

A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants

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I. INTRODUCTION

Bar admission in most states includes some inquiry into applicants' mental and emotional fitness to practice law.¹ In theory, such an inquiry protects the public and the system from mentally and emotionally unfit practitioners. In practice, the effectiveness of this approach is open to serious question. Both the substance and process of current character and fitness inquiries have been subjected to pervasive and compelling criticism.² The strongest indictment to date has been framed by Professor Rhode.

Politically non-accountable decisionmakers render intuitive judgments, largely unconstrained by formal standards and uninformed by a vast array of research that controverts the premises on which such adjudication proceeds. This process is a costly as well as empirically dubious means of securing public protection. Substantial resources are consumed in vacuous formalities for

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1. "Ninety percent of all bar applications include questions regarding mental health, such as involuntary (43%) or voluntary (39%) commitment to mental institutions, treatment or diagnosis of mental illness (27%), and treatment or diagnosis of emotional disturbance (12%)." Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 581 (1985). An inquiry into an applicant's mental health is one of four types of inquiries commonly made by character committees. Gerber, *Moral Character: Inquiries Without Character*, 57 B. EXAMINER, May 1988, at 13. The other three areas of inquiry are honesty and integrity, personal life, and loyalty to the American system of government. *Id.*

2. See, e.g., Elliston, *Character and Fitness Tests: An Ethical Perspective*, 51 B. EXAMINER, Aug. 1982, at 8; Gerber, *supra* note 1; Huber, *Admission to the Practice of Law in Texas: A Critique of Current Standards and Procedures*, 17 HOUS. L. REV. 687 (1980); McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984); Rhode, *supra* note 1.

routine applications, and nonroutine cases yield intrusive, inconsistent, and idiosyncratic decisionmaking. Examiners generally lack the resources, information, and techniques to predict subsequent abuses with any degree of accuracy. Only a minimal number of applicants are permanently excluded from practice, and the rationale for many of those exclusions is highly questionable.³

Professor Rhode has made a series of observations about mental and emotional fitness requirements. Individuals with histories of psychological treatment “clearly risk extended inquiries and delay, and in some instances, a possibility of exclusion.”⁴ “[U]ntrained examiners [are permitted] to draw inferences that the mental health community would itself find highly dubious.”⁵ Efforts are further hampered because “even with respect to problems most likely significantly to affect an individual’s professional practice, forecasts in individual cases rarely will be conclusive.”⁶ Rhode also identified hypocrisy,⁷ intrusiveness,⁸ and unfairness⁹ in the process, and suggested that this area has attracted “remarkably little scholarly interest” and “no systematic scrutiny” of underlying premises.¹⁰ Despite its logical force, Rhode’s critique has failed to change the realities of the bar admission process in this area.

In this Article, we attempt to advance a similar critique, but do so in a way that we hope will be more likely to lead to changes in the bar admission process. We share Rhode’s assessment of mental and emotional fitness requirements, but because we understand the difficulty of convincing the bar examiners¹¹ to alter their approach, we advocate

3. Rhode, *supra* note 1, at 584-85.

4. *Id.* at 581.

5. *Id.* at 582.

6. *Id.*

7. She considers it hypocritical to exclude individuals from practice on the grounds of contentiousness because the profession generally rewards such a trait. *Id.*

8. Rhode recognized that the requirement that applicants waive the confidentiality of their psychological treatment threatens the effectiveness of the counseling and is “flatly at odds with mandates of the American Psychiatric Association and the American Psychological Association” *Id.* at 582-83. This requirement forces applicants “to choose between developing adequate therapeutic relationships and minimizing certification difficulties [and] is not readily justified given the limited value of the information likely to be provided.” *Id.* at 583.

9. She noted that “licensed attorneys . . . are not forced to make comparable tradeoffs, despite the temporally more relevant nature of any disclosures” *Id.*

10. *Id.* at 493.

11. We use the words “bar examiners” to refer to individuals who participate in fitness determinations concerning bar applicants. These individuals are not referred to as bar examiners in all jurisdictions, but for simplicity we use the words bar examiners here. We also recognize that the state supreme court may exercise ultimate authority over the bar admission process.

more modest changes. Rhode concluded that changing the bar examiners' focus from preliminary screening to post-admission sanction may solve the problems she identified.¹² Such a radical departure from present practice is likely to solve many of the problems that have been identified, but such an approach is not likely to be adopted soon, and we believe there is a need for immediate action. Although it is always possible that court decisions will compel the bar examiners to change their approach,¹³ we question the wisdom of awaiting such a solution. Instead, we seek a negotiated solution. To this end, we advance a compromise. We believe that the examiners will not abandon the present system until they are given an acceptable alternative. To be acceptable to the examiners, a solution must permit them to make some inquiry concerning applicants' mental and emotional fitness, and to reject applicants on the basis of mental and emotional unfitness. The compromise we offer can both satisfy the examiners on these points and help many applicants avoid the difficulties that result from the current approach.

The compromise that we advance would benefit applicants in many jurisdictions, even though we formulated it while focused on problems in one jurisdiction, the State of Florida.¹⁴ In fact, any comprehensive study of the problem would have to focus on one jurisdiction in order

12. Rhode, *supra* note 1, at 589.

In essence, the bar would cease monitoring character for purposes of admitting attorneys or of disciplining non-professional abuses. Such an approach would avoid the indeterminacies of standards, the rigidity of rules, and the pretense that either promises adequate public protection.

Id.

13. Legal arguments could be advanced in an attempt to implement the critique through court action. Those arguments are outside the scope of this Article. We assume that the legal status quo will continue, and ask how examiners can best be encouraged to change their approach, uncoerced by court decision. We do not discuss legal arguments that could be advanced to require the examiners to abandon their current approach because we believe that threats of court action are not part of an effective strategy for changing the bar examiners' approach in this area. For further discussion of constitutional considerations involved in bar admission, see Rhode, *supra* note 1, at 566-83; Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655 (1981). Constitutional challenges to the process have proven unsuccessful in Florida, even though it is one of the few states with a freestanding state constitutional privacy provision. Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983) (requirement that applicant disclose history of psychological and medical treatment and release all records was least intrusive means of achieving compelling state interest and did not violate state or federal privacy provisions, nor did it contravene applicant's due process rights or rights guaranteed by state constitutional section providing that no person shall be deprived of any right because of physical handicap).

14. Thus far, our efforts to encourage the bar examiners in Florida to change their approach and accept our compromise have not proven productive. See *infra* Section III (A).

to detail the various concerns involved. We focus on Florida here because it is the jurisdiction with which we are most familiar and because it provides a good example of the problem. In Florida, the examiners make particularly intrusive inquiries about all forms of psychiatric treatment, from counseling to hospitalization. This Article focuses on the effect that the examiners' inquiries have on counseling by a psychologist, rather than on other mental health treatment, because counseling is often available at no charge to law students through their university health centers, and because we believe that greater student use of those services would improve their mental and emotional fitness for the practice of law.

We begin with Professor Rhode's conclusions about mental and emotional fitness inquiries. How should those insights affect the bar admission process? The serious deficiencies she identifies in this area suggest a need to modify the current approach. However, it does not appear that Rhode's scathing indictment has had much of an effect. What will compel the bar examiners to take these problems more seriously? We try to reframe abstract critique in human terms and to give it a more complete factual context. We elaborate on the benefits and costs of the current approach and conclude that it is both costly and ineffective.

Next, we focus on the conflict that exists between the examiners' inquiry made by the examiners into applicants' treatment and the benefits of that treatment. We suggest that the conflict is inherent in the process, that it can be minimized, but not avoided, as long as the inquiry continues. Thus, the inquire and exclude approach represents one possible choice between two competing values: the benefits of inquiry and the benefits of mental health treatment. We argue that if there is any wisdom in the choice to inquire at the cost of discouraging treatment, it is penny-wise and pound-foolish because it discourages applicants from taking advantage of opportunities to develop their mental and emotional fitness before they are admitted to the bar. This is a mistake because law practice is stressful, and students need to prepare for the stress of practice, just as they need to prepare for its other demands. Through counseling, students can develop healthy coping strategies that will permit them to deal with the stress of practice. Without adequate preparation, they may resort to unhealthy coping strategies, such as drug or alcohol abuse. Given that the examiners' inquiry rarely results in exclusion, we conclude that the public is best protected if a balance is struck in favor of encouraging applicants to learn to cope with the stress of practice.

We propose that inquiries concerning treatment should be initiated in only those circumstances where more serious mental and emotional problems are involved. We will describe how the mental health delivery system, freed of the intrusive inquiries that now cripple its effectiveness,

can provide stronger support for law students who are subject to stress, and can help produce lawyers who are more fit for practice than the present system permits. We hope that this Article will contribute to a re-examination of the approach to mental and emotional fitness now used in most jurisdictions.

II. THE PRESENT APPROACH: INQUIRE AND EXCLUDE THE UNFIT

Nationally, bar examiners have taken a variety of approaches in determining applicants' mental and emotional fitness for admission to the bar. Some pay little attention to the mental and emotional fitness of applicants who have otherwise demonstrated their eligibility for admission. Others devote significant resources in an attempt to assure that only mentally and emotionally fit applicants are admitted to practice. Our focus is on the bar examiners in Florida, who devote significant attention, resources, and energy to this endeavor. Those examiners, like many others in the United States, use an "inquire and exclude" approach.

In Florida, the inquiry begins with the bar application.¹⁵ If answers to questions on the bar application reveal that the applicant has undergone treatment, a written inquiry is made to the therapist concerning the treatment. The bar examiners may solicit additional information from various sources, and in some cases the matter is brought to informal or formal hearing.¹⁶ The issue in this inquiry is whether or not the applicant should be excluded from admission to the bar.

15. Question 29 of the Florida bar application asks:

a. ___ Yes ___ No Have you ever received diagnosis of emotional disturbance, nervous or mental disorder? If yes, please state the name, address, and zip of each psychologist, psychiatrist, or other medical practitioner who made such diagnosis.

b. ___ Yes ___ No Have you ever received REGULAR treatment for emotional disturbance, nervous or mental disorder? If yes, please state the name, address, and zip of each psychologist, psychiatrist, or other medical practitioner who treated you and the date you began treatment. (Regular treatment shall mean consultation with any such person more than four times within any 12-month period).

APPLICATION FOR ADMISSION TO THE FLORIDA BAR 10 (1989) [hereinafter FLORIDA BAR APPLICATION]. Other questions in the application make related inquiries. Question 26 asks if the applicant has ever been addicted to or dependent upon the use of narcotics, drugs, or intoxicating liquors, or has been diagnosed as being addicted or dependent. Question 27 asks whether the applicant has, within the past ten years, undergone treatment for, counseling for, or consulted any doctor about the use of drugs, narcotics, or intoxicating liquors. Question 28 asks if the applicant has ever been declared legally incompetent. Question 29(c) asks if the applicant has ever been hospitalized or institutionalized or entered any other treatment facility for treatment of any condition or disorder listed in Question 29(a) and (b). *Id.* at 9-10.

16. In Florida, the Board of Bar Examiners consists of 12 lawyers and three non-

Since examiners inquire about the applicant's mental and emotional fitness for the purpose of excluding "unfit" applicants, the careful review of the limitations inherent in that approach is important. The limitations are best illustrated by comparing the Florida approach to some ideal approach.

If we were to design an ideal system for identifying and excluding unfit applicants, how would we proceed? First, we would define what we mean by "mentally and emotionally fit" applicants. We might describe such applicants as those who have the ability to meet the mental and emotional demands of practice, beyond intellectual and educational preparedness. Is it possible to go beyond that description and articulate mental and emotional characteristics which, individually or in combination, are necessary to meet the demands of legal practice? If so, how should applicants be examined to determine the applicants' presence or absence of those characteristics? It is likely that even if these characteristics could be defined, applicants would possess the identified characteristics in varying degrees.

Such an inquiry, if possible, would tell us much about the applicants, but it would only go part of the way toward determining fitness. We would still be left with the task of determining how much weakness in various characteristics would render the applicant mentally and emotionally unfit. Thus, to determine fitness, we should do more than inquire into the characteristics of applicants. We should devise a set of standards against which the findings made in the review of individual applicants could be measured. These standards should disqualify individuals from bar membership only if their mental conditions impair their ability to practice law. The fact that an applicant has an emotional condition

lawyers who serve under the direction and control of the Supreme Court of Florida. McFarlain, *Character & Fitness Process Before the Florida Board of Bar Examiners*, 63 FLA. B.J., Jan. 1989, at 29. When the application and amendments do not satisfy the Board, an investigative or informal hearing process is conducted. *Id.* at 30. At the conclusion of that process, the applicant is told he or she has met the established character and fitness qualifications, or that further investigation is needed, or that specifications will be filed charging the applicant with matters which, if proven, would preclude the Board's favorable recommendation to the Supreme Court. *Id.* at 31. A formal hearing is then held on the specifications. One observer asserts that, of the approximately 2,000 applications for admission filed in a year, 120 will result in informal hearings. Green, *Passing the Bar May Not Be the Only Obstacle Between You and a Law Career*, RES IPSA LOQUITUR, UNIV. OF MIAMI SCHOOL OF LAW, Sept. 1988, at 13. Green estimates that about 10 individuals a year are denied admission on character and fitness grounds. *Id.* One other alternative exists. Rule 1-3.2(b) of the Rules Regulating the Florida Bar provides that an applicant with a prior history of drug, alcohol, or psychological problems can be admitted to active membership, subject to conditions of probation imposed by the Supreme Court of Florida. The conditions may include periodic psychological examinations or supervision by another member of the bar.

should not be disqualifying.¹⁷ If the applicant has such a condition, does that condition constitute an impairment? The degree of impairment is sometimes difficult to assess.¹⁸ Even if impairment can be determined, is it fair to exclude the applicant on that basis? Most would agree that individuals with a physical handicap should not be excluded from the practice on the basis of their impairment. Thus, a further inquiry may be appropriate. Does the impairment prevent the applicant from providing competent representation once admitted?

One further problem exists. Even if there were some way to determine the mental and emotional fitness of applicants at the time of application, there is no guaranty that applicants' fitness will remain constant. Even trained mental health practitioners have difficulty predicting future conduct, such as violent behavior or "dangerousness."¹⁹ Therefore, this approach will always operate with a limitation: all predictions are based on present or past circumstances. The predictions made may or may not come true.

This leads us to conclude, as others have before us, that exclusion of mentally and emotionally unfit applicants is difficult business. It is difficult to isolate, with precision, "characteristics" of mental and emotional fitness, to test for them, to frame minimum standards, and to

17. Indeed, some psychiatrists believe that certain emotional conditions make applicants better qualified to practice law; other conditions, like manic-depression, can be controlled through medication. Custer, *Georgia's Board to Determine Fitness of Bar Applicants*, 51 B. EXAMINER, Aug. 1982, at 17, 20.

18. For example, a psychiatrist informed a fitness board that the applicant "is acutely schizophrenic; however, I do not know how schizophrenic one must be before he should be disqualified from practicing law." *Id.* Such input led the board to conclude that it must "confront each case on an individual basis because it has become increasingly apparent that the mental health professionals cannot provide it with a litmus test." *Id.*

19. See, e.g., J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981); Steadman, *The Right Not to Be False Positive: Problems in the Application of the Dangerousness Standard*, 52 PSYCHIATRIC Q. 84 (1980). This difficulty has been the subject of some debate. See, e.g., Givelber, Bowers & Blich, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 463-64 (study of 2,875 psychiatrists, psychologists, and social workers finding that "therapists are quite confident in predicting future violence" and that "[s]even out of ten respondents believed that 90 - 100% of their colleagues would agree with their conclusion that the patient was dangerous"); McCarty, *Patient Threats Against Third Parties: The Psychotherapist's Duty of Reasonable Care*, 5 J. CONTEMP. HEALTH L. & POL'Y 119, 121 (1989) ("predicting dangerousness is something psychotherapists do quite often"). This difficulty has not discouraged courts from using such predictions. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (rejecting "petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible"); *Jurek v. Texas*, 428 U.S. 262, 272 (1976) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" is a valid consideration in imposing the death penalty).

measure the findings against those standards. Even if this could be done with reasonable precision, the result would be only a prediction of the future, with uncertain accuracy.

A. *The Benefits of the Present Approach*

Although it is difficult to determine with precision whether applicants are mentally and emotionally fit for the practice of law, the present Florida approach seeks to avoid that difficulty by looking for suspicious behavior, rather than by attempting to articulate fitness standards or to measure each applicant against articulated standards.²⁰ Obtaining mental health treatment is one form of suspicious behavior to which bar examiners in Florida and elsewhere pay close attention. According to Rhode's study, ninety percent of all bar applications include questions regarding mental health.²¹ Ninety-eight percent of the bar officials who responded indicated that the disclosure of psychiatric treatment would or might trigger an investigation.²² Thus, applicants who seek any type of mental health treatment, including counseling, put their fitness at issue.²³

20. The CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, which has been approved by the American Bar Association, the National Conference of Bar Examiners, and the Association of American Law Schools provides in relevant part that "character and fitness standards should be articulated and published by each bar examining authority." CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, *reprinted in* A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1989 LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 72 (published by the American Bar Association, Section of Legal Education and Admissions to the Bar) [hereinafter RECOMMENDED STANDARDS]. Locating applicable standards is a problem in Florida.

There are published opinions and there are confidential unpublished opinions. The only persons with access to the unpublished confidential opinions are the members of the Court and the parties to the unpublished opinions. Since one of those parties is always the Board, it follows the examiners know the full body of the law and applicant's counsel does not.

McFarlain, *supra* note 16, at 33.

21. Rhode, *supra* note 1, at 581.

22. *Id.* at 534.

23. The RECOMMENDED STANDARDS includes a list of "Relevant Conduct" "the revelation or discovery of which should be treated as cause for further inquiry." RECOMMENDED STANDARDS, *supra* note 20, at 73. The list includes "evidence of mental or emotional instability." *Id.* But manifestations of mental illness are not the sole cause of concern. Resort to mental health treatment also raises questions about mental health. In Florida, the Florida Board of Bar Examiners adopted a protocol that provides that an applicant whose background contains any of a number of specified factors should be requested to submit to a psychiatric examination. Among the factors is a "[h]istory of repeated psychological or psychiatric or counseling sessions in which the true picture of the psychological diagnosis is uncertain to the Board." Pobjecky, *Everything You Wanted to Know About Bar Admissions and Psychiatric Problems But Were Too Paranoid to Ask*, 58 B. EXAMINER 14, 18-19 (1989).

This approach has some benefits. It allows the examiners to avoid the difficulties outlined above. This approach also makes the inquiry itself less difficult for the examiners. By seeking information about the applicant directly from the therapist, the examiners can conduct a comprehensive, but relatively inexpensive, investigation. The therapist probably is well informed. One commentator notes that "[s]uccessful treatment usually requires patients to disclose matters that are personal and embarrassing. The therapist has a unique relationship that allows access to the most intimate areas of the mind normally inaccessible to others."²⁴ Thus, assuming the therapist is cooperative and the applicant was candid during therapy, an inquiry to the therapist may reveal the best information available concerning the applicant's mental and emotional health.

Nevertheless, the focus on suspicious behavior places limitations on the effectiveness of the approach. The fact that applicants have not sought treatment is not proof that treatment is not needed. Indeed, the group needing the most attention may be those who have difficulties, but have not sought treatment. Unless these individuals have engaged in behavior that raises the examiners' suspicions, the inquire and exclude approach probably will not detect mentally and emotionally unfit applicants.

B. The Costs of the Present Approach

The inquire and exclude approach is costly on a number of levels. The time and resources of the bar examiners are the most obvious costs. The applicant also suffers economically if admission is delayed during the investigation, and if participation in formal or informal proceedings is required.²⁵ The applicant also suffers personally if questions of character delay admission and thus become public. There are also emotional costs because of the anxiety the investigation produces for the applicant.²⁶ These costs are easy to see and understand. However, there is a larger, but more subtle, cost attributable to the present system: lost opportunities to prepare lawyers for the stress of practice through the use of mental health resources available before admission to the bar.

24. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL. L. REV. 31, 40 (1989).

25. The economic costs could include legal fees, court reporter fees, travel costs, the retention of experts, and payment for the services of experts suggested or appointed by the examiners.

26. The prospect of discussing painful personal problems with strangers who have the power to deny bar admission, the prize for which the applicant has strived at great personal and financial cost for many years, will create anxiety no matter how diplomatically the actual appearance is handled by the examiners.

1. *The Inquiry Conflicts With the Goal of Encouraging Fitness.*— Those who employ the inquire and exclude approach may not intend to prevent bar applicants from taking full advantage of the mental health resources available to them as law students, but that is one of the consequences of that approach. It discourages applicants from seeking treatment, and interferes with treatment in cases in which treatment is sought. Thus, the approach carries a high cost and conflicts with the goal of encouraging fitness.

a. *The inquiry discourages treatment*

The examiners' inquiry into treatment has a chilling effect on applicants that discourages them from seeking treatment — applicants know that examiners inquire about treatment, and, thus, the inquiry discourages them from seeking or obtaining treatment. This effect is suggested, if not proven definitively, by a combination of logical analysis and common sense. The examiners' approach generally is known to potential applicants. Students learn of the examiners' inquiry from the bar application. Even if the application is ambiguous on this point, applicants will likely interpret it as requiring disclosure of treatment. Applicants are well advised to err on the side of disclosure when dealing with bar examiners. The available authorities suggest that bar examiners are more likely to deny an applicant admission for lack of candor than for any other reason, including mental disorder.²⁷

If students do not find out about disclosure requirements from reading the bar application, they are likely to find out from others on campus who are familiar with the examiners' approach. Faculty, staff, and others who might recommend that students seek counseling are often familiar with the bar examiners' approach; they understand the dilemma that it poses for students who could benefit from the mental health resources the school makes available. Should faculty and staff recommend that potential bar applicants take advantage of those resources? Should they explain the bar examiners' approach before they make a referral? Such an explanation might discourage the student from seeking help. Should the individual making the referral attempt to gauge the extent of the student's need, and withhold full disclosure in more serious circumstances? The dilemma of hurting when you help, of creating future

27. Custer, *supra* note 17, at 20 ("By far the greatest number of denials of applications have involved a lack of candor on the part of applicants in preparing their applications and in their appearances before the Board."); McChrystal, *supra* note 2, at 78 ("Misconduct in the bar admission process is one of the most cited bases for denial of admission on moral character grounds."); Rhode, *supra* note 1, at 535.

consequences for students by referring them to counseling services, is a recognized consequence of the present approach.²⁸

Assuming that potential applicants could remain completely unaware of the examiners' approach before seeking counseling, it is reasonable to assume that they will be notified of the examiners' approach at the time they seek treatment. Psychologists who treat law students are likely aware that the examiners inquire about treatment because of inquiries made to them concerning former patients, if not from other sources. If psychologists are aware of the disclosure requirement, they are obligated to disclose its existence to applicants seeking treatment.²⁹ For example, in the case of the "four visit rule"³⁰ in effect in Florida, if the therapist is aware of the rule, he or she should advise a law student planning to apply for licensure in Florida of the consequences of more than four visits prior to the fourth visit. Thus, a potential applicant is likely to find out about the examiners' approach and be subject to its chilling effect.

The knowledge that applicants must report their treatment to the examiners will discourage them from seeking treatment.³¹ Although it has not been studied empirically, it seems logical that disclosure will have a chilling effect.³² The risk of discouraging treatment is further compounded when the examiners seek to obtain confidential information compiled by the therapist in connection with the treatment.³³

28. Kaslow, *Moral, Emotional and Physical Fitness for the Bar: Pondering (Seeming) Imponderables*, 51 B. EXAMINER 38 (1982).

29. *Report of the Association: Ethical Principles of Psychologists* (amended June 2, 1989), 45 AM. PSYCHOLOGIST 390, 392-93 (1990) [hereinafter *Ethical Principles*]. Principle 5 of the Ethical Principles of Psychologists provides that "where appropriate, psychologists inform their clients of the legal limits of confidentiality." *Id.* Principle 6 states:

Psychologists fully inform consumers as to the purpose and nature of an evaluative, treatment, educational or training procedure and they freely acknowledge that clients, students, or participants in research have freedom of choice with regard to participation.

Id. If a psychologist knows that a law student will be required to waive confidentiality of treatment during the bar application process, the psychologist is ethically compelled to disclose that fact to the client.

30. Question 29 of the Florida Bar Application defines regular treatment, which must be disclosed, as more than four visits in a 12-month period.

31. As in aversive conditioning, which pairs the behavior to be avoided with negative consequences, the examiners have paired counseling with all the negative consequences that flow from putting one's mental and emotional fitness at issue. For this reason, we expect applicants to respond by avoiding counseling, even if counseling would benefit them.

32. "Stigma is attached to therapy, in part because graduates may be asked in the bar application if they have ever sought therapy; their answer may be a deterrent to employment." Gutierrez, *Counseling Law Students*, 64 J. COUNSELING & DEV. 130, 132 (1985).

33. Interference with treatment is the subject of the next Section.

Empirical data is lacking because the chilling effect is the logical result of the inquiry, and empirical support is unnecessary to establish the existence of the effect. Another reason for the lack of empirical data is the difficulty involved in designing a study of the problem.³⁴ In designing a study, the applicants must be asked directly whether the examiners' inquiries concerning counseling have discouraged or would discourage their use of such services. However, if applicants are asked directly whether the disclosure requirement, or the follow-up by the examiners to determine whether they are nevertheless fit, would discourage them from using such services, the questions themselves suggest that the interviewer thinks a reason exists for the applicant to be concerned. The danger is that the suggestion implicit in the question might give applicants the impression that even if they are not concerned about the disclosure requirement, they should be. Thus, a study of the chilling effect would likely increase the effect.

A series of other problems might be encountered if such a study were attempted. Which applicants should be the focus of the study? Should the study focus on all applicants, or only those who have actually faced the problem? Only those who respond based upon actual experience have balanced the interests, made the decision, and lived with the consequences. For them, the inquiry is not hypothetical. It asks: What did you do? Anyone else answering the survey would be responding based upon how they think they would respond if faced with that dilemma. How helpful can those responses be? If those responding have not actually felt that conflict, or faced the consequences, their responses, though probably well intended, might be no better than the commentary that already exists.

In summary, the inquiry into the existence of treatment itself discourages treatment. Because the examiners' inquiry deters psychological or psychiatric treatment, the current approach penalizes those who recognize a need for assistance and is unlikely to yield greater mental health among the practicing bar.³⁵ Understandably, many applicants are unwilling to engage in any activity, no matter how beneficial it might later prove to be, if their mental and emotional fitness for practice is put at issue when they seek admission to the bar.

Examiners argue that applicants who forego counseling are overreacting because it is, after all, quite unlikely that they will be denied admission on the basis that they obtained mental health treatment. This response is unsatisfying for two reasons. First, the more progressive

34. We do not suggest that such a study would be impossible. Rather, we identify difficulties in undertaking such a project.

35. Rhode, *supra* note 1, at 582.

attitude about counseling that this assumes is often not apparent from the way the inquiry is made on the bar application. Second, even if the examiners have a progressive attitude, attitude alone cannot solve the problems presented by the examiners' inquiry. Many bar applications display a less than progressive attitude toward mental health treatment. Most applicants, counselors, and those who might recommend counseling will know little about how the examiners actually view the decision to seek counseling. The individual recommending counseling may see a significant difference between counseling and hospitalization. The bar application may be unclear on whether the examiners take a similar view. The secrecy that normally surrounds the examiners and the bar admission process makes it difficult to clarify such a point. Even if the examiners publicly proclaim that they do not believe counseling is a bad thing, or if they amend the bar application to reflect that, the problem may persist.³⁶ As long as the existence of counseling puts the applicant's mental and emotional fitness at issue, the applicant will be discouraged from seeking treatment. The assertion that the inquiry creates a chilling effect is strengthened further because the applicant knows, or will be told by the therapist, about the follow-up inquiry that can be expected when the examiners discover the applicant has received treatment.

b. The inquiry interferes with treatment

Although each state's follow-up varies, Rhode's data generally suggests that examiners believe psychiatric treatment should be investigated once it is disclosed.³⁷ Therefore, although the examiners' approach varies by jurisdiction, some follow-up is likely. For example, in Florida, once "regular treatment" with a "psychologist, psychiatrist or other medical practitioner" is disclosed, the examiners send a follow-up letter to the treating practitioner, requesting detailed information concerning the applicant, the treatment, and the prognosis. Such highly intrusive inquiries have significant consequences for treatment.

During treatment, either the applicant, the therapist, or both might be affected by the knowledge that the records of the treatment will not

36. For example, the preface to the Florida Bar Application now provides: Questions regarding psychiatric treatment are not intended to invade unnecessarily the privacy of an applicant or to probe into desirable treatment or counseling for most nervous or depression related disorders.

This message is encouraging, but nevertheless somewhat inconsistent with the examiners' actual practice. As discussed later, the examiners conduct an overly intrusive inquiry into the applicant's treatment. Rhetoric alone cannot resolve the conflict inherent in the present inquire and exclude system.

37. Ninety-eight percent of the bar examiners responding to Rhode's study indicated that psychiatric treatment generally would or might trigger an investigation. Rhode, *supra* note 1, at 534.

remain confidential. The counselor has a duty to inform the law student seeking counseling about bar application disclosure requirements. Therefore, both parties are aware from the outset that the therapeutic interaction is not confidential from the bar. The first consequence may be that the patient will not be candid. "For therapy to be effective, the therapist must be able to persuade the patient to talk freely and fully and that it is safe to do so."³⁸ The bar's inquiry destroys the development of the trust and openness on which successful therapy depends. The informed student is unlikely to disclose necessary information if disclosure could threaten his or her admission to the bar. The second consequence may be that the therapist alters the treatment. The therapist, whether consciously or not, is likely to avoid or not take note of those areas that may prove problematic or open to misinterpretation, or where disclosure may not be in the patient's best interests. Thus, the examiners' intrusion affects both patient cooperation and treatment strategy.

Psychologists, like attorneys, have a primary obligation to protect the confidentiality of any information obtained under the psychotherapist/patient relationship,³⁹ except where there is a clear and present danger.⁴⁰ As with attorney/client privilege, this principle serves the important purpose of promoting full and honest disclosure. Without the benefit of confidentiality, the nature of therapy changes. When the patient is or will be an applicant to a bar that makes an inquiry into treatment, treatment becomes similar to an evaluation ordered by a third party.⁴¹ In such situations, the patient should be advised of the future disclosure if it is not already known. Knowledge of that disclosure will

38. Kaslow, *supra* note 28, at 42.

39. Psychologists have professional ethical rules that govern disclosure of confidences. See *supra* note 29 and *infra* notes 41-49 and accompanying text. Commentators have noted that it is incongruous for lawyers, who are ethically bound to respect client confidences, to require psychologists to violate such confidences during the bar admission process. Elliston, *supra* note 2, at 13.

40. An exception to the confidentiality rule exists when psychotherapists have a duty to warn and/or protect potential victims from a patient's violent acts. See, e.g., *Schuster v. Altenberg*, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).

41. Principle 6b provides that "[w]hen a psychologist agrees to provide services to a patient at the request of a third party, the psychologist assumes the responsibility of clarifying the nature of the relationship to all parties concerned." *Ethical Principles*, *supra* note 29, at 393. The fact that the applicant's therapist is actually a consultant to the bar examiners is underscored by the procedure followed when the therapist fails to clarify "the true picture of psychological diagnosis" to the examiners. Pobjecky, *supra* note 23, at 19. In that event, the examiners retain a psychiatrist to conduct a psychiatric evaluation of the applicant. *Id.* The psychiatrist answers questions quite similar to those posed in the examiners' letter to the applicant's therapist. Compare letter to applicant's therapist *infra* text accompanying note 42, with psychiatric evaluation report requirements, *infra* note 54.

clearly affect the patient's attitude about the evaluation, presentation, and degree of candor. In this way, the examiners' inquiry changes the nature of the therapeutic relationship, and significantly limits its utility.

The examiners' inquiry not only interferes with treatment as described, but the follow-up letter also places the therapist, who is asked to respond to the examiners' inquiry, in an untenable position. The therapist must choose between disclosure, which may not be in the patient's best interests, and nondisclosure, which would also not be in the patient's best interests because it would delay or defeat the patient's application to the bar. The form letter that the Florida examiners send to psychiatrists and psychologists is a large part of the psychologists' concern. The form letter used in Florida will be reviewed and critiqued here in detail because it demonstrates the type of difficulties that a thorough follow-up can create. It asks the psychologist or psychiatrist to inform the examiners of his or her "analysis of [the] applicant's condition, along with a description of the treatment afforded and your prognosis in the case." It requests "cooperation in commenting on the following areas":

1. State why the applicant underwent therapy with you, the goals of such therapy and whether that goal has been achieved.
2. Advise whether there is or was evidence of psychosis.
3. Document a mental status examination.
4. Provide the results of any psychological testing undertaken by you or at your direction or your statement that testing was not warranted by the facts as you saw them.
5. List all medication that was prescribed for the applicant including a description of the medication and the results, if any, that might occur with the discontinuation of the medication either at doctors direction or by the applicant's decision.
6. Do you feel that the applicant needs further treatment, monitoring or supervision prior to or during the independent practice of law?
7. Your opinion on whether the applicant's current condition would inhibit the applicant's future independent unsupervised practice of law. Among other things, "the unsupervised practice of law" includes the ability to be truthful even if to do so may be to the applicant's embarrassment, financial disadvantages (sic) or other detriment; the ability to represent clients in a timely manner by keeping appointments and meeting deadlines; and to handle money for others.⁴²

42. Form letter from the Florida Board of Bar Examiners (applicant reference omitted) (on file at Indiana Law Review).

The Ethics Committee of the American Psychological Association has ruled⁴³ that "the Florida Board of Bar Examiners' method of requesting the specifics of treatment of law student clients is asking the psychologist to violate the *Ethical Principles of Psychologists*. . . ." The Association particularly noted violations of Principles 1,⁴⁴ 6,⁴⁵ 8,⁴⁶ 8.c,⁴⁷ and 8.d.⁴⁸

Ethical considerations are particularly troublesome in the area of testing. Paragraph 4 of the letter requires disclosure of test data. Psy-

43. Letter from David H. Mills, Ph.D. to Malcolm Kahn, Ph.D. (July 6, 1987) (included the ethics opinion) (on file at Indiana Law Review). The opinion was based on an earlier version of the follow-up letter that did not include paragraphs 3 and 5 of the present letter of inquiry.

44. Principle 1 states:

In providing services, psychologists maintain the highest standards of their profession. They accept responsibility for the consequences of their acts and make every effort to ensure that their services are used appropriately.

Ethical Principles, *supra* note 29, at 390.

45. Principle 6 states:

Psychologists respect the integrity and protect the welfare of the people and groups with whom they work. When conflicts of interest arise between clients and psychologists' employing institutions, psychologists clarify the nature and direction of their loyalties and responsibilities and keep all parties informed of their commitments. Psychologists fully inform consumers as to the purpose and nature of an evaluative treatment, educational or training procedure, and they freely acknowledge that clients, students, or participants in research have freedom of choice with regard to participation.

Id. at 393.

46. Principle 8 states:

In the development, publication and utilization of psychological assessment techniques, psychologists make every effort to promote the welfare and best interests of the client. They guard against the misuse of assessment results. They respect the client's right to know the results, the interpretations made, and the bases for their conclusions and recommendations. Psychologists make every effort to maintain the security of tests and other assessment techniques within limits of legal mandates. They strive to ensure the appropriate use of assessment techniques by others.

Id. at 394.

47. Principle 8.c states:

In reporting assessment results, psychologists indicate any reservations that may exist regarding validity or reliability because of the circumstances of the assessment or the inappropriateness of the norms for the person tested. Psychologists strive to ensure that the results of assessments and their interpretations are not misused by others.

Id.

48. Principle 8.d states:

Psychologists recognize that assessment results may become obsolete. They make every effort to avoid and prevent the misuse of obsolete measures.

Id.

chologists are ethically compelled to maintain the security of test results and to guard against their misuse.⁴⁹ The release of test results to persons untrained to interpret them, especially with the knowledge that such results may be used against a client, is unethical.⁵⁰ To be useful, test data must always be interpreted carefully and within the context of the clients' background, current experiences, and presenting complaints.⁵¹ Without such context and experience in interpretation, test results are misinterpreted easily and may be under- or over-pathologizing. Thus, the demand for psychological test results is a disincentive for psychologists to use tests with law students even if their use may be helpful for treatment. Furthermore, students' knowledge that such test results may be provided to the bar makes it impossible to obtain the open, honest, natural response to test materials that is necessary for an accurate evaluation.

Other aspects of the letter's inquiry are also problematic. Paragraph 2 of the letter requests "evidence of psychosis." If the client is not diagnosed as psychotic, why is this information necessary? Will the examiners independently review the evidence and come to their own conclusion? If so, is it ethical for the psychologist to provide such information? Paragraph 3 requests that the psychologist document a mental status exam. Mental status is a fluid concept. The results of the exam may differ as treatment progresses. No current exam may be available. Should old information be forwarded? How will such information be used? Paragraphs 6 and 7 seem to be an attempt to shift some of the responsibility for making difficult judgments to the psychologist. What does it mean to say that a person needs further treatment? That they cannot function at all without it? That they cannot function effectively without it? That they would benefit from it? Question 7, regarding whether a current condition may inhibit the applicant's future independent unsupervised practice of law, raises liability concerns, especially for counseling centers maintained by private universities. If a psychologist recommends a student to the examiners in answer to this question, and that student then becomes a lawyer and steals money from a client, will the client argue that the psychologist, and the university that employs the psychologist, should be legally responsible for the loss?

How do the examiners use this information? Certainly it is evidence of a thorough investigation. But how is the confidential information

49. Principle 8, Assessment Techniques. *Id.*

50. "[T]est-derived data in the hands of an untrained professional . . . is a tool of potential harm." Matarazzo, *Computerized Clinical Psychological Test Interpretations*, 41 AM. PSYCHOLOGIST 14, 19 (1986).

51. A. ANASTASI, *PSYCHOLOGICAL TESTING* (4th Ed. 1976); Matarazzo, *supra* note 50, at 19.

that is obtained actually used to evaluate fitness? How can bar examiners competently evaluate the information they receive in connection with their inquiries to psychiatrists and psychologists?⁵² In Florida, the examiners may review the information themselves, or they may order a psychiatric evaluation by "a board-certified psychiatrist in active clinical practice and preferably with a sub-speciality interest in the type of disorder being evaluated."⁵³ The psychiatrist is asked to provide the bar examiners with a written report addressing six specific points.⁵⁴ Nevertheless, it appears that the examiners, at some point in the process, act as amateur psychiatrists.⁵⁵

52. Kaslow, *supra* note 28, at 41. Kaslow suggests that "[i]f mental health professionals, trained in personality assessment, cannot always agree on a person's diagnosis, how is one attorney to make a determination of another's emotional fitness?" *Id.*

53. Pobjecky, *supra* note 23, at 18-19.

54. Those six points are:

- * Documented mental status examination.
- * Evidence of psychosis, if any.
- * Results of psychological testing or statement that testing was not necessary in the evaluation of the applicant.
- * Applicant's medications, including description of effects, side effects and what may occur if the medication is discontinued at doctor's direction or on applicant's decision.
- * Opinion of whether psychiatric problems that the applicant exhibits now or has exhibited in the past will inhibit applicant's future independent practice of law.
- * Specific recommendations on whether drug level testing, therapy, monitoring, or other treatment would be necessary prior to or during the independent practice of law.

Id. at 19. One problem with this request is that psychiatrists are not necessarily qualified to administer or interpret psychological tests. That is the domain of the psychologist. Some other problems with individual points, such as the concerns raised by the request for evidence of psychosis, have already been addressed. *See supra* note 51 and accompanying text.

55. In a recent article, the general counsel of the Florida Board of Bar Examiners stated:

Throughout the identification and determination steps, an invaluable reference is the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, third edition (commonly known as DSM-III). Published by the American Psychiatric Association, the manual classifies the different mental disorders. DSM-III provides the user with brief, insightful information as to each disorder on several topics including: diagnostic criteria, essential and associated features, complications, impairment, age at onset, and sex ratio. Based on personal experience, one need not have background in psychology to benefit from the use of this manual.

Pobjecky, *supra* note 23, at 19. The fact that the General Counsel to the bar examiners would make a statement recommending use of the DSM-III "[b]ased on personal experience" further evidences the unlicensed practice of psychiatry by bar examiners. An additional concern is that the reference work recommended in the article was out of date at the time it was recommended. DSM-III was replaced by DSM-III-R in 1987. The article recommending the use of DSM-III appeared in 1989.

2. *The Consequences of Discouraging and Interfering With Treatment.*—The next question is: What are the consequences of discouraging treatment? Before we can understand and weigh the gravity of the current approach's consequences, we must understand generally about stress and treatment in relation to the law student and the lawyer. This Section first discusses the stress with which applicants must cope, and describes how treatment can help the applicant learn to cope with that stress. Second, it attempts to put treatment in a larger perspective.

a. *Applicants' stress*

Stress is defined physiologically as "any stimulus . . . that disturbs or interferes with the normal physiological equilibrium of an organism."⁵⁶ The human body automatically responds to any stressful situation. There is an elevation of certain hormones; an increase in heart rate, blood pressure, breathing, and perspiration; an increase in muscle tension; a slowing of digestion; and a feeling of heightened mental awareness.⁵⁷

In the short run, this automatic reaction is extremely adaptive. The mental alertness and heightened concentration can lead to improved performance in situations such as running a race, giving a presentation, or responding to an emergency. If stress is not diminished, however, its effects can be deadly. As we exhaust our adaptive energy reserves, we become more susceptible to diseases. Doctors estimate that up to 75% of all visits to physicians are prompted by stress-related problems.⁵⁸ Stress has been implicated in hypertension, coronary heart disease, migraine and tension headaches, insomnia, ulcers, asthma, and skin disorders. Stress is often the culprit in harmful habits such as smoking, overeating, and drug and alcohol abuse.⁵⁹

The symptoms of stress exhaustion, or exposure to prolonged stress, cross areas of human functioning beyond the physical. Emotionally, symptoms include anxiety, frustration, depression, irritability, apathy, and anger. Cognitive difficulties such as increased distractibility, forgetfulness, poor concentration, boredom, loss of motivation, and low productivity often result. There may be spiritual symptoms including feelings of emptiness and loss of direction and meaning in one's life. Finally, there are relational symptoms such as withdrawal, loneliness,

56. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1300 (college ed. 1968).

57. E. CHARLESWORTH & R. NATHAN, STRESS MANAGEMENT 4 (1984) [hereinafter CHARLESWORTH].

58. CHARLESWORTH, *supra* note 57, at 8.

59. T. MILLION, C. GREEN & R. MEAGHER, HANDBOOK OF CLINICAL HEALTH PSYCHOLOGY 103, 110 (1982).

distrust, intolerance, lowered sexual drive, and resentment of others.⁶⁰

One significant effect of stress is that persons can become trapped in vicious cycles. Consider an individual with an important project and a rapidly approaching deadline. Already under stress, this person may be distracted and miss easy solutions to pressing problems. Under time pressure, the individual is not likely to eat well, leading to a decrease in already depleted energy reserves. Feelings of frustration and pressure at work may lead to irritability at home, resulting in alienation from family and friends. The result is increased stress.

The general stress cycle may be described as follows: Exposure to stressors leads to the physiological, behavioral, emotional, and cognitive symptoms discussed previously that eventually lead to behavioral disorders (obesity, alcoholism); medical disorders (headaches, heart disease); emotional disorders (chronic anxiety, depression); memory problems; obsessive thoughts; and sleep disorders.⁶¹ The result is decreased productivity, enjoyment of life, and capacity for intimacy.

Such negative consequences are not inevitable for stress prone individuals if they can be taught more adaptive responses. Techniques such as assertiveness, time management, relaxation, exercise, good nutrition, and alternative ways of thinking can lead to increased self-esteem, improved physical health, resistance to disease, improved mental health, and resistance to future stressors. The effect is increased productivity and an improved quality of life. Such strategies are the most effective before the onset of significant stress. For lawyers, the ideal time for learning adaptive coping mechanisms is in law school before the novice lawyer is overwhelmed by practice and stuck with the maladaptive patterns that lawyers often develop to cope with the stress in their lives.

Although what is stressful for one person may not be stressful for another, pressure from the environment is almost always stressful. The lawyer's environment is rife with external pressure and stress. The legal profession involves a great deal of responsibility. The law involves significant uncertainty and is subject to change. Lawyers must operate as counselors and advisors in this legal environment, suggesting courses of action to clients who are often demanding, angry, or upset. If the client is not pleased with the outcome of a transaction, the lawyer is a likely target of the client's dissatisfaction. And yet, the lawyer must remain calm, courteous, and professional; lawyers need clients and must abide them.

Beyond the clients, there is the variable nature of the work. Hours are irregular and generally long, making it difficult to meet obligations

60. CHARLESWORTH, *supra* note 57, at 22.

61. *Id.*

outside of work or establish a regular lifestyle beyond the office. For litigators, there is the additional pressure of trial work. Personal life may be put on hold at unpredictable times. The performance of trial lawyers is determined by the facts of the case, but it is also subject to many forces beyond the lawyers' control. The unknown or the unforeseen constantly threatens.

Beyond the work itself is the stress of office politics and competition. In many cases, there is a question of partnership, and the constant evaluations by both peers and superiors. Not everyone will make it, and those who do make it seem to be the ones who work the longest hours and make the most sacrifices. Once partnership is achieved, further goals are established. Success one year may establish expectations that may be used as a standard for future performance.

The above description is clearly reminiscent of the Type A or coronary-prone behavior pattern. Type A individuals are highly competitive, hard-working, impatient, time-conscious, driven to achieve, visibly tense, and have a tendency to suppress hostility. They frequently strive to do two or more things at once and feel guilty and preoccupied when trying to relax.⁶² It is not surprising then that occupational stress and emotional strain have been found to be major etiological factors in coronary heart disease among lawyers.⁶³

Further, the competitive, aggressive nature of practice makes it unwise for lawyers to admit to weakness or to express fears, doubts, concerns, or frustrations. If lawyers do not articulate their concerns, they are unlikely to receive much emotional support or to take other steps necessary to mediate the effects of their stress. Since lawyers are trained to present themselves as strong, effective, and competent, others are probably unlikely to view them as in need of support or sympathy.

Three approaches are available to control stress: avoiding the stress, modifying the stress, or modifying the patient's adjustment to stress.⁶⁴ Lawyers must continue to work in stressful environments, so they require a solution for stress that does not involve avoidance or modification of stressful situations. They must learn to adjust to stress. Relaxation and exercise have the potential to provide relief.

Whether the relaxation response is obtained through transcendental meditation, prayer, hypnosis, biofeedback, exercise, music

62. M. FREIDMAN & R. ROSINMAN, TYPE A BEHAVIOR AND YOUR HEART 70-79 (1974).

63. Russek & Russek, *Is Emotional Stress An Etiological Factor in Coronary Heart Disease?*, 17 PSYCHOSOMATICS 63, 66 (1976). "The candidates for coronary heart disease appear to be those individuals whose homeostatic mechanisms remain chronically mobilized in response to the challenges of a rapidly changing environment. Such persons demonstrate a failure to master stress in continuum." *Id.*

64. *Id.*

or the like, regular practice should be encouraged for both primary and secondary prevention as well as for the symptomatic treatment of angina pectoris itself. Exercise would appear to be another valuable technique for neutralizing the cumulative effects of stress.⁶⁵

Lawyers have difficulty developing healthy strategies for coping with stress on their own. The long and often unpredictable hours, coupled with the continuing competition in legal practice, make it difficult for lawyers to develop a lifestyle conducive to stress management. Inexperienced lawyers, who tend to work longer hours, are less likely to have important recreational interests and are less likely, even than physicians, to take vacations, two healthy stress management strategies. Only twenty-nine percent of lawyers reported participating in strenuous sports such as jogging and skiing.⁶⁶

The strategies that lawyers develop on their own may involve drug or alcohol use and may cause harm to themselves and their clients. Drugs and alcohol may be used to escape from stressors. Such strategies are ineffective because they create additional problems. Lawyers commonly employ other unhealthy strategies for avoiding stress in their practice. For example, a lawyer may fail to return clients' phone calls if the lawyer believes the calls will increase his or her level of stress. Even if this one stress avoidance technique were abandoned, lawyer/client relationships would improve dramatically. The most common client complaint is that lawyers do not return phone calls.⁶⁷ If lawyers provided their clients with routine, three-minute status updates, clients would call less.⁶⁸ If lawyers would learn healthier coping strategies for dealing with stress, the practice itself might prove less stressful. The proliferation of seminars on managing stress at bar conventions and in continuing legal education programs demonstrates an increasing awareness of the need to address the problem of stress.

Stress does not begin in practice. Law school is also stressful. Law students experience unusually high levels of stress, anxiety, and depression because of the nature of legal training.⁶⁹ Although many people recognize

65. *Id.*

66. Krakowski, *Stress and the Practice of Medicine: Physicians Compared With Lawyers*, 42 *PSYCHOTHERAPY AND PSYCHOSOMATICS* 143, 147 (1984).

67. Cory, *Helping the Client Deal with Stress*, 9 *B. LEADER* 17, 31 (1984); DeBenedictis, *Lawyers Told to Address Clients' Stress*, 97 *L.A. Daily Journal*, March 21, 1984, at 5, col. 1.

68. DeBenedictis, *supra* note 67.

69. Guitierrez, *supra* note 32. Guitierrez collects much of the psychological literature on law student stress and distress and notes that "[p]rofessional counseling journals have focused little attention on the problem." *Id.*

that law school is stressful,⁷⁰ some commentators recommend changes in the way lawyers are trained,⁷¹ but others do not.⁷²

Law school is not only stressful, it may actually promote unfitness. Empirical studies have shown that when compared to medical and other graduate students, law students experience greater stress.⁷³ Symptoms of that stress include increased depression, anger, hostility, anxiety, social alienation, and obsessive-compulsive behavior.⁷⁴ Such symptoms increase during law school so that third-year students and graduates tend to be more symptomatic than first year students.⁷⁵

Law students do not know how to handle the stress of law school effectively. One study⁷⁶ asked students in various graduate programs, "Have you had any crises which clearly put you behind in your studies?" For medical students, psychology students, and law students the most frequently reported crises involved relationships. When the students were asked how they handled the crisis, medical students most frequently reported that they sought help or support from family or friends; psychology students reported seeking help from professional therapists; and law students reported that they handled the crisis themselves. Another

70. See, e.g., Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV.L. & SOCIAL ACTION 71 (1970); Richardson, *Does Anyone Care for More Hemlock?*, 25 J. LEGAL EDUC. 427 (1973); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Taylor, *Law School Stress and the "Deformation Professionelle"*, 27 J. LEGAL EDUC. 25 (1975); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968).

71. See, e.g., Stone, *supra* note 70, at 417 ("Changes in teaching techniques must be designed to counterbalance the psychological impact of the Socratic method while retaining its academic advantages.").

72. See, e.g., Taylor, *supra* note 70, at 267 ("[N]othing in the evidence here reviewed proves the necessity of specific changes.").

73. Heins, Fahey & Leiden, *Perceived Stress in Medical, Law and Graduate Students*, 59 J. MED. EDUC. 169 (1984) [hereinafter Heins I] (finding that law students had higher overall levels of stress associated with academic, economic, and time concerns, and fears of failure, and work related issues than medical students or graduate students in psychology or chemistry); Heins, Fahey & Henderson, *Law Students and Medical Students: A Comparison of Perceived Stress*, 33 J. LEGAL EDUC. 511 (1983) [hereinafter Heins II] (finding that law students indicated significantly more psychological stress associated with academics and fear of failure than medical students); Kellner, Wiggins & Pathak, *Distress in Medical and Law Students*, 27 COMPREHENSIVE PSYCHIATRY 220 (1986) [hereinafter Kellner] (finding that law students reported more depression, anger, and hostility and less contentment and friendliness than medical students).

74. Benjamin, Kaszniak, Sales & Shanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 236 (1986) [hereinafter Benjamin]; Kellner, *supra* note 73, at 221.

75. Benjamin, *supra* note 74, at 241; Kellner, *supra* note 73, at 220.

76. Heins I, *supra* note 73, at 175-76.

study found that forty-three percent of law students reported excessive drinking.⁷⁷

Few studies actually document the diagnoses or presenting problems of law students. However, existing data suggest that law students are not seriously dysfunctional. In one study involving law students conducted over a period of four years, twenty-four percent were diagnosed with mild anxiety disorders, and two percent with other or no diagnoses. Six percent had major depressions, and nineteen percent had personality disorders, although only ten percent of those were more serious variants. Forty-three percent of these students saw school or career issues as their primary stressor. Twenty-nine percent of the students had relationship concerns, seven percent had family concerns, and four percent had health concerns.⁷⁸

In unpublished data from the University of Miami Counseling Center gathered over two and one-half years, thirty-one percent of law students presented with conflict in or breakup of their primary relationship, twenty-three percent presented with occupational or academic concerns, thirteen percent presented with generalized depression, five percent presented with social/dating problems, five percent presented with generalized anxiety/tension, five percent presented with family conflicts, four percent presented with physical problems, and three percent presented with eating disorders. One percent presented with drug/alcohol problems, and one student was suicidal.⁷⁹

The counseling center is an available resource. Almost all universities provide free counseling services to students through counseling centers on campus.⁸⁰ The counseling center is a particularly important resource because the law school curriculum fails to prepare law students for the stress of practice in any systematic way.⁸¹ Thus, the approach currently used by the examiners to identify and exclude unfit applicants actually discourages applicants from taking advantage of the only significant

77. Heins II, *supra* note 73, at 522.

78. Dickerson, *Psychological Counseling For Law Students: One Law School's Experience*, 37 J. LEGAL EDUC. 82, 84 (1987) (percentages calculated from raw data).

79. Blum, Unpublished Study (1988) (on file at Indiana Law Review).

80. A survey of ABA accredited law schools found that the majority provide a mental health or counseling center for students, but less than one-fifth designate a mental health professional specifically for law students. Dickerson, *supra* note 76, at 83. An unpublished 1986 Counseling Center Survey noted that only two percent of the 213 centers surveyed charged students for counseling. Directors' Annual Data Bank Survey of College and University Counseling Centers (1986) (on file at Indiana Law Review).

81. Stress management is taught occasionally, but it is not currently a focus of the standard law school curriculum. Specific suggestions for additions to the present curriculum are the subject of a later section.

resource that most universities have to teach students how to cope with stress.

b. How treatment can help

Counseling or psychotherapy of any sort may be broadly viewed as a set of procedures through which one learns to enhance the quality of one's life in the context of a helping relationship. Though broad, this definition applies whether one seeks help in response to major mental illness (schizophrenia or major depression) or to simple life stressors (financial concerns, conflict with relationships, or job pressure). On one end of the continuum of mental health, clients may be helped so that they can meet minimal requirements for daily living; at the other end, therapy is more concerned with developing competence and feelings of self-sufficiency, allowing clients to make the most of their lives.

A myriad of techniques are available, and almost as many theories concerning which techniques are most useful for a particular difficulty. Goals in therapy are generally client specific. They depend on the nature of the presenting complaint and the client's capacity for growth. After successful psychotherapy, clients should experience much more than just the relief of symptoms. They should also display an increased capacity to cope with stressful or difficult events and, having the capacity to cope successfully, they should feel better about themselves and more optimistic about the future. As such, good psychotherapy may be said to have a preventative element. Minimally, the client's repertoire of coping strategies is expanded; maximally, the client's instrumental style of coping becomes more flexible, adapting to the demands of various circumstances.

c. Treatment in perspective

Law students should be as free to seek assistance from a psychologist as they are to seek church counseling or the advice of their family or friends. The present approach in Florida treats those situations differently. Although counseling by a psychiatrist or psychologist triggers an inquiry, counseling by an unqualified layman, or by qualified individuals who are not psychiatrists and psychologists, does not even need to be reported. Why, for example, should students who come from religious or cultural backgrounds that encourage counseling by a member of the clergy be treated differently than those who use the university counseling center?

Therapy, like other traditions, attempts to encourage personal growth through guided introspection.⁸² Increased self-awareness is essential to

82. "The pilgrim, whether patient or earlier wayfarer, is at war with himself, in struggle with his own nature. All of the truly important battles are waged within the self." S. KOOP, *IF YOU MEET THE BUDDA ON THE ROAD, KILL HIM* 8 (1972).

professional competence.⁸³ The applicant's attempt to accomplish such personal goals through therapy, rather than through some older tradition, should not be viewed as raising a question concerning the applicant's fitness to practice law. Actually, counseling should be encouraged because the results will help the applicant and benefit the public. A broader view of therapy as yet another tradition promoting personal growth suggests that it is the applicants who do not seek therapy, or who do not otherwise take affirmative steps to grow into their new responsibilities, that are likely to encounter problems later.

The public is not well served by a system that fails to teach legal practitioners who will work under extreme stress to cope with that stress. The present inquire and exclude approach may actually disserve the public because it discourages students from taking advantage of the free mental health resources made available by the schools.

C. *Comparing Costs and Benefits*

When comparing the costs and benefits of the present approach, the costs outweigh the benefits, primarily because the approach is largely ineffective. The protection that the inquire and exclude approach gives to the public is limited to the very few applicants who are excluded on the basis of mental and emotional unfitness. The inquire and exclude approach prevents those who are not excluded from preparing for the stress of the practice. To be effective, the selection system must encourage admitted applicants to prepare for the stress of practice. The danger to the public arises not only from applicants who are unfit, but from applicants who are mentally and emotionally unprepared for practice, and who will, therefore, become unfit when subjected to the stress of practice.

III. POSSIBLE RESPONSES TO THE CONFLICT BETWEEN INQUIRY AND TREATMENT

A. *Justifying the Conflict: Intensifying the Inquiry*

One possible way to improve the current inquire and exclude approach is to make an even more intrusive investigation into applicants' back-

83. Although mastery of information and experience are important for personal growth, greater self-awareness can be equally vital. Without such awareness, the unsure student may quickly begin to sacrifice his values and sense of self for an image of "competence" and "mastery", instead of seeking to develop strength and integrity simultaneously.

Himmelstein, *Reassessing Law Schooling: Towards a Humanistic Education in Law*, HUMANISTIC EDUCATION IN LAW 35 (1980) (footnote omitted).

grounds. This is the strategy now being used in Florida, where an intensive investigation is made into all applicants' backgrounds.⁸⁴ As has been demonstrated, a detailed inquiry is made into counseling and other mental health treatment. That inquiry is more intensive today than it was several years ago.⁸⁵

The intensified inquiry motivated us to become involved in efforts to convince the examiners that their approach should be reexamined. We began by enlisting the support of Dean Mary Doyle of the University of Miami School of Law. She was instrumental in arranging a meeting between interested Florida deans and counseling center representatives and the Florida Board of Bar Examiners in 1987. At that meeting, Dean Doyle and Dean Frank Read, who was then Dean of the University of Florida College of Law, expressed their concerns to the Board. A committee of bar examiners and representatives of our group was established, and further discussion occurred. Over time, we developed a draft of this Article and proposed revisions to the questions on the Florida Bar Application designed to limit the examiners' inquiry. We discovered in June, 1990, when the bar examiners met with the Florida law school deans, that the examiners had decided to amend the bar application to expand the present inquiry. The revised application will ask applicants to disclose all counseling, not just regular counseling. Thus, future applicants will not be able to meet with a psychologist on even one occasion without reporting it to the bar.

The intensified inquiry concerning mental health reflects the examiners' concern that a significant number of applicants are afflicted with psychiatric disorders.⁸⁶ That conclusion seems inconsistent with the counseling center data discussed earlier, which suggests that few students who seek counseling are seriously disturbed.⁸⁷ Nevertheless, there are indications that the general counsel of the Florida Bar Examiners believes

84. An average of 35 to 40 written inquiries are mailed out in connection with each bar application. If information suggests the need for further information, it is collected over the phone or through a special investigator. *Id.* at 18.

85. Prior to 1985, the follow-up inquiry sent to therapists stated only that "[t]he Board would be most grateful for your analysis of this applicant's condition, along with a description of the treatment afforded and your prognosis in this case." Letter from the Florida Board of Bar Examiners, with applicant reference omitted, on file with the authors. The letter was then expanded to include five of the seven items now included, *supra* note 43, then it was expanded to its present form.

86. An article written by the General Counsel for the Florida Board of Bar Examiners holds the Florida approach up as a model and counsels that "a significant number of bar applicants have psychiatric disorders. If a bar examining authority is not seeing any applicants with these problems, then it is suggested that such authority is not looking very hard." Pobjecky, *supra* note 23, at 16.

87. See *supra* note 79 and accompanying text.

that a significant number of bar applicants and attorneys are afflicted with psychiatric problems.⁸⁸ This concern does not find support in the number of applicants actually excluded from admission on fitness grounds,⁸⁹ the number of applicants admitted on a probationary basis,⁹⁰ or the number of lawyers disciplined in connection with psychiatric problems.⁹¹

The unsubstantiated belief that significant numbers of applicants have psychiatric problems may have an effect beyond its impact on the examiners' choice of approach. It also raises concerns about the examiners' bias during the investigative process. Given the examiners' apparent willingness to make their own diagnosis of individuals who have seen therapists,⁹² the belief that significant numbers of applicants have psychiatric problems could lead the examiners to diagnose applicants as having psychiatric problems when they do not. This could lead to long and expensive delays in admission, even when applicants are eventually admitted.

88. Pobjecky, *supra* note 23, at 14-15. He appears to base this conclusion upon some preliminary data gathered in an epidemiological study discussed in Freedman, *Psychiatric Epidemiology Counts*, 41 ARCHIVES OF GENERAL PSYCHIATRY 931 (1984). That article reported preliminary findings of a survey done by the National Institute of Mental Health. That survey used a structured interview administered by lay personnel, was conducted on the general population, and looked at a range of disorders, many of which would not affect fitness to practice law. In fact, although the General Counsel cites figures from the study that place the prevalence of psychiatric disorders in various populations from 15 to 38% or higher, the study upon which these figures are drawn itself indicates that the prevalence of more serious problems is much lower, for example, six to seven percent for substance abuse disorders and one percent for schizophrenia. *Id.* at 932. Also, the fact that bar applicants have been able to complete law school successfully demonstrates a level of competence not necessarily shared by the general population. Elliston, *supra* note 2, at 14 ("the law school program is sufficiently demanding that those who are mentally unfit are unlikely to complete it"). Therefore, the cited data does not support the conclusion that a significant number of bar applicants and attorneys are afflicted with psychiatric problems. In fact, the author of the article cited by the General Counsel cautioned:

Unfortunately, if epidemiology describes a trend, someone searching for a scapegoat or reform will surely feast unseemly upon the finding! In fact, historical perspective documents the use of epidemiology to enhance patient care or, tragically, to dispatch those deemed undesirable.

Id. at 933.

89. One observer has estimated that about 10 applicants are denied admission on fitness grounds each year in Florida. Green, *supra* note 16. The number denied for psychiatric problems is, therefore, probably even smaller.

90. Twenty-six conditional admissions, not all for psychiatric problems, were made in Florida between December 4, 1986, when the rule authorizing such admissions was added, and February, 1989, when the article reporting that statistic was released. Pobjecky, *supra* note 23, at 21.

91. The examiners' General Counsel cited three reported Florida cases. *Id.* at 15.

92. See *supra* note 55 and accompanying text.

Even if it were true that the examiners are besieged with applicants who suffer from psychiatric disorders, the decision to address the problem by intensifying the inquiry is not sound. It is unclear whether a more intensive inquiry would discover more unfit applicants. Given the greater costs of an intensified inquiry, a more intrusive inquiry could do more harm than good. Because a more intensive inquiry does nothing to prepare those who are admitted to the bar for the practice of law, the possible benefits available appear to be quite limited.

B. Minimizing the Conflict: Limiting the Inquiry

Another possible response to the problems raised earlier is to modify the inquire and exclude approach to make a less intrusive inquiry. A less intrusive inquiry might discourage fewer applicants from seeking treatment, and might pose less interference with the treatment of applicants who have sought treatment.

Several ways exist to limit inquiries. First, inquiries about counseling could be limited to situations in which applicants have made a specified number of visits to a psychiatrist or psychologist. A second, bolder, approach would limit inquiries to only those circumstances in which evidence of more serious problems exists independent of the mental health treatment. Such an approach rejects the current use of counseling as an indicator of unfitness, and encourages applicants to use counseling to solve their problems before they get out of hand. Such a limitation could raise concerns about the thoroughness of the examiners' inquiry, but the benefits of the approach may outweigh its limitations. A third way to limit inquiries is to limit the substance of the inquiries about applicants made to counselors.

Some examiners have limited counseling inquiries to situations in which counseling has continued beyond a specified number of visits. Although the motivation behind this limitation on the inquiry is commendable, the results are unsatisfactory. For example, in Florida, the examiners have limited their inquiries to applicants who have undergone "regular" treatment. Regular treatment is defined in the Florida Bar Application as four visits to a psychologist or psychiatrist within a twelve-month period. Although such limitations may have been designed to permit students to have freer access to counseling services, they may not have that effect. The requirement that isolated instances need not be reported suggests that only those who have seen a psychologist or psychiatrist, and have discovered that they do not need treatment, are above suspicion. This may reinforce the applicant's impression that the examiners take a dim view of those obtaining treatment.

Even if regular treatment is defined in broader terms, the requirement that applicants must report counseling on bar applications when it exceeds

a certain specified number of visits will ultimately succeed in removing disincentives to counseling. It is impossible to determine that a set number of visits will not risk interfering with the successful development of coping strategies in some individuals. Brief psychotherapy is time-limited and generally not considered appropriate for more seriously disturbed patients.⁹³ Despite its designation as specifically "time-limited," even the duration of brief psychotherapy varies. One author notes that practitioners agree on an upper limit of twenty-five sessions.⁹⁴ Another author suggests that it should not exceed one year.⁹⁵

Despite this disagreement on the duration of therapy, authorities generally agree on what must take place for effective therapy.⁹⁶ In the beginning phase, the therapist must take the patient's history, determine the client's appropriateness for treatment, and, most importantly, develop a therapeutic relationship or working alliance with the patient. The therapist and patient must set realistic goals and expectations. In the middle phase, there is the formulation of the focus of treatment, the parameters of the present problem, and its implications for daily living. The therapist must help the patient become aware of options for coping, and facilitate the implementation of such options. The most important phase is the final or termination phase.⁹⁷ It involves summarizing and reviewing the therapy, discussing expectations following therapy, and working through the fears and concerns related to ending treatment.

Clearly, such processes take time. Law students should not be forced to choose, at any point in their counseling, between developing therapeutic relationships and minimizing perceived difficulties with bar examiners. Thus, although the decision to revise the bar application by increasing the number of counseling visits that are allowed before reporting is required may be an improvement over present practice, it is not an ideal solution. The student who attends a large number of counseling sessions may actually be more well-adjusted as a result of those visits than the student who dropped out after only a few visits. Any maximum imposed on the number of visits could potentially interfere with the orderly course of treatment.

A bolder approach might attempt to deal with the problems that have been discussed by focusing the inquiry on serious life problems,

93. Sifneos, *The Current Status of Individual Short-Term Dynamic Psychotherapy and Its Future: An Overview*, 38 AM. J. PSYCHOTHERAPY 472, 473 (1984).

94. Koss, Strupp & Butcher, *Brief Psychotherapy Methods in Clinical Research*, 54 J. CONSULTING & CLINICAL PSYCHOLOGY 60 (1986).

95. Sifneos, *supra* note 93, at 475.

96. Reich & Neenan, *Principles Common to Different Short-Term Psychotherapies*, 40 AM. J. PSYCHOTHERAPY 62, 65 (1986); Sifneos, *supra* note 93, at 473-78.

97. J. MANN & R. GOLDMAN, *A CASEBOOK IN TIME-LIMITED PSYCHOTHERAPY* 12 (1982).

rather than on the applicants' use of mental health resources to cope with less serious problems. If serious life problems exist, applicants could be asked whether they sought treatment for those problems. This approach is better than one that asks about treatment to discover life problems, because it does not inquire about counseling in cases where no serious life problems exist. If such an approach were used, most counseling would remain confidential from the examiners, thus benefiting the treatment environment. Also, this approach encourages treatment, and thus sends the applicant the right message. If such a dynamic could be established, applicants would not be as discouraged from seeking treatment.

This approach should not make a significant difference in the number of applicants excluded. Few are excluded under the current approach. If examiners believe applicants should be asked whether they have undergone serious mental health treatment, then the bar application should ask only about such treatment, being careful to exclude counseling. For example, examiners could ask applicants whether they were hospitalized or treated with psychotropic drugs. Such an inquiry would still permit most counseling to remain confidential.

Another possible modification of the current approach is to make the follow-up inquiry less intrusive. The use of a more general letter of inquiry could avoid many of the concerns raised by more specific inquiries. A letter that requests only the reasons the applicant sought treatment, a description of the treatment, and its outcome would allow the substance of the treatment to remain more confidential.

These proposals are all compromises, and none are entirely satisfactory. The proposed limitation on inquiries concerning counseling still permits inquiries in some cases, so it will not entirely remove the chilling effect. However, it will substantially improve the current environment without depriving the examiners of necessary information. Similarly, even a modified inquiry will have some effect on the nature of the therapy, but the less intrusive inquiry suggested here is an attempt to strike a balance between the interests involved. The less intrusive inquiry is more sensitive to the real needs of applicants and the real needs of the bar examiners in making admission decisions.

C. Avoiding the Conflict: Inquiring Only Through the Administration of Psychological Tests

A third possibility is to use psychological testing to conduct the examiners' inquiry. This approach might provide an opportunity to avoid the conflict between the inquiry and the benefits of treatment, because the inquiry could be made through the administration of a psychological test to all potential applicants. The testing approach would be designed to screen applicants for mental or emotional dysfunction.

Psychological testing solves many of the problems of the inquire and exclude approach. First, it would allow the approach to be administered more fairly because the test would be given to all applicants, rather than to only a few. Second, psychological testing would be fairer because the examiners would need to define mental and emotional fitness in order to design an appropriate test. The resulting test would reflect this shared understanding of fitness. Third, the use of psychological testing could enable examiners to identify applicants with serious problems who have never sought treatment, thus identifying a greater number of problem applicants than the inquire and exclude approach. Psychological testing would not interfere with treatment because it would permit examiners to inquire about mental and emotional fitness without necessarily inquiring about treatment. In fact, it might encourage treatment because individuals might be motivated to prepare for the test through counseling. For this reason, the testing approach is less intrusive. However, testing might also be more intrusive because all applicants would be asked probing questions. The concept of using standardized tests to determine applicants' real world abilities is not foreign to the examiners. Administration of a standardized psychological test to determine mental and emotional fitness parallels the examiners' use of the bar examination to assure competence.

Despite these positive features, there are some serious problems with this approach. Rather than discuss the problems abstractly, the problems with the most widely used psychological test will be discussed. Those problems will be discussed at some length because such difficulties are typical of tests that assess the bar applicants' mental and emotional fitness. The Minnesota Multiphasic Personality Inventory (MMPI) is the most widely used psychological test in the United States.⁹⁸ The test is easy to administer since it is a self-report, true/false inventory that can be computer scored and interpreted.⁹⁹ The examiners might consider using the results of the MMPI or some similar test. However, the test has some difficulties.

The MMPI was developed for adult psychiatric patients.¹⁰⁰ Its development involved selecting items that could discriminate reliably between various psychiatric groups and between a psychiatric group and a normal group.¹⁰¹ In other words, items were selected for inclusion in

98. J. GRAHAM, *THE MMPI, A PRACTICAL GUIDE* 71 (1987) [hereinafter GRAHAM]. See generally Lubin, Larsen & Matarazzo, *Patterns of Psychological Test Usage in the United States: 1935 to 1982*, 39 AM. PSYCHOLOGIST 451 (1984).

99. A detailed discussion of the dangers of automated test interpretations is beyond the scope of this Article. For a more detailed discussion see Matarazzo, *supra* note 50, at 14-24.

100. GRAHAM, *supra* note 98, at 81.

101. *Id.* at 5.

a scale if groups known to differ on the characteristics suggested by the item actually responded differently to the item. Ten clinical scales were developed in this fashion. Four validity scales, intended to detect test-taking attitudes, were also developed.¹⁰² A high score on a particular MMPI clinical scale indicates the presence of pathology.

The normal sample used in constructing the MMPI included 724 persons who were visiting a Minnesota hospital.¹⁰³ Thus, normal responses to the MMPI were determined by the responses of this group. The average subject was white, about thirty-five years old, married, living in a small rural town, and working in a skilled or semi-skilled trade. Normal responses for those individuals are unlikely to correspond to normal responses for a law student. For example, scale six is the paranoia scale. High scores on this scale suggest clinical paranoia. Individuals with high scores feel mistreated, angry, suspicious, are guarded, use rationalizations, and are unwilling to discuss emotional problems. These characteristics are not uncommon in law students, and are certainly much more prevalent in the law school population than in rural Minnesota. Does that mean that law students are clinically paranoid?

Another scale that is subject to potential misinterpretation in a law school population is the K validity scale. Research with the K validity scale, one of the four scales that address the validity of the overall protocol, has shown that higher levels of education and socioeconomic status are associated with higher, and hence, more pathological, scores.¹⁰⁴ What does it mean when a law student gets a high score? Is that in line with what other law students would score? Does it demonstrate that the law student is trying to fake a good profile?¹⁰⁵ Is the student lacking in self-insight? These questions cannot be answered by a computer. Any test adopted to test law students would have similar limitations. Designing a test specifically for this purpose would be extremely difficult because of the technical difficulties and the problem of defining unfitness.

Further exploration of this option requires examination of test construction. Leovinger wrote the classic article on psychological test construction in 1957.¹⁰⁶ The following discussion will be based on her work. According to Loevinger, construction and validation of a test requires

102. *Id.* at 6.

103. *Id.* at 73.

104. *Id.* at 25.

105. ANASTASI, *supra* note 51, at 34. Faking a good profile involves presenting oneself in the best possible light, generally by denying symptoms and problems. Law students may tend to respond in ways that they believe will not put their fitness in question.

106. Loevinger, *Objective Tests as Instruments of Psychological Theory*, 3 PSYCHOLOGICAL REPORTS 635 (1957).

three components. The first step, the substantive component, requires that items be derived from a theoretical framework. This step requires the development of a framework for determining what constitutes fitness and unfitness to practice law. Items for the test are derived from this framework. The second component pertains to the degree to which the structure of the test, its scales, and items correspond to the expected model. Are the scales internally consistent? Do they correlate with each other as expected? Is the test measuring a construct that should be reliable over time and, if so, does the test possess such reliability? Are the factors underlying the test meaningful given its theoretical framework? The third component addresses the degree to which the test corresponds empirically to some nontest measure of the traits or characteristics being studied. At this step, the criteria of fitness to practice would have to be operationalized to determine whether the test is really measuring the intended constructs. Further studies are necessary to determine if the test has any predictive validity. All of the studies would have to be replicated in order to be sure that the test is indeed valid for the intended purpose. The design of a test for bar applicants would be a difficult, expensive, and time consuming project.

Even the revision of an already existing test, like the MMPI, would require significant time, expense, and effort. Even after that revision, the test would not be specifically designed to test fitness for the practice of law. The revision of a test like the MMPI for such use would require the gathering of a large representative sample of law students from across the country to determine what a "normal" law student would look like on the MMPI. Once norms were established and cross validated on another sample, studies would have to be done to determine that the scores indeed reflect something relevant to the practice of law. Finally, further study would be necessary to determine if the scores have any predictive value.

Another serious problem with such a test is how applicants would approach it. The test is unlikely to yield an accurate picture of the applicants' functioning because they know when they take the test that the results will impact their ability to become licensed to practice. Even if the test is sophisticated enough to detect a "fake good" response set, the scores would be useless for evaluation or prediction.¹⁰⁷

Even if these problems could be overcome and a "perfect" test could be designed, examiners could not rely on it to provide definitive answers. The use of a single psychological test without the benefit of context or other test data is simply bad practice.¹⁰⁸ Psychological tests,

107. GRAHAM, *supra* note 98, at 18.

108. Matarazzo, *supra* note 50, at 22.

especially personality tests, must be used with great care because there is much room for error even when a well designed test is used.¹⁰⁹ Applicants could appear overly pathological or not pathological enough, and either result would pose a problem for the examiners. Although a test might be useful in identifying severe psychotics, students with such serious thought disorders seem unlikely to get through law school undetected anyway. Thus, the prospect of using psychological tests is not promising. Therefore, there appears to be no realistic way exists to avoid the conflict inherent in the inquire and exclude approach.

IV. PRIORITIZING CONFLICTING GOALS

The inquire and exclude approach conflicts with the goal of encouraging applicants to take advantage of mental health resources. The conflict may be minimized, but not eliminated. This conflict has serious consequences. The decision to use the approach, in view of its alleged effect on applicants' ability to take advantage of mental health resources, should be a conscious choice based on weighing competing concerns.

A. *The Recommended Resolution: Priority for Prevention and Treatment*

How should examiners respond to their concern about the mental and emotional fitness of applicants? We suggest that given the realities of law practice today, they should adopt an approach that encourages all applicants to prepare for the stress of practice. If the stress of practice is not managed well, it may lead to problems like alcoholism and drug abuse, which pose a serious threat to lawyers and clients alike.

The problem's solution requires the assistance of bar examiners, but the examiners cannot solve it alone. Even if the examiners' inquiry is modified so that it does not discourage applicants from obtaining counseling, many law students will still hesitate to use counseling services. The social stigma associated with counseling is especially strong among law students. Law students are less likely to use counseling services than other students.¹¹⁰ Law students are four times less likely to use counseling services than medical students.¹¹¹ The study finding this disparity suggests that counseling resources are emphasized to incoming medical students.¹¹² Another reason may be the competitive nature of the law students' environment, which allows little room for personal disclosure or emotional

109. ANASTASI, *supra* note 51, at 524.

110. Heins I, *supra* note 73, at 176.

111. Heins II, *supra* note 73, at 521.

112. *Id.* at 523.

vulnerability.¹¹³ Finally, it may reflect an attempt to conform to the perception of lawyers as shrewd, independent, and self-sufficient.¹¹⁴

Nevertheless, a change in the examiners' approach can lead the way. Once law students realize that the use of counseling services will not raise the question of their fitness, professors, deans, and other school personnel will be free to encourage students to take full advantage of the free resources that usually exist. The combination of change in the examiners' approach with the adoption of primary prevention techniques likely will encourage further utilization.

B. *A Proposed Framework*

We suggest a shift in focus from identifying and excluding unfit applicants to promoting mental and emotional fitness among all applicants. This emphasis is analogous to the shift Americans have made recently in the area of physical health. A focus on physical wellness is designed to prevent heart disease and other physical ailments, and recognizes that prevention is preferable to the alternatives available after the onset of disease or disability. Similarly, a focus on promoting fitness will require that the system pay more attention to the mentally healthy, rather than focusing on individuals who have already demonstrated an inability to cope.

The importance of prevention is recognized in the mental health field. In 1959, the Joint Commission on Mental Illness and Health concluded that the growing demand for mental health services necessitated a shift from remediation to prevention in order to meet peoples' needs.¹¹⁵ A framework of prevention was borrowed from public health literature, and that framework was used to conceptualize possible approaches to psychiatric treatment.¹¹⁶ That framework will be used here to organize the alternatives that together can be used to promote the mental and emotional fitness of applicants.

The framework distinguishes among primary, secondary, and tertiary prevention.¹¹⁷ Primary prevention is based on the idea that the entire population, particularly populations at risk for problems, can benefit from services. The goal is to promote growth and emotional well-being. Such strategies would reduce the incidence of problems for all people.

113. Dickerson, *supra* note 78, at 89.

114. Kobasa, *Commitment and Coping in Stress Resistance Among Lawyers*, 42 J. PERSONALITY & SOC. PSYCHOLOGY 707 (1982).

115. G. ALBEE, MENTAL HEALTH MANPOWER TRENDS 254 (1959).

116. G. ALBEE & J. JOFFE, PRIMARY PREVENTION OF PSYCHOTHERAPY xii (1977).

117. R. PARSONS & J. MEYERS, DEVELOPING CONSULTATION SKILLS: A GUIDE TO TRAINING DEVELOPMENT AND ASSESSMENT FOR HUMAN SERVICES PROFESSIONALS 2 (1984).

Secondary prevention focuses on problems that have begun to appear. The goal is to shorten the duration and impact of problems by intervening at an early point. Tertiary prevention involves the implementation of techniques designed to reduce the consequences of severe problems once they have already occurred.

Using this as a framework, alternatives to the identify and exclude approach currently employed by the bar examiners will be examined. When applied to the question of fitness to practice law, tertiary strategies would focus primarily on those already admitted to practice, although applicants with obvious difficulties also would be included in this approach. A tertiary approach necessitates developing a system that monitors the practicing bar more carefully. It might also involve delivering mental health services and supervising lawyers' practices when problems are discovered.

Opportunities for secondary prevention, which focuses on early identification and intervention with problems that have just begun to appear, abound during law school. During law school, under the stress described above, the first signs of difficulty will begin to show. Early intervention is preferred because it results in more successful treatment. Furthermore, most law students have access to free services through their university counseling centers. Such centers are uniquely suited to early intervention because university counselors are familiar with the particular demands of law school, and can deliver services uniquely suited to law students. Students who begin to show difficulties can be referred for help immediately, and can learn coping strategies to help them in practice. Once lawyers are admitted to the bar, treatment might be more difficult because habits are more firmly established. Also, when lawyers discover that counseling services from private providers not affiliated with the university probably cost more than \$100.00 an hour, young lawyers may decide to spend their money on types of unhealthy strategies described above, rather than on the counseling they may need.

The implementation of a sound secondary prevention strategy requires changes in the current approach. The bar examiners' current inquiry would have to be modified so that it does not discourage applicants from seeking counseling, and so that it does not disrupt the counseling that occurs. An approach should be adopted that balances the interests involved. It should attempt to protect the fact and substance of counseling from disclosure, and at the same time permit the examiners to obtain and review information that suggests the existence of serious mental illness.

Primary prevention techniques go beyond secondary approaches because they are directed at the entire population at risk, not merely at those who do develop problems. As such, they are oriented toward actively promoting better mental and emotional fitness in the entire law

school population. As law students are taught legal skills, they should also be taught coping skills and an increased adaptive capacity. Such attempts at primary prevention are noticeably absent from the standard law school curriculum.

Primary prevention might take a variety of forms. The law school curriculum might be expanded to include coursework designed to teach students healthy coping strategies. One focus could be stress management. Such a course could familiarize students with the importance of exercise, diet and nutrition, positive thinking, and time management, and could include instruction on topics such as study skills, memory enhancement devices, and exam preparation.¹¹⁸ The course could also focus on communication skills, assertiveness training, conflict resolution, negotiation, and mediation skills; all are useful on both personal and professional levels. Workshops could be offered for law students and their "significant others" to prepare them for the stress on their relationships that law school will create. Human relations training workshops could teach students to develop a more flexible interpersonal style and help them develop self-confidence and self-esteem.

Limited experimentation with stress management training has yielded encouraging results. In one study, students volunteered to participate in a six-session seminar on personal stress management skills including self-relaxation training, schedule planning, priority-setting, leisure time planning, and cognitive modification techniques.¹¹⁹ The results of the study were that:

[s]ubjects showed pre- to post-treatment improvement on a variety of measures that included their knowledge about stress, personal ratings of stressful situations, and their daily activity schedules. In contrast, a control group showed no improvement and worsened in reported levels of personal stress.¹²⁰

Although some individuals recognize the need for this type of instruction, other individuals wonder whether it is necessary to make lawyers more paranoid, hostile, and obsessive-compulsive to prepare them for adversarial conflict.¹²¹ Thus, one problem is that all individuals may not share the goals of these primary prevention strategies. Another difficulty is that law faculties are not prepared to teach in these areas. This is easily solved by hiring qualified professionals to teach these courses.

118. Dr. Marty Peters of the University of Florida teaches such a course.

119. St. Lawrence, McGrath, Oakley & Sult, *Stress Management Training For Law Students: Cognitive Behavioral Intervention*, 1 BEHAVIORAL SCI. & L. 101 (1983).

120. *Id.*

121. Benjamin, *supra* note 74, at 251.

A primary prevention approach is not inconsistent with a secondary approach, which would involve making counseling available to those who may need it. In fact, the promotion of good mental health as a regular part of the curriculum is likely to significantly reduce the resistance law students may have to utilizing free counseling services. Finally, the approach is not inconsistent with some continuing effort to identify those whose backgrounds reflect evidence of more serious problems. In fact, the instructors in prevention-type courses would be in a good position to identify students who might benefit from counseling and could direct them there. Students who are not suited to the practice of law because of serious mental and emotional problems might be counseled away from that career choice. The real benefit of primary prevention is that it focuses on all possible bar applicants, helping them all to become better adjusted. Such an approach directly protects the public by creating healthier practitioners through more comprehensive law school training.

V. A PROPOSED SOLUTION

Bar examiners have the ability to revise their inquiries to facilitate evaluation of the mental fitness of applicants, while discouraging fewer applicants from seeking counseling. We conclude that some limitation on inquiries about counseling and treatment is necessary. What inquiry will permit bar examiners to encourage the development of coping strategies in law school without endangering the public by admitting mentally unfit applicants? We suggest that the examiners should focus their initial inquiry on whether applicants have had serious life problems, rather than on whether they have taken advantage of mental health resources like counseling. The indication that an individual suffered serious life problems should raise the question of fitness. The fact that an individual has sought and obtained counseling should not raise the question of fitness. Applicants who indicate that they have experienced serious life problems should be asked if they have sought mental health treatment. If so, inquiries can be made into their treatment, including counseling.

Examiners might combine the inquiry we suggest with limited inquiries concerning mental health treatment. The bar application should make clear that the examiners do not want the existence of counseling disclosed, no matter how many visits to a counselor are involved, unless the applicant has experienced serious life problems. The application should also make clear that a limited inquiry will be made into the substance of counseling. The application could also ask about more serious mental health treatment, such as whether the applicant has ever been hospitalized for mental illness, or participated in a drug or alcohol treatment program, as an inpatient or as an outpatient. The application could also ask whether the applicant has ever been adjudicated incompetent or insane.

Inquiry into these particular circumstances may prove as useful for examiners' purposes as more general inquiries into counseling, but they will not cause as severe a chilling effect on counseling as the more general inquiry causes.

This new and narrower focus must be communicated clearly to applicants. To accomplish that goal, vague or ambiguous language in bar applications must be removed, and ideally examiners should explicitly encourage applicants to take advantage of counseling while in law school. Bar applications should also be rewritten to avoid questions regarding facts which are unknown to the applicant. For example, an application that asks an applicant about a health care professional's diagnosis, especially in the form of, "Were you ever diagnosed as," creates problems for the applicant. Usually, applicants are not told that a diagnosis was made or the nature of the diagnosis. When the inquiry is limited to known facts, the chances of misunderstandings are lessened.

The suggested approach is a compromise and, like all compromises, is both positive and negative. On the positive side, it will make counseling more available and will protect the integrity of some treatment. Thus, mental and emotional fitness will be encouraged. On the negative side, the modification recommended does not solve all the problems of the inquire and exclude approach. Nevertheless, we hope that our proposed compromise, although less comprehensive than another more radical approach might be, has a more realistic chance of adoption by the examiners.

We do not expect that examiners will quickly embrace our proposal. Examiners may be concerned that applicants will not be candid in responding to questions about serious life problems, and believe that applicants would be more candid about treatment, because definitive records of treatment exist while definitive records of serious life problems may not exist. Even if the fear of detection is different, this can be overcome by the examiners' substantial experience in looking for life problems. Bar applications typically contain many questions that do not directly ask about mental problems or mental fitness to practice law, but that will yield valuable information bearing on the existence of significant life problems. For example, answers to questions about whether the applicant has been arrested or has had difficulty holding a job may raise concerns about fitness. The limitation that we suggest will not obscure such information from the view of bar examiners.

The examiners may also object to our compromise because applicants may discuss problems with drugs and alcohol during counseling, and examiners want access to that information. Drug and alcohol problems are fast becoming a primary focus of bar examiners. As one commentator notes:

In the 1950's and early 1960's bar examiners looked for communists and fornicators. In the late 1960's and early 1970's they looked for hippies and pot smokers. Then came the era of cocaine, homosexuals, bankruptcy and unpaid student loans. Today alcoholism and other drug abuse is on the ascendency.¹²²

The argument that examiners must look into the substance of counseling for this reason ignores the fact that such inquiries will drive students away from counseling. By limiting their inquiries to drug and alcohol treatment programs, the examiners will still detect individuals with serious problems, but will not discourage students from learning coping strategies that do not involve drugs and alcohol.

If individuals learn healthy coping strategies through counseling while they are in law school, they are less likely to resort to unhealthy coping strategies, such as drug and alcohol abuse, under the stress of practice. Drug and alcohol abuse among lawyers are significant concerns.¹²³ In Florida, the bar is "cracking down" on drug-abusing lawyers, and is the first state to adopt a policy of suspending lawyers for ninety-one days and then placing them on probation if the bar finds they have used drugs.¹²⁴ This penalty may be reduced if lawyers complete rehabilitation, or increased if they refuse treatment or if their actions harmed clients.¹²⁵ Efforts to direct drug-abusing lawyers into treatment would be complemented by action to encourage bar applicants to learn coping strategies that do not include alcohol and drugs while they are still in law school. Our compromise removes barriers to the counseling that could provide support. It allows bar applicants to improve their mental and emotional fitness while they are making other preparations for practice.

122. McFarlain, *supra* note 16, at 34.

123. It has been estimated that there are between 72,000 and 130,000 lawyers nationwide who drink beyond their control. Hickey, *Attorney Alcoholism*, WASH. LAW., Mar./Apr. 1990, at 34, 36. Today, virtually every state has some kind of lawyer assistance program. *Id.* at 36-37. "Although far less prevalent than alcoholism, illegal substance abuse is pervasive. Even in the most profitable and prestigious white-shoe firms, lawyers have been enticed and then entrapped by white powder, colored pills, and needles." Safian, *High Times On The Fast Track*, AM. LAW., Mar. 1990, at 75.

124. *Bar Cracks Down on Drug-Abusing Lawyers*, MIAMI REV., Mar. 23, 1990, at 10. "The new policy will be used when disciplining lawyers who personally use drugs, but are not accused of sale or distribution. This includes lawyers who are never prosecuted or convicted of such activity, but whose activities are revealed to the Bar." *Id.*

125. *Id.*

