with the subjective nature of assessments, make the certification process highly uncertain for some individuals, and may prompt the more risk-adverse among them to avoid seeking admittance into the practice of law altogether.<sup>152</sup>

### Timing

At this point, it is interesting to make note of a concern regarding medical fitness questions which relates to timing, namely that requiring Bar applicants to submit to medical fitness screening during the licensing process comes both “too early and too late.”<sup>153</sup> Rhode explains that, in many ways, the screening is premature because it occurs “before most applicants have faced situational pressures comparable to those [which they will face] in practice”.<sup>154</sup> This is a significant observation since most mental health impairments experienced by lawyers do not begin to manifest themselves until *after* they have been practicing for some time.<sup>155</sup> Arguably, the questions come too early because they are unable to reveal a lawyer’s actual pro-

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145 Rhode, *supra* note 15 at 582.

146 Wielobob, *supra* note 27.

147 Edson, *supra* note 1 at 896.

148 Edson, *supra* note 1 at 896.

149 Rhode, *supra* note 15 at 518.

150 Wielobob, *supra* note 27.

151 Rhode, *supra* note 15 at 518.

152 Rhode, *supra* note 15 at 518.

153 Rhode, *supra* note 15 at 515.

154 Rhode, *supra* note 15 at 515 [emphasis added].

155 Duke, *supra* note 27 at 121.



pensity towards mental illness and (supposedly) towards medical “unfitness”. It has also been suggested that the screening questions come too late because by the time applicants apply to the Bar they have already invested a great deal of time and expense in their legal education. It is not surprising, then, that many Bar examiners are reluctant to deny admission and withhold certification at such a late stage.<sup>156</sup>

### Futile Exercise

The final noteworthy problem with medical fitness disclosures is that they are entirely superfluous. As previously noted, there are very few individuals who actually divulge their mental health conditions, particularly in response to narrowly-framed questionnaires. But even among those who do, despite being required to provide oftentimes extensive medical disclosures, there are very few applicants who are ever denied admission to the Bar on the basis of their mental health status.<sup>157</sup> Indeed, the reality is that the vast majority of individuals who have mental disabilities are admitted to the Bar.<sup>158</sup> If only for this reason, some commentators have questioned the effectiveness of inquiries into medical fitness:<sup>159</sup> if affirmative responses to the questionnaires are not actually used to preclude ostensibly unfit individuals from practicing law, what is the point of requiring the (invasive) disclosures? Moreover, the (few) applicants who may be denied admission are not indefinitely precluded from practice. Typically, the applicants either ask for reconsideration or move to another (less stringent) jurisdiction and seek (successful) admission there.<sup>160</sup> Finally, the fact that there is no connecting link between mental health status and professional “fitness” also militates against the efficacy of the questions insofar as the inquiries are wholly incapable of achieving their intended purposes of identifying unqualified applicants.<sup>161</sup> Interestingly, a retrospective study undertaken in Michigan affords concurring evidence that there is no “correlation between attorney misconduct and previous mental health treatment.”<sup>162</sup> The study evaluated the mental health backgrounds of all recently disciplined lawyers in the State, and indicated that in no way were individuals with a history of mental illness more likely to engage in professional misconduct than their mentally “fit” colleagues.<sup>163</sup>

## VII. ARE MENTAL FITNESS QUESTIONS DISCRIMINATORY?

As a final point of analysis, it is important to consider whether mental fitness inquiries are discriminatory under either the *Canadian Charter of Rights and Freedoms* or under provincial Human Rights legislation. In light of the fact that this paper is merely intended to survey the primary problems inherent in Bar Societies’ medical fitness questionnaires, a formal *Charter* and Human Rights analysis will not follow.

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156 Rhode, *supra* note 15 at 516. Rhode proceeds to hypothesize that Bar examiners’ reluctance to deny admission at such a late stage likely helps to account for the “low incidence of applications denied on character grounds.”

157 Rhode, *supra* note 15 at 504.

158 Herr, *supra* note 28 at 674.

159 Herr, *supra* note 28 at 674.

160 Rhode, *supra* note 15 at 517.

161 Wielobob, *supra* note 27.

162 Bauer, *supra* note 39 at 141.

163 Bauer, *supra* note 39 at 142, citing study of Carl Baer & Peg Corneille, “Character and Fitness Inquiry: From Bar Admission to Professional Discipline” (1992) B. Examiner at 5.

Nevertheless, it is noteworthy that breaches in these regards are possible (and perhaps even likely). Before undertaking an assessment of potential *Charter* and *Human Rights Act* breaches, however, it is interesting to evaluate why Bar Societies do not actually think the inquiries are discriminatory, and to assess how the prevalence of medical fitness questions may actually have a discriminatory impact on women.

### Formal Equality versus Substantive Equality

Some proponents of medical fitness inquiries suggest that the questions do not, in fact, discriminate against persons with mental disabilities because the questions are asked of *everyone* and treat all applicants alike: regardless of whether an applicant has a disability, she is required to respond to the medical fitness questions.<sup>164</sup> Despite that the questions may appear to treat all applicants equally on a formal level, however, applicants are certainly not treated equally on substantive level: only Bar applicants who answer affirmatively are investigated; only applicants who disclose a mental health problem are required to release their medical records; only applicants with a mental illness must produce a letter from their treating physician attesting to their “fitness”; only applicants who respond affirmatively are required to appear before a Credentials Committee to be interrogated about their professional competence; and only applicants with mental disorders are compelled to disclose personal psychological traumas and reveal their sensitive medical files as a condition to have their applications processed. Accordingly, substantively speaking, proponents’ argument that the inquiries treat all applicants equally is ludicrous. As explained by Coleman and Shellow, by inquiring into individuals’ mental and emotional problems, licensing boards are “invidiously discriminat[ing] against a particular group.”<sup>165</sup>

### Inordinate Discrimination Against Women

One point that does not often come to light in the context of medical fitness inquiries is that mental health screening actually has an inordinately discriminatory impact on women.<sup>166</sup> According to Stanley Herr, women are treated for and diagnosed with mental disorders far more frequently than men.<sup>167</sup> In the context of mental fitness inquiries, this suggests that women have a disproportionately high responsibility to report as compared to their male counterparts insofar as the burdens of disclosure are more likely to fall on their shoulders.<sup>168</sup> According to Bauer, the disclosures required of women could also have severely damaging psychological effects on the applicants because the mental health problems women experience are frequently “associated with traumatic events of a personal or humiliating nature, such as physical or sexual abuse, parental neglect or the loss of a loved one.”<sup>169</sup> Accordingly, when applicants are required to disclose their counselling records, exceedingly personal information

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164 Bauer, *supra* note 39 at 131.

165 Coleman & Shellow, *supra* note 7 at 157.

166 Bauer, *supra* note 39 at 160.

167 Herr, *supra* note 28 at 662-3. Notably, women do not necessarily experience higher incidence of mental illness than men, but merely are more likely to seek treatment, particularly in regards to anxiety, depression and eating disorders. Further, Herr, citing Joan Busfield in “Men, Women, and Madness: Understanding Gender and Mental Disorder” (1996), explains that “women are also twice as likely as men to receive prescriptions for psychotropic medication as “treatment”, thus finding it harder to deny the fact of mental health treatment.”

168 Bauer, *supra* note 39 at 164.

169 Bauer, *supra* note 39 at 164.

(unnecessarily) “become[s] part of the admission process”<sup>170</sup>

### Canadian Charter of Rights and Freedoms

Although this has been continually suggested throughout the course of this paper, it is important to explicitly note that the requirement for applicants to disclose their mental health status has more than a merely informative significance insofar as the Bar Societies may use the disclosures as a means to preclude certain applicants from practice. On this basis, there appears to be a *prima facie* breach of applicants' equality rights under section 15 of the *Charter*.<sup>171</sup>

In order to establish whether there has been a s.15 *Charter* breach, it is necessary to undertake the test outlined by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*.<sup>172</sup> Because the questions asked by Bar Societies draw a clear distinction between applicants who have mental disabilities and applicants who do not, the first branch of the test appears to be satisfied. The second branch also appears to be satisfied because applicants with disabilities are, indeed, subjected to differential treatment as a result of their mental health: by inquiring into applicants' disability status, Bar Societies are not only discriminating against persons with mental disabilities, but are also imposing more burdensome admission requirements on them than on other applicants by requesting supplementary medical documentation, by requiring possible interviews, and by demanding physicians' reports to attest to applicants' competence. Finally, the third branch of the *Law* test appears to be satisfied insofar as the mental health inquiries are futile and appear to be based predominantly upon outdated and closed-minded stereotypes against persons with mental disabilities. Although Bar Societies may have a legislated right to impose certain admission requirements on applicants, the requirements must be based on *actual* risks, not on mere speculation and bias.

Despite the apparent section 15 breach, it remains to be determined whether it can be saved under section 1 of the *Charter*.<sup>173</sup> Certainly, Bar Societies' purported goal of protecting the public is a pressing and substantial objective. However, it is unlikely that the breach could withstand either the rational connection or minimal impairment aspects of the section 1 analysis. As previously indicated, there is no evidence to suggest any positive correlation between individuals' mental health status and

170 Bauer, *supra* note 39 at 164.

171 *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11. Note that s.15 reads: 15.(1) Every individual is equal before and under the law and has the right of the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

172 [1999] 1 S.C.R. 497, 170 D.L.R. (4<sup>th</sup>) 1, 43 C.C.E.L. (2d) 49. There is a three-part test which must be undertaken in order to establish whether there has been a breach of s.15 of the *Charter*. According to Iacobucci J., speaking for the unanimous Court, one must ask:(1) Does the impugned law:(a) draw a formal distinction between the claimant and others on the bases of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics: If so, there is differential treatment for the purpose of s.15(1).(2) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?(3) Does the differential treatment discriminate in a substantive sense, bring into play the purpose of s.15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

173 *R. v. Oakes*, [1996] 1 S.C.R. 103.

their ability to function as competent lawyers.<sup>174</sup> Accordingly, there is no rational connection between asking mental fitness questions and protecting the public as the questions are incapable of identifying “unfit” applicants. These questions do not appear to be minimally impairing, either, in that they could be narrowed in any number of ways so as to impinge less upon applicants’ privacy rights.<sup>175</sup> Based upon the foregoing, it is unlikely that the section 15 breach could be saved under section 1.

## Human Rights Act

In addition to a potential *Charter* violation, it is likely the Bar Societies’ medical fitness inquiries would also prove to be discriminatory under provincial Human Rights legislation. According to the Nova Scotia *Human Rights Act*, “discrimination” may be defined as “a distinction, whether intentional or not, based on a characteristic, or perceived characteristic... that has the effect of imposing burdens, obligations or disadvantages... not imposed on others or which withholds or limits access to opportunities, benefits and advantages available to other[s]...”<sup>176</sup> In the context of medical fitness inquiries, it is possible to make an argument that applicants are being discriminated against based on either employment (s.5(1)(d)), membership in a professional association (s.5(1)(g)), or disability (s.5(1)(o)). In order for the medical fitness questions to stand, they would have to be justified by one of the saving provisions outlined in section 6 of the *Act*.<sup>177</sup> In large part, a successful defence would require the Bar Society to show that the mental fitness inquiries are necessary to fulfill the Society’s mandate both of determining applicants’ fitness to practice and protecting the public.<sup>178</sup> As has already been illustrated, it is unlikely that the Society would be able to prove either of these facts, suggesting that the inquiries would, indeed, lead to a breach under the *Human Rights Act*.

## VIII. CONCLUSION

In light of the foregoing, it should be clear that I vehemently oppose the medical fitness questions that are currently asked of Bar applicants throughout most of Canada and the United States. In balancing Bar Societies’ reasons for mental fitness inquiries against the negative implications the questions have on applicants, I think it is apparent that the questions do not serve a justifiable purpose. While Bar Societies’ goals are laudable - namely to protect the public and to uphold the integrity of the legal profession - the questions come at too great an expense: they discourage applicants from seeking needed mental health treatment; they unreasonably impinge on individuals’ privacy rights; and they are discriminatory against both women and persons with disabilities. Furthermore, the questions are of dubious predictive power. Not only is there a wealth of evidence refuting a positive correlation between mental health status and professional competence, but even if there *were* a correlation, future responses to mental illness would be difficult if not impossible to predict.

174 Edson, *supra* note 1 at 885.

175 See Downie, *supra* note 70 at 476 for a list of ways in which the intrusiveness of Law Societies’ fitness questions could be narrowed.

176 R.S.N.S. 1989, c.214.

177 *Ibid.* at s.6.

178 Bauer, *supra* note 39 at 136.

I would suggest that instead of continuing the debate regarding how to appropriately narrow and improve upon current medical fitness questions, a more suitable examination might be to consider whether Bar Societies' screening processes can be effective *without* any mental health questions at all. Arguably, the fact that there are already some provinces and states which do not require medical fitness disclosures of their applicants suggests that the inquiries are not, in fact, necessary in order to protect the public, let alone as a means to maintain the integrity and the positive repute of the legal profession. At the very least, it is clear that current practices need to be changed insofar as they send entirely mixed messages to Bar applicants. By likening mental illness to (im)moral character, Bar Societies effectively intimate that individuals who seek psychological treatment are incompetent and are unworthy of being admitted to the legal profession. The irony, however, is that the Bar is merely encouraging applicants to postpone their treatment until *after* being called to the Bar, namely when the applicant has clients, work obligations, and social responsibilities.