



MEMO

To: National Conference of Bar Examiners

From: Institute for Well-Being in Law

Date: December 6, 2022

Re: Recommendations for Elimination of Mental Health & Substance Use Questions on NCBE Sample Bar Application

Introduction

The Institute for Well-Being in Law (IWIL) is a 501(c)(3) organization formed in December of 2020. Its mission statement is as follows:

The Institute for Well-Being in Law (IWIL) is dedicated to the betterment of the legal profession by focusing on a holistic approach to well-being. Through advocacy, research, education, technical and resource support, and stakeholders' partnerships, we are driven to lead a culture shift in law to establish health and well-being as core centerpieces of professional success.

IWIL grew out of the National Task Force on Lawyer Well-Being, a grassroots collaborative of many organizations and thought leaders, which drafted *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (Task Force Report).¹ The Task Force Report, published in 2017, had support from both the ABA and Conference of Chief Justices which passed Resolutions urging all states to review and consider the Report's 44 recommendations. This early work relied largely on dedicated professionals who volunteered their time and effort. For effective, ongoing change, the work of the National Task Force needed to evolve into a permanent model, now IWIL. IWIL is comprised of an Executive Director, 9 volunteer Directors, 22 volunteer Advisors including past American Bar Association and national Affinity Bar presidents, Lawyer Assistance Program Directors, Chief Justices, Law School Deans, well-being directors, researchers, as well as hundreds of volunteers participating in one of the following committees: Policy, Communications, Research and Scholarship, Programming, Governance, or Diversity, Equity, and Inclusion.

¹ The National Task Force, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* (2017), <https://lawyerwellbeing.net/the-report/>.



In addition to nationwide efforts, IWIL supports more than 30 states that have convened a State Task Force or Commission to address well-being and the recommendations in the Task Force Report. These Task Forces or Commissions bring together multiple stakeholders, such as court leaders, lawyer assistance programs, bar regulators, law schools, bar associations, firms, public agencies, and others to identify challenges in the profession and determine how to alleviate them in both collective and individual ways.

The continued expansion of well-being efforts comes at a time when the data on the well-being of our profession demonstrates a great deal of suffering, dissatisfaction, and burnout. In just the past year, the legal profession lost numerous lawyers and law students to suicide. Studies on the legal profession cite high rates of suicide contemplation, including a 2021 Mental Health Survey by Law.com and ALM Intelligence² where 19% of all respondents and 31% of Black lawyers indicated they contemplated suicide at some point in their professional careers, and a 2021 Survey of Law Student Well-Being reporting that 11% of law student respondents had suicidal thoughts during the past year (up from 6% in 2014). Stigma continues to be one of the most pervasive obstacles to seeking and getting help.³

Mental health is a serious crisis, particularly among young adults with rates of depression, suicidal behaviors, and substances use rising steadily over recent decades. In law school, we've found the same is true. In the recent 2021 Survey of Law Student Well-Being,⁴ 68.7% of respondents reported needing help for emotional or mental health problems over the past twelve months. However, only a bit over half actually received help from a mental health professional.

“For law students, the barrier to help seeking related to self-stigma is compounded by fear of professional consequences. This is strongest with respect to the character and fitness questions on state bar applications and the ensuing investigation if the applicant reveals that he or she has sought help.”⁵

² ALM Intelligence, *Mental Health and Substance Use Survey* (May 2021) <https://www.alm.com/intelligence/solutions-we-provide/surveys-rankings-and-reports/surveys-rankings-and-reports-list/mental-health-substance-abuse/>.

³ Bibelhausen, Bender & Barrett, *Reducing the Stigma: The Deadly Effect of Untreated Mental Illness and New Strategies for Changing Outcomes in Law Students*, 41 WM. MITCHELL L. REV. 3 (2015), <https://www.mncl.org/wp-content/uploads/2020/05/Reducing-the-Stigma-The-Deadly-Effect-of-Untreated-Mental-Illnes.pdf>.

⁴ Jaffe, Bender & Organ, *'It is Okay to Not Be Okay': The 2021 Survey of Law Student Well-Being*, 60 U. LOUISVILLE L. REV. 441 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127297.

⁵ See Bibelhausen et al.

We believe the time has come to eliminate mental health and substance use-related⁶ questions on the NCBE Sample Bar Application. While states make their own determinations of questions on their bar applications, many look to the NCBE for guidance. NCBE has a great opportunity to demonstrate leadership and commitment to improving student well-being and consequently better preparing law students to become lawyers by alleviating student concerns over seeking help, reducing perception of stigma related to mental health conditions and disabilities, and contributing to a more equitable admissions process. We submit this comment to NCBE urging the complete elimination of questions 30 and 31 related to mental health and substance use.

30. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?

Are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

31. Within the past five years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in connection with an employment disciplinary or termination procedure?

Why Questions 30 and 31 on the NCBE Bar Application Should Be Eliminated

In February 2019, the Conference of Chief Justices passed Resolution 5, urging jurisdictions to “eliminate from applications required for admission to the bar any questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus solely on conduct or behaviors that impairs an applicant’s current ability to practice law in a competent, ethical, and professional manner” and that “reasonable inquiries concerning an applicant’s mental health history are only appropriate if the applicant has engaged in conduct or behavior and a mental health

⁶ The term “substance use” is considered non-stigmatizing whereas “substance abuse” has been found to have a high association with negative judgements and punishment. Substance use disorder is a “chronic, treatable disease from which patients can recover and continue to lead healthy lives.” National Institute on Drug Abuse, *Words Matter – Terms to Use and Avoid When Talking About Addiction*, <https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction>.

condition has been offered or shown to be an explanation of such conduct or behavior.”⁷

Similarly, in 2019, the ABA House of Delegates adopted Resolution 12, which urged licensing entities to remove questions about mental health history, diagnoses, and treatment, and to focus instead on conduct and behavior.⁸

Many states do not currently ask questions related to mental health or substance use or ask only about impairments or conditions as a defense, in mitigation, or explanation for conduct or in relation to criminal charges.⁹

There are three primary reasons for the complete elimination of questions 30 and 31 from the NCBE Sample Application.

Reason #1. The chilling effect on bar applicants that prevents them from seeking help for mental health and substance use in law school because of questions pertaining to mental health and substance use history, diagnosis, and treatment on bar applications far outweighs the benefits of the use of those questions to determine fitness to practice law.¹⁰

We acknowledge that the character and fitness process serves a necessary purpose to determine whether bar applicants can perform the essential elements and duties of a lawyer with competence and diligence. Questions are appropriate when they identify conduct, not diagnoses, that could adversely affect the applicant’s ability to practice law. Based on our discussions with admissions directors and investigators in states where mental health and substance use questions were removed, the general sentiment is that the questions did little to assist in character and fitness determinations and much greater harm to students. As far as we are aware, those jurisdictions have not cited any significant spike in disciplinary violations that could be attributed to removal

⁷ Conference of Chief Justices, Resolution 5: In Regard to the Determination of Fitness to Practice Law (Feb. 2019), https://www.ncsc.org/_data/assets/pdf_file/0021/23484/02132019-determination-of-fitness-to-practice-law.pdf.

⁸American Bar Association, ABA House of Delegates Resolution 105 (2019), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf.

⁹ The Institute for Well-Being in Law tracks ongoing changes in bar admissions. Other resources including the ABA Commission on Disability Rights also tracks this data, see

<https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/>. States having recently eliminated mental health and substance use diagnosis and treatment questions include Connecticut, Indiana, Iowa, Maine, Maryland, Michigan, Ohio, New Hampshire, New York, Texas, and Wisconsin.

¹⁰ Substance use disorder is considered a mental health disorder and commonly co-occurs with another mental disorders. See National Institute of Mental Health, <https://www.nimh.nih.gov/health/topics/substance-use-and-mental-health>.

of those questions. Further, we have significant and ongoing data to support the chilling effect of these questions on bar applicants.

In a 2014 ABA-sponsored survey of law students at fifteen schools, 45% of the law students who reported that they chose not to seek mental health treatment when needed cited fear of having to disclose this information on bar applications as the reason for not seeking treatment.¹¹ Unfortunately, not much has changed; a follow-up on that survey in 2021 which included 39 law schools (nearly 20% of the law students in the country) found that approximately half of respondents cited concern that seeking help for substance use or mental health issues would affect bar admission or job or academic status.¹² 49.7% of respondents in the study believed that if they had a drug or alcohol problem, their chances of getting admitted to the bar were better if the problem was hidden.¹³ The continued use of these questions in jurisdictions around the country and the historical ubiquity of the questions impact even jurisdictions such as Massachusetts, where mental health and substance use questions never existed on the bar application. A forthcoming study on well-being in the legal community of Massachusetts reveals continued concerns among the Massachusetts legal community about mental health and substance use questions impacting bar admissions, particularly for those bar applicants planning to seek admission in other states.¹⁴ In its Steering Committee on Lawyer Well-Being Report, the Massachusetts Supreme Judicial Court indicated that it would work to encourage other state bar application administrators to remove questions that inquire into bar applicants' history of mental health, alcohol, or substance use.¹⁵

We recognize that the legal profession is largely a self-governing institution. This issue however is not about an applicant "governing" himself or herself; our law students desperately want to get help when a mental health or substance use issue arises.¹⁶ What they don't want to have occur is a denial of bar admission as a result of them getting the help they need. Unfortunately, jurisdictions that retain these questions provide no assurances that applicants will not face significant consequences for getting this help. Beyond answering questions, they must disclose personal information including names of physicians, counselors, hospitals, and institutions, and potentially medical records with no way of knowing how this will be used by bar examiners. This

¹¹ Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 116, 142 (2016), https://digitalcommons.wcl.american.edu/facsch_lawrev/376/

¹² See 2021 Law Student Study.

¹³ Id.

¹⁴ Report on the State of Well-Being of Massachusetts Lawyers (forthcoming).

¹⁵ Massachusetts Supreme Judicial Court Steering Committee on Lawyer Well-Being, *Report to the Justices* (July 15, 2019) <https://www.mass.gov/doc/supreme-judicial-court-steering-committee-on-lawyer-well-being-report-to-the-justices/download>.

¹⁶ See 2021 Law Student Study.

“vicious loop”, as a result, is best (if not only) broken by eliminating these questions, thereby allowing law school administrators and faculty to double down on educating and encouraging students to seek the help they need and consequently preparing a new cadre of lawyers with better tools to deal with the stress of practice and ultimately contributing to a profession with better well-being and mental health outcomes.

Reason #2. Questions regarding mental health and substance use continue to stigmatize mental health conditions and disabilities, whereas many lawyers with mental health conditions and disabilities thrive in the practice of law.

- 1 in 5 U.S. adults experience mental illness each year.¹⁷
- 1 in 25 U.S. adults live with serious mental illness, such as schizophrenia, bipolar disorder, or major depression.¹⁸
- 15% of adults had substance use disorder in the past year and 93.5% did not receive treatment.¹⁹
- Depression is the leading cause of disability worldwide.²⁰

Lawyers are not immune. In fact, mental health conditions and unhealthy or hazardous substance use continue to run high in the legal profession, oftentimes exacerbated by the profession.²¹ The same is true for law students. In fact, data provides that “[l]aw students who begin law school with no major pre-existing mental health conditions frequently acquire mental health impairments as a result of their experience”; and “[f]or law students who begin law school with pre-existing mental health issues . . . , and those in recovery, the stressors of law school may intensify the conditions.”²²

¹⁷ Centers for Disease Control and Prevention, *About Mental Health*, <https://www.cdc.gov/mentalhealth/learn/index.htm>.

¹⁸ *Id.*

¹⁹ Mental Health America, *The State of Mental Health in America* (2023), <https://mhanational.org/issues/state-mental-health-america>.

²⁰ World Health Organization, *Depression* (Sept. 2021), <https://www.who.int/news-room/fact-sheets/detail/depression>.

²¹ Patrick J. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016), https://journals.lww.com/journaladdictionmedicine/fulltext/2016/02000/the_prevalence_of_substance_use_and_other_mental.8.aspx; see also The Canadian Bar Association, *The National Study on the Psychological Health Determinants of Legal Professionals in Canada* (Oct. 27, 2022), https://flsc.ca/wp-content/uploads/2022/10/EN_Preliminary-report_Cadieux-et-al_Universite-de-Sherbrooke_FINAL.pdf; IBA Young Lawyers’ Report 2022, <https://www.ibanet.org/document?id=IBA-Young-Lawyers-Report-2022>; Anker & Krill, *Stress, Drink, Leave*, PLoS ONE 16(5) (May 12, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0250563>; see ALM Mental Health and Substance Abuse Survey (2021).

²² ABA Law Student Division, ABA Commission on Lawyer Assistance Programs, & Dave Nee Foundation, *Substance Abuse & Mental Health Toolkit for Law School Students and Those Who Care About Them* (2015), at 5,

In recent years, and heightened due to the pandemic, numerous public campaigns have worked to reduce stigma against mental health conditions.²³ The ABA Commission on Lawyer Assistance Programs produced a video entitled “Fear Not: Speaking Out to End Stigma”, featuring a diverse group of lawyers, judges, and law students talking openly about challenges with behavior health issues, including depression, anxiety, alcoholism and drug addiction.²⁴ Partners at big law firms have opened up about their journeys through clinical depression and other bar leaders discuss other challenges such as substance use, dyslexia, and anxiety.²⁵ Organizations such as the Lawyers Depression Project exist, in part, to help break the stigma around discussing mental health by providing peer support to one another.²⁶

When bar applications ask questions about mental health and substance use to evaluate character and fitness to practice law, the message is that if you live with mental health conditions or disabilities and/or live with ongoing recovery from substance use, you are somehow less fit to practice law or inadequate. This continues to stigmatize those living with mental health conditions and disabilities and who live with addiction and substance use disorders, and encourages those to stay silent for fear of professional ramifications, embarrassment, and failure.

With nearly 80% of law students reporting needing help for emotional or mental health problems over the past twelve months,²⁷ we need to do everything we can to break this stigma and encourage help-seeking behavior early rather than sending the message to students they may be inadequate if they do suffer from mental health conditions or have struggled with substance use, especially when it begins in law school or is exacerbated by it.

Reason #3. These questions may have a disproportionate and disparate impact on certain communities.

https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lsc_colap_mental_health_toolkit_new.authcheckdam.pdf.

²³ See e.g., NAMI, *Stigma Free*, <https://www.nami.org/get-involved/pledge-to-be-stigmfree>; Cleveland Clinic, *Athletes and Mental Health: Breaking the Stigma* (Aug 2021), <https://health.clevelandclinic.org/mental-health-in-athletes/>.

²⁴ American Bar Association, *Speaking Out to End Stigma*, https://www.americanbar.org/groups/lawyer_assistance/profession_wide_anti_stigma_campaign/.

²⁵ Halkett, *A BigLaw partner's journey through clinical depression*, *Above the Law*, Apr. 2021, <https://www.abajournal.com/voice/article/a-big-law-partners-journey-through-clinical-depression>; Rubino, *Former Sidley Partner Opens Up About Depression and Washing Out of BigLaw*, *Above the Law*, Jan. 2021, <https://abovethelaw.com/2021/01/former-sidley-partner-opens-up-about-depression-and-washing-out-of-biglaw/>.

²⁶ Lawyers Depression Project, <https://www.lawyersdepressionproject.org>.

²⁷ See 2021 Law School Study.

There exist disparities in mental health among diverse communities. LGBTQ+ identified individuals are 2.5 more likely to experience depression, anxiety, and substance misuse as compared to heterosexual individuals.²⁸ Individuals from non-White races and ethnic groups are less likely to receive mental health care and often bear a disproportionately high burden of disability resulting from a mental disorder. People who identify as being two or more races are most likely to report a mental illness. American Indians/Alaskan Natives report higher rates of posttraumatic stress disorder and alcohol dependence than any other ethnic/racial group.²⁹

Specifically in the legal profession, recent studies indicate high rates of mental health issues, stress, and burnout in women and high rates of suicide contemplation among Black lawyers.³⁰ Other past studies found law students who identify as women, as LGBTQ, Students of Color, and students considered “low income” were more likely to experience mental health issues during law school than their counterparts; and Students of Color were less likely to seek mental health treatment than white students, and students from lower incomes were significantly less likely to seek services than high income students.³¹

In a profession that desperately needs to improve its diversity, reducing barriers to entry for diverse candidates is essential.³² It is time to remove structural barriers, including mental health and substance use questions that disproportionately impact diverse individuals by scrutinizing applications of individuals from certain communities.

CONCLUSION

One by one, states have sought to remove inquiries into mental health and substance use as part of their bar application process. Numerous advocacy pieces and articles over the years make a strong case for removal, citing among them the aforementioned arguments.³³ Some of the strongest advocates are legal educators and administrators

²⁸ American Psychiatric Association, *Diversity & Health Equity Education: Lesbian, Gay, Bisexual, Transgender and Queer/Questioning*, <https://psychiatry.org/psychiatrists/diversity/education/lgbtq-patients>.

²⁹ American Psychiatric Association, *Mental Health Disparities: Diverse Populations* (2017), <https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-Diverse-Populations.pdf>.

³⁰ See ALM Mental Health and Substance Abuse Survey (2021); Krill 2021.

³¹ Yale Law School Mental Health Alliance, *Falling Through the Cracks: A Report on Mental Health at Yale Law School* (Dec. 2014), at 6, https://law.yale.edu/system/files/falling_through_the_cracks_120614.pdf.

³² Albeit not the focus of this memo, we encourage NCBE to consider any question that may have a disparate impact on diverse and underrepresented populations in the legal profession, including questions related to “financial responsibility” and “legal proceedings”.

³³ See Appendix.

who witness firsthand students failing to receive help they need for fear that their future will be jeopardized because of inquiries about their mental health or substance use history, diagnoses, or treatment on the bar application.³⁴ Deans of students address these issues with students on a routine basis. For law deans in states where these questions have been removed, they continue to struggle with the complexity of students sitting for multiple bars that may have to disclose for one and not another. And, while additional education from bar administrators around character and fitness inquiries is helpful, it still doesn't address the stigma created by the mere existence of these questions. Anything we can do to address the serious mental health, substance use, and other challenges rampant in our profession, we must. Law students overwhelmingly support removal of these questions; it's time we listened to them, the future of our legal profession. We encourage NCBE to be a leader in this well-being movement and consider the elimination of any mental health or substance use inquiry as part of the bar application process.

³⁴ Jaffe & Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions To Promote Lawyer Well-Being*, 26 ABA Prof. Lawyer 2 (2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing/.

APPENDIX – Additional Resources Not Referenced Above

Law students, law schools lead efforts to remove mental health questions from Character & Fitness equation (Oct. 9, 2019), ABA Student Lawyer

<https://abaforlawstudents.com/2019/10/09/law-students-law-schools-mental-health-character-and-fitness/>

Margaret Hannon, *Why the character and fitness requirement shouldn't prevent law students from seeking mental health treatment*, A.B.A. (Jul. 29, 2018),

<https://abaforlawstudents.com/2018/07/09/character-fitness-requirement-and-seeking-mental-health-treatment/>

Brian Cuban, *When Bar Examiners Become Mental Health Experts*, Above the Law (Jan. 10, 2018),

<https://abovethelaw.com/2018/01/when-bar-examiners-become-mental-health-experts/>

Christine Charnosky, *Are Questions About Mental Health on Bar Applications Harming Law Students?* (July 12, 2022), Law.com

Christine Charnosky, *Ahead of the Curve: Examining Character & Fitness Mental Health Questions* (July 18, 2022), Law.com

Alyssa Dragnich, *Have You Ever...? How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 Brooklyn L. Rev. 3 (2015)

<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1071&context=blr>

Kristen Clow, *Mental Health and the Character and Fitness Examination: The Tide is Shifting*, 95 N. Dakota L. Rev. 327 (2020),

<https://law.und.edu/files/docs/ndlr/pdf/issues/95/2/95ndlr327.pdf>

Law students say they don't get mental health treatment for fear it will keep them from becoming lawyers. Some states are trying to change that (Feb. 29, 2020),

<https://www.cnn.com/2020/02/23/health/law-school-bar-exam-mental-health-questions/index.html>

The Impact, Legality, Use and Utility of Mental Disability Questions on the New York State Bar Application (Aug. 13, 2019), <https://lawyerwellbeing.net/wp-content/uploads/2019/09/NYSBA-Working-Group-Report-FINAL-8.15.19.pdf>

ABA Law Student Division, ABA Commission on Lawyer Assistance Programs, & Dave Nee Foundation, *Substance Abuse & Mental Health Toolkit for Law School Students and Those Who Care About Them* (2015), at 5,

https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_mental_health_toolkit_new.authcheckdam.pdf

Kaplan, *Kaplan Bar Review Survey: Only 29 Percent of Law Student Graduates Think Their Alma Mater Does Enough to Help their Students in the Area of Mental Health* (May 1, 2019), <https://www.kaptest.com/blog/press/2019/05/01/kaplan-bar-review-survey-only-29-percent-of-law-school-graduates-think-their-alma-mater-does-enough-to-help-their-students-in-the-area-of-mental-health/>

Hudson & Gemignani, *The Other Bar Hurdle: An Examination of the Character and Fitness Requirement for Bar Admission*, 48 WM. MITCHELL L. REV. 500 (2022) <https://open.mitchellhamline.edu/mhlr/vol48/iss2/3/>.

Change is Coming: The Institute for Well-Being in Law Sets Out to Transform the Legal Profession, *The Bar Examiner* (Summer/Fall 2021), <https://thebarexaminer.ncbex.org/article/summer-fall-2021/change-is-coming/>

Colin M. Black, *The Rise and Fall of the Mental Health Inquiry for Bar Admission*, 50 *Capital Univ. L. Rev.* 537 (2022), <https://www.capitallawreview.org/article/55615-the-rise-and-fall-of-the-mental-health-inquiry-for-bar-admission>

Jaffe & Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions To Promote Lawyer Well-Being*, 26 *ABA Prof. Lawyer* 2 (2020), https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/2/conduct-yourselves-accordingly-amending-bar-character-and-fitness-questions-promote-lawyer-wellbeing/