

***IN RE ANONYMOUS APPLICANT FOR ADMISSION TO THE SOUTH
CAROLINA BAR***

O. Gracie Fowler*

I. INTRODUCTION.....	893
II. BACKGROUND.....	894
A. In re Anonymous Applicant for Admission to the South Carolina Bar.....	894
B. <i>Admission to the South Carolina Bar</i>	896
C. <i>Character and Fitness</i>	898
III. ANALYSIS.....	899
A. <i>Impact of Questions about Mental Health, Convictions, and Expungement</i>	902
1. <i>Questions About Mental Health</i>	902
2. <i>Questions About Prior Convictions</i>	905
3. <i>Questions About Expunged Convictions</i>	907
B. <i>Additional Recommendations</i>	910
C. <i>Predictive Power of Character and Fitness Evaluations</i>	911
D. <i>Comparison of Other States' Character and Fitness Evaluations</i>	913
1. <i>Regional Comparison</i>	913
a. <i>North Carolina</i>	913
b. <i>Georgia</i>	914
2. <i>States with Revised Bar Application Questions</i>	915
IV. CONCLUSION.....	917

I. INTRODUCTION

In fulfilling its duty to provide South Carolina with competent and trustworthy lawyers, the Supreme Court of South Carolina must guarantee that applicants to the South Carolina Bar have met not only all the educational requirements but also that each applicant possesses the requisite character and

* J.D. candidate, University of South Carolina School of Law, May 2024; B.A. Public Health, University of South Carolina, May 2021. I would like to thank Professor Robert Wilcox for his expertise, advice, and encouragement throughout my research and writing process. I would also like to thank my family, specifically my parents, for their love and support in my personal and educational endeavors. Finally, I would like to thank Grace Driggers, Mary Geer Kirkland, and the rest of the *South Carolina Law Review's* Editorial Board for their guidance and attention to detail throughout the editing process.

fitness to practice law. To achieve this, the court attempts to predict an applicant's future conduct based on an applicant's past conduct. An applicant's past conduct is disclosed in the Application for Admission to the South Carolina Bar from which the court must ascertain which information has the most reliable predictive power, the accuracy of the information provided, and the discriminatory impact that soliciting specific information about the applicant's past might have. In *In re Anonymous Applicant for Admission to the South Carolina Bar*, the South Carolina Supreme Court addressed its concerns about growing applicant nondisclosures on law school applications and bar applications that affect the accuracy of the information the court receives.¹ The court, however, has yet to address the extent to which the bar application questions are overly broad and burdensome, the potentially discriminatory impact the questions may have, and the predictive power of the data being weighed in character and fitness evaluations.

Part II of this Comment addresses the facts, procedural history, and holding of *In re Anonymous Applicant for Admission to the South Carolina Bar*; the process of being admitted to the South Carolina Bar; and the character and fitness requirement of the South Carolina Bar Application. Part III analyzes the questions on the Application for Admission to the South Carolina Bar that require information about mental health, prior convictions, and expunged offenses; makes recommendations on how to amend questions that are discriminatory or overly broad; examines the predictive power of the information solicited by the application; and compares other states' character and fitness evaluations to South Carolina's character and fitness evaluation. Part IV concludes by highlighting the difficult task of protecting the legal profession charged to the Character and Fitness Committee and by urging the South Carolina Supreme Court to make progressive changes to the character and fitness portion of the Application for Admission to the South Carolina Bar.

II. BACKGROUND

A. *In re Anonymous Applicant for Admission to the South Carolina Bar*

In June 2022, the Supreme Court of South Carolina published its first opinion commenting on bar admissions with the goal of highlighting and addressing recent patterns of nondisclosure.² The opinion centered around an

1. *In re Anonymous Applicant for Admission to the South Carolina Bar*, 437 S.C. 1, 11, 875 S.E.2d 618, 623 (2022).

2. *See id.* at 11, 875 S.E.2d at 624.

anonymous bar applicant's "lack of candor" when completing both his law school application and bar application.³

When the anonymous applicant applied to law school, he falsely stated on his application that he had not been subject to any criminal or disciplinary actions.⁴ However, the applicant failed to disclose four instances of misconduct. First, the applicant failed to disclose a ticket for minor in possession of alcohol that he received as a senior in high school.⁵ The applicant made the law school aware of this charge in 2019 but did not amend his law school application until December 2020.⁶ Second, the applicant did not include that he had been charged with hindering the police when he was sixteen years old.⁷ He amended his law school application in August 2020, although his amendment at that time seriously downplayed the nature of the charge.⁸ Third, in December 2020, he amended his law school application to include a ticket that he received in May 2012 for careless operation of a vehicle, which he had failed to initially disclose.⁹ Finally, prior to the Character and Fitness Committee hearing, the applicant amended his bar application to include a fraternity prank he participated in during his undergraduate career.¹⁰

When testifying about each instance of misconduct in front of the Character and Fitness Committee, the applicant stated he did not disclose the minor in possession of alcohol ticket charge and the charge for hindering the police because both charges were expunged.¹¹ Additionally, he did not disclose the ticket for careless driving because he did not recall the ticket when he was completing his law school application, and he only recalled the ticket when he requested his driving record to complete his bar application.¹² After hearing from the applicant, the Character and Fitness Committee decided that he did have the requisite character and fitness to practice law.¹³ The Committee considered the relatively minor nature of the infractions and the length of time which had passed since the infractions occurred (almost a decade).¹⁴

In October 2021, after the hearing before the Committee, the applicant received notice that he had passed the bar exam but had not been admitted due

3. *Id.* at 4, 875 S.E.2d at 620.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 5, 875 S.E.2d at 620.

8. *Id.*

9. *Id.* at 6, 875 S.E.2d at 621.

10. *Id.* at 6–7, 875 S.E.2d at 621.

11. *Id.* at 7, 875 S.E.2d at 621.

12. *Id.* at 6, 875 S.E.2d at 621.

13. *Id.* at 8, 875 S.E.2d at 622.

14. *Id.* at 7, 875 S.E.2d at 622.

to the Committee's incomplete investigation.¹⁵ The applicant then updated his LinkedIn profile to say he was an associate attorney.¹⁶ Although the Committee found that the applicant possessed the requisite character and fitness to practice law, the applicant was still liable for the false and misleading information he provided on his application.¹⁷ Under South Carolina Appellate Court Rule 402(e), once it is determined that an applicant has provided false and misleading information, the South Carolina Supreme Court may take such action as it deems appropriate.¹⁸ Therefore, the court noted that, along with his history of nondisclosure in his law school and bar applications, the applicant's decision to untruthfully hold himself out as an attorney brought into question his moral character.¹⁹ The court found that this constituted a "sustained pattern of false and misleading conduct."²⁰

The court granted the applicant's petition for admission to the South Carolina Bar but found he was not eligible to be admitted until November 14, 2022.²¹ In addition to the court's holding on the anonymous applicant's petition, the court also provided guidance to potential law students, law schools, and bar applicants.²² The court emphasized that potential applicants must take more seriously application instructions and early warnings about the consequences of nondisclosure.²³ To further impress upon potential applicants the seriousness of nondisclosure, the court published this opinion and firmly stated "that future nondisclosures and misleading statements will not be viewed with any degree of leniency and may result in this Court's outright denial of admission to practice law."²⁴

B. Admission to the South Carolina Bar

The beginning of the practice of law in South Carolina is somewhat obscured, but, by 1699 there was a definite and growing legal profession.²⁵ In 1884, the South Carolina Bar was made up of approximately 200 lawyers.²⁶

15. *Id.* at 8, 875 S.E.2d at 622.

16. *Id.*

17. *Id.* at 10, 875 S.E.2d at 623.

18. Rule 402(e), SCACR.

19. *In re Anonymous*, 437 S.C. at 10, 875 S.E.2d at 623.

20. *Id.*

21. *Id.* at 13, 875 S.E.2d at 624.

22. *Id.* at 12, 875 S.E.2d at 624.

23. *See id.* at 11, 875 S.E.2d at 624 (emphasizing the importance of proper disclosures by applicants).

24. *Id.* at 12, 875 S.E.2d at 624.

25. *See* W. Lewis Burke, *Legal Education*, S.C. ENCYCLOPEDIA (Aug. 9, 2022), <https://www.scencyclopedia.org/sce/entries/legal-education/> [<https://perma.cc/KF2H-JV6X>].

26. *About Us*, S.C. BAR, <https://www.scb.org/about-us/> [<https://perma.cc/YH9M-WYKC>].

Today, the South Carolina Bar is made up of more than 17,000 members.²⁷ In the early years of the practice of law in South Carolina, the profession had no uniform standards for admitting lawyers or solicitors to practice in the court of law or court of chancery.²⁸ However, by 1721, there was a demand for higher quality lawyers.²⁹ In 1722, the chancery court ruled that one had to have been a member of one of the four law colleges in London for five years and have attended eight sessions of commons in order to be admitted as a solicitor.³⁰ Later, in the 1780s:

“[i]n order to qualify, a man had to be a citizen of the state; to have studied law in a law office within the state for four years or to have studied law ‘in any foreign nation as to qualify . . . [for] the profession of the law’ there, to give proof of being a person ‘of Fair Character and Competent Abilities’; and to take the oath of allegiance to the new state of South Carolina.”³¹

As the legal practice began to develop, the demand for a highly educated bar did as well.³² Over the next almost two-hundred years, admission to the bar became more formalized.³³ In March 1958, the South Carolina Supreme Court disallowed reading law and required all candidates for admission to the bar to be law school graduates.³⁴ Since then, the standard of bar admission to the South Carolina Bar has required a law school education, passage of the bar examination, and requisite character and fitness.³⁵

Today, that standard of bar admission has continued and been expanded upon. Prior to undergoing a lengthy character and fitness evaluation, an applicant first must apply for admission to the South Carolina Bar. Admission to the South Carolina Bar is governed by Rule 402 of the South Carolina Appellate Court Rules.³⁶ Under Rule 402(c), to be qualified for admission to the bar, an individual must: be at least twenty-one years old; be of good moral character; have received a JD or LLB from an ABA-approved law school; be found qualified by a panel of the Character and Fitness Committee; receive a satisfactory score on the UBE; receive a satisfactory score on the Multistate

27. *Id.*

28. *See* Burke, *supra* note 25.

29. *Id.*

30. *Id.*

31. GEORGE C. ROGERS JR., GENERATIONS OF LAWYERS: HISTORY OF THE SOUTH CAROLINA BAR 8 (1992).

32. *See* Burke, *supra* note 25.

33. *See id.*

34. *Id.*

35. *See id.*

36. Rule 402(a), SCACR.

Professional Responsibility Examination; have not been disbarred, suspended from the practice of law, or have been the subject of any pending disciplinary proceeding in another jurisdiction; successfully complete a Course of Study on South Carolina Law; pay the fees required by this rule and take the oath or affirmation.³⁷

C. *Character and Fitness*

Before admitting an applicant to the South Carolina Bar, the Character and Fitness Committee needs to discern if the applicant has the requisite moral character to practice law, thus continuing a long tradition in South Carolina.³⁸ A showing of good character has almost always been a requirement of admission to the South Carolina Bar. In the eighteenth century, South Carolina provided for examination by the court to determine whether the candidate manifested “probity, honesty, and good demeanor.”³⁹ Some of the requirements to practice law in South Carolina have been more relaxed than they are now, such as in 1812 when the legislature passed a law that made it much easier to become a lawyer by removing all required periods of preparation for admission to the bar because they were an unnecessary and expensive delay. However, even then, each person still had to “produce satisfactory evidence of his morality and general good character.”⁴⁰

Today, following the self-regulatory design of the legal licensing system, the Character and Fitness Committee consists of eighteen members of the South Carolina Bar who are appointed by the South Carolina Supreme Court for five-year terms.⁴¹ It is the Committee’s duty to investigate and determine whether an applicant for admission possesses the qualifications prescribed by this rule as to age, legal education, and character.⁴² The Character and Fitness Committee begins their investigation of an applicant’s character with the application form, which is approved by the Committee.⁴³ Along with other standard information, such as educational background, the application asks numerous questions to ascertain an applicant’s moral character.⁴⁴ These questions inquire into matters such as disciplinary proceedings from school or college; bonded positions; participation in civil proceedings; arrests or

37. Rule 402(c), SCACR.

38. Rule 402(g)(1), SCACR.

39. ANTON-HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA*, 247–48, 267–68 (1965).

40. *See* ROGERS, *supra* note 31.

41. Rule 402(l)(1), SCACR.

42. Rule 402(l)(5), SCACR.

43. Rule 402(d)(1), SCACR.

44. SUP. CT. S.C., OFF. BAR ADMISSION, PART B OF THE APPLICATION FOR ADMISSION (2022) [hereinafter APPLICATION FOR ADMISSION].

violations of the law; driving records; substance abuse; alcohol abuse; mental health disorders; professional misconduct; financial obligations; and past participation in anarchial groups.⁴⁵ The application also requires “the original affidavits of three responsible citizens, each of whom is able, and is hereby authorized to give a factual, accurate, and reliable appraisal showing that [the applicant is] a person of good moral character.”⁴⁶

The questions on South Carolina’s bar application are in line with the scope recommended by the American Bar Association (ABA). The ABA states that “[t]he primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice.”⁴⁷ Furthermore, “a lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.”⁴⁸ Therefore, the ABA notes that relevant conduct includes, but is not limited to, unlawful conduct, academic misconduct, making of false statements, abuse of the legal process, neglect of financial responsibilities, violation of a court order, evidence of mental or emotional instability, and evidence of drug or alcohol dependence.⁴⁹

III. ANALYSIS

It is undisputed that the bar application and the character and fitness process have a worthwhile goal in mind: the protection of the public and the protection of the legal profession.⁵⁰ However, the appropriateness and effectiveness of the methods used to evaluate bar applicants to ensure the protection of the public and the legal profession are in dispute. The bar’s methods are in dispute specifically due to their potentially discriminatory effects, lack of predictive value, and interference with the accuracy of information provided on bar applications.⁵¹ To assess a bar applicant’s character, most applications inquire about past conduct, including past convictions, academic misconduct, and credit history.⁵² The applications also seek evidence of rehabilitation and current character.⁵³ Delving into these aspects of a bar applicant’s life can often have discriminatory impacts on bar

45. *Id.*

46. *Id.*

47. NAT’L CONF. OF BAR EXAM’RS & THE AM. BAR ASS’N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, at vi (2021).

48. *Id.* at viii.

49. *Id.*

50. See Leslie C. Levin, *Rethinking the Character and Fitness Inquiry*, 22 PRO. LAW. 19, 20 (2014).

51. See *id.*

52. *Id.* at 19.

53. *Id.*

applicants⁵⁴ without providing much in the way of predictive power of future attorney misconduct.⁵⁵ Discussions surrounding character and fitness, and the subsequent urging of those in legal profession to revise the process, are not new.⁵⁶ For more than three decades, those in the legal profession have debated the following questions:

What are the appropriate questions on bar applications to provide bar examiners with sufficient information to screen out unfit and unstable potential attorneys? Do questions on mental health treatment reveal information that helps predict current and future ability to practice law? Are questions about substance abuse and treatment relevant in order to prevent attorney misconduct? Should inquiry of criminal misconduct be restricted to criminal convictions or should information about arrests alone be permitted, and should a time frame be placed on such investigations? Are there certain behaviors or conduct in an applicant's past that are red flags in predicting present and future misconduct? Does the burden of proof fall on the bar applicant to prove moral fitness or should it be placed on the shoulders of bar examiners to demonstrate unfitness?⁵⁷

But while each of those questions has been thoughtfully answered by numerous law review articles,⁵⁸ substantive change to methods of character and fitness evaluation has been slow.

In 2014, these questions were also the subject of a U.S. Department of Justice investigation.⁵⁹ The investigation resulted in the Department of Justice taking “its strongest action to date”⁶⁰ concerning the character and fitness

54. See *infra* Part III.A.

55. See *infra* Part III.C.

56. See, e.g., Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. UNIV. L. REV. 331, 331 (1995).

57. *Id.*

58. See generally, e.g., Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. REV. 383, 385 (2020) (describing the article's various Parts which analyze character and fitness requirements in bar applications); Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the “Others” in the Name of “Protection,”* U. ILL. L. REV. 345 (2018) (analyzing character and fitness requirements in bar applications, particularly as they relate to mental health and discrimination); Stone, *supra* note 56, at 331 (posing crucial questions relating to the relevance and usefulness of the character and fitness questions in bar applications).

59. See David Jaffe & Janet Stearns, *Conduct Yourselves Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, 26 PRO. LAW. 3, 4–6 (2019).

60. Aaron Loudenslager, *Applying to the Bar: Fit to Practice?*, 89 WIS. LAW. 34, 37 (2016).

portion of the bar application.⁶¹ On August 15, 2014, the U.S. Department of Justice concluded a three-year investigation of the Louisiana attorney licensure system.⁶² The investigation was launched after “applicants with mental health disabilities alleged that they were subject to ‘additional inquiries and/or conditions on admission on account of mental health disability.’”⁶³ The questions the bar applicants had to answer had been developed by the National Conference of Bar Examiners.⁶⁴

On August 15, 2014, the U.S. Department of Justice concluded its investigation, resulting in a consent decree with the Louisiana Supreme Court that “prohibited the court from asking bar applicants questions about diagnosis and treatment ‘which did not effectively predict future misconduct as an attorney.’”⁶⁵ Then, in August 2015, the ABA Commission on Disability Rights submitted a resolution to the ABA House of Delegates which affirmed the Louisiana consent decree. The resolution urged state bars 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 behavior that impairs an applicant's current ability to practice law in a competent, ethical, and professional manner.”⁶⁶

After the Department of Justice consent decree, South Carolina was one of at least twenty-five states to change questions related to an applicant’s

61. See Jaffe & Stearns, *supra* note 59, at 5.

62. See *id.*

63. *Id.*

64. Those questions are as follows:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. 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) which in any way affects, or if left untreated, could affect your ability to practice law in a competent and professional manner?

26B. If your answer to 26A is yes, are the limitations caused by your mental health condition...reduced or ameliorated because you receiving ongoing treatment (with or without medication) or because you participate in a mentoring program?

27. Within the past five years have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation, any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority. *Id.* at 5.

65. *Id.*

66. *Id.* at 8.

mental health and fitness to practice.⁶⁷ While compliance with the 2014 Louisiana consent decree represents a step in the right direction for South Carolina bar licensing, the Application for Admission to the South Carolina Bar must be further amended to modify the mental health questions, modify questions pertaining to convictions, remove questions requesting expunged convictions, and remove questions that are overly broad. By considering the negative effects of some of the current application's questions and making the recommended changes, the Application for Admission to the South Carolina Bar can more effectively provide the Character and Fitness Committee with the information they need to make quality decisions on applicant admission.

A. Impact of Questions about Mental Health, Convictions, and Expungement

1. Questions About Mental Health

The South Carolina Bar Application asks applicants to identify any conditions or impairments that in any way affect their ability to practice law in a “competent, ethical, and professional manner.”⁶⁸ The application provides that “substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition” could be considered an impairment.⁶⁹ Although the character and fitness process is intended to protect the practice of law and future clients by identifying issues that could affect the ethical and competent practice of law,⁷⁰ seeking to identify applicants that struggle with mental health, substance abuse, or alcohol abuse prevents law students from seeking help.⁷¹ Accordingly, such questions should be amended to remediate the discriminatory effect the questions can have on law students struggling with mental health, substance abuse, or alcohol abuse.

Bar application questions referencing past or current struggles with mental health, alcohol abuse, or substance abuse can prevent law students from seeking the help they need while in law school because law students are under the impression that efforts to seek treatment could eventually become a roadblock to bar admission.⁷²

The ABA Center for Professional Responsibility has reported that many individuals first experience issues with mental health, alcohol abuse, or substance abuse in law school when faced with new academic, financial, and

67. See Bobbi Jo Boyd, *Embracing Our Public Purpose: A Value-Based Lawyer-Licensing Model*, 48 U. MEM. L. REV. 351, 372–73 (2017).

68. APPLICATION FOR ADMISSION, *supra* note 44, at 9.

69. *Id.*

70. See Jaffe & Stearns, *supra* note 59, at 5.

71. See *id.* at 4.

72. See *id.*

career pressures.⁷³ In one study, “nearly half of the lawyers [surveyed] stated that the drinking issues began within their first 15 years in the industry, including their time in law school.”⁷⁴ If it is not a student’s first time facing such issues, those with a history of mental health conditions or substance abuse have admirably overcome those challenges to attend law school and practice law.⁷⁵ Once admitted to law school, these questions seem to loom over students, scaring them out of speaking up about what is going on in their lives. For instance, in a national multisite study of a sample of law students, students reported that they did not seek treatment for substance use disorders because it posed a “[p]otential threat to bar admission” (endorsed by 63% of the sample) and a “[p]otential threat to job or academic status” (endorsed by 62% of the sample).⁷⁶ The threat of not being admitted to the bar led almost half of law students to feel like their drug or alcohol problems should be hidden so that they could be admitted to the bar.⁷⁷ Unfortunately, this belief only increased among populations with increasingly severe substance use behaviors: in a group of 200 students who had reported “two or more incidents of binge-drinking, use of street drugs, use of prescription drugs without a prescription, positive screening for depression and/or positive screening for severe anxiety,” 72% of students believed their chances of being admitted to the bar would improve if they hid their problems.⁷⁸

When students feel scared to speak out and receive help because the character and fitness evaluation delves into their substance abuse habits and mental health, a cycle of alcohol and drug use continues to persist. A spring 2014 study that surveyed fifteen law schools found that 53% of students got drunk at least once within 30 days of receiving the survey, 14% of students used prescription drugs without a prescription within 12 months of receiving the survey, and 6% of students used cocaine within 12 months of receiving the survey.⁷⁹ These rates of substance abuse are likely linked to the highly competitive and intense atmosphere that law students experience during law school. Law students have reported using substances to concentrate better while studying, increase alertness to study longer, and enhance academic performance.⁸⁰ This data indicates that many law students struggle with

73. *See id.* at 3.

74. Priscilla Henson, *Addiction & Substance Abuse in Lawyers: Statistics to Know*, AM. ADDICTION CTR. (Sept. 7, 2022), <https://americanaddictioncenters.org/rehab-guide/workforce/white-collar/lawyers> [<https://perma.cc/55AX-3K3Z>].

75. Jaffe & Stearns, *supra* note 59, at 3.

76. 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, 141 (2016).

77. *See id.* at 142.

78. *Id.*

79. *Id.* at 129, 133, 134.

80. *Id.* at 135.

mental health, substance abuse, or alcohol abuse, but bar applications that seek information about treatment can deter law students from seeking the necessary help to address those issues.

Questions pertaining to mental health, substance abuse, or alcohol abuse should be amended so law students are unafraid to seek treatment for substance abuse and mental health struggles they may be facing, which will lead to a healthier legal profession in the future. Specifically, questions which solicit information about mental health, substance abuse, or alcohol abuse should be limited in scope and focus on actual and recent conduct. For instance, Question 14 of Part B of the Application for Admission for the South Carolina Bar⁸¹ does an excellent job of limiting the time frame of inquiry and follows recent recommendations from the ABA Center for Professional Responsibility.⁸² In accordance with those same recommendations from the ABA Center for Professional Responsibility, question 14(b) should be eliminated because it does not focus on “actual and recent conduct.”⁸³ If question 14(b) cannot be eliminated for some reason, the scope of the question

81. Question 14 reads:

(a) Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?

If you answered YES, furnish a thorough explanation and provide relevant dates.

(b)

(i) 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?

(ii) If your answer to Question 14 (b)(i) is YES, 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?

If your answer to Question 14 (b)(i) or (ii) is YES, complete a separate Appendix 2 and Appendix 3 for each service provider. (Appendix 2 and Appendix 3 appear later in this form.) As used in Question 14 (b), “currently” means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.

APPLICATION FOR ADMISSION, *supra* note 44, at 9.

82. *See* Jaffe & Stearns, *supra* note 59, at 13.

83. *See id.* at 12–13.

should be limited.⁸⁴ If question 14(b) is amended to be more limited, the question should focus on mental health conditions that lasted for more than one year so that bar applicants are not required to disclose short term crisis situations for which applicants sought help (grief counseling or marital troubles, for example).⁸⁵ Additionally, the amount of past history that is relevant should be limited to the last five years so that bar applicants are not required to disclose every mental health condition that lasted more than one year since birth.⁸⁶ If the Committee chooses to eliminate question 14(b), the bar application will target an applicant's recent conduct, rather than mental health conditions that do not accurately reflect on an applicant's fitness to practice law.

2. *Questions About Prior Convictions*

The South Carolina Bar Application asks applicants to disclose if they have ever “been arrested or taken into custody or accused, formally or informally, of the violation of a law including instances which have been expunged by court order and including juvenile offenses whether or not the records are sealed.”⁸⁷

Questions about prior convictions are troubling because inquiring into past convictions or criminal history can act as a “proxy for race” according to some who oppose the current approach to character and fitness evaluation.⁸⁸ Inquiring into past convictions or criminal history can act as a “proxy for race” because the criminal justice system disparately impacts people of color and lower socioeconomic status; thus, an admission standard related to criminal history will also disproportionately affect those applicants.⁸⁹ Research shows that in South Carolina in 2015 and 2017, Black people constituted 29% of state residents but 53% of people in jail (2015) and 60% of people in prison (2017).⁹⁰ Therefore, since South Carolina's criminal justice system disparately impacts people of color, there is a high risk that an admission standard related to criminal history will also disparately affect minority applicants in South Carolina.

Furthermore, in addition to penalizing non-white applicants, admissions standards relating to criminal history can cause non-white applicants to self-

84. See Stone, *supra* note 56, at 333–34.

85. See *id.*

86. See *id.*

87. APPLICATION FOR ADMISSION, *supra* note 44, at 8.

88. Lusk, *supra* note 58, at 373.

89. *Id.*

90. *Incarceration Trends in South Carolina*, VERA INST. OF JUST., <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-south-carolina.pdf> [<https://perma.cc/R6Q-WS3C>].

select out of pursuing the legal profession. For example, “[a] survey conducted by Stanford University’s Criminal Justice Center . . . [which surveyed] 100 formerly incarcerated college graduates and criminal justice leaders . . . [found that] ‘many’ cited moral character requirements as the reason they did not apply to law school, despite their desire to do so.”⁹¹ Without clear guidelines on how convictions and criminal history will be weighed in the character and fitness evaluation, potential applicants self-select out, thus depriving the legal profession of attorneys with unique knowledge and insight.⁹²

Even if an applicant with prior convictions does matriculate into law school, the lack of clarity in character and fitness decisions can still act as an impediment to a legal career. For example, in 2018, the *North Carolina Lawyers Weekly* published an article highlighting one attorney’s experience with character and fitness, emphasizing his fear of how his convictions would be viewed.⁹³ Marlowe Rary, the attorney interviewed, had been arrested for marijuana possession and driving under the influence as a teenager.⁹⁴ He appropriately disclosed those instances on his law school and bar applications.⁹⁵ However, his chief complaint with the character and fitness process was the lack of “any set-in-stone requirements or disqualifiers” and the feeling that “[y]ou are at the mercy of the team that interviews you.”⁹⁶ The article specifically notes that “[i]n South Carolina, the state Supreme Court’s Committee on Character and Fitness is tasked with determining whether an individual is morally worthy, but its thoughts on ex-offenders is an enigma. If any sort of litmus test is applied, no one is talking.”⁹⁷

A lack of transparency in how past criminal convictions will be weighed or considered by the South Carolina Character and Fitness Committee may deter otherwise-qualified individuals from applying to law school and potentially discriminates against people of color. In an effort to remedy

91. Heath Hamacher, *A Game of Craps: Law School, Bar Admissions a Gamble for Applicants with Records*, N.C. LAWS. WKLY. (June 13, 2018), <https://nclawyersweekly.com/2018/06/13/a-crap-game-law-school-bar-admissions-a-gamble-for-applicants-with-records/> [https://perma.cc/8Q8J-BN4B].

92. *See id.*

93. *See generally id.*

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.* In terms of a litmus test, the balance is currently in favor of giving discretion to the Character and Fitness Committee; however, many people do not trust a broad grant of discretion. Providing a clear standard or “litmus test” could better provide the guidance that the South Carolina Supreme Court was trying to provide in their decision. A possible model is a value-based licensing system, as proposed by Assistant Professor of Law at Campbell University School of Law, Bobbi Jo Boyd. *See Boyd, supra* note 67, at 361. Her proposed licensing system would revolve around four values: clarity, accessibility, transparency, and fairness. *Id.*

discrimination arguably caused by question 12 of Part B of the Application for Admission to the South Carolina Bar, which requests information about past convictions,⁹⁸ question 12(a) should be limited to only require detailed explanations for adult felony and misdemeanor convictions and juvenile felony convictions within the last 10 years.⁹⁹ Limiting the type of convictions that are required to be disclosed will give applicants a clearer idea of how past criminal convictions will be considered by the South Carolina Character and Fitness Committee.

3. *Questions About Expunged Convictions*

As previously noted, the South Carolina Bar Application asks applicants to disclose if they have ever “been arrested or taken into custody or accused, formally or informally, of the violation of a law including instances which have been expunged by court order and including juvenile offenses whether or not the records are sealed.”¹⁰⁰ An additional problem posed by this question, along with the potentially discriminatory effects of inquiring broadly about convictions, is the requirement to disclose violations of law “which have been expunged” or records that have been sealed.¹⁰¹

South Carolina law allows the expungement of criminal records in three scenarios: (1) following a conviction for a crime carrying a penalty of not more than thirty days imprisonment or a fine of one thousand dollars,¹⁰² (2) following a conviction for domestic violence in the third degree,¹⁰³ and (3) following a first offense conviction as a youthful offender.¹⁰⁴ Each statute provides very specific details about how and when criminal convictions can be expunged from an individual’s record, respective to the applicable scenario.¹⁰⁵ Additionally, both statutes provide that:

After the expungement, the South Carolina Law Enforcement Division is required to keep a nonpublic record of the offense and the date of the expungement to ensure that no person takes advantage of

98. Question 12(a) of Part B of the Application for Admission to the South Carolina Bar reads: “Have you ever been arrested or taken into custody or accused, formally or informally, of the violation of a law including instances which have been expunged by court order and including juvenile offenses whether or not the records are sealed?” Applicants are then required to provide a brief personal explanation for each incident they disclose. APPLICATION FOR ADMISSION, *supra* note 44, at 8.

99. Stone, *supra* note 56, at 343.

100. APPLICATION FOR ADMISSION, *supra* note 44, at 8.

101. *Id.*

102. S.C. CODE ANN. § 22-5-910(A) (West Supp. 2022).

103. *Id.* § 22-5-910(B).

104. *Id.* § 22-5-920(B)(1).

105. *See id.* § 22-5-910; *see also id.* § 22-5-920.

the rights of this section more than once. This nonpublic record is not subject to release pursuant to Section 34-11-95, the Freedom of Information Act, or any other provision of law except to those authorized law or court officials who need to know this information in order to prevent the rights afforded by this section from being taken advantage of more than once.¹⁰⁶

Accordingly, many individuals who have had a conviction expunged may believe that they need not ever disclose the details of their expunged conviction. And, similar to the anonymous applicant in *In re Anonymous Applicant for Admission to the South Carolina Bar*,¹⁰⁷ many of those individuals who go on to apply to law school are often wrongly advised that they do not need to disclose violations of the law that have been expunged on their law school or bar applications.¹⁰⁸ However, both the belief that an expunged conviction does not need to be disclosed and the advice not to disclose on a law school or bar application are incorrect in South Carolina.¹⁰⁹ The South Carolina statutes governing expungement only provide for the mere destruction of the records; the statutes do not include language that would “expressly prohibit interested parties from inquiring into expunged offenses or limit the weight interested parties may give to an expunged offense.”¹¹⁰ Therefore, the Application for Admission to the South Carolina Bar can rightfully inquire into these past convictions, expunged or not, to provide the Character and Fitness Committee with information to consider when making their determinations of character.

Although allowed by statute in South Carolina,¹¹¹ seeking information about expunged offenses can cause needless delay and confusion in the character and fitness process because applicants are unsure about what information they are required to disclose.¹¹² First, it is necessary to consider the public policy behind expungement. The policy goals of expungement are typically to reduce the harmful effects of youthful offenses and preserve future opportunities because juvenile criminal records can often act as hinderances

106. *Id.* § 22-5-910(D); *see also id.* § 22-5-920(C).

107. *In re Anonymous Applicant for Admission to the South Carolina Bar*, 437 S.C. 1, 7, 875 S.E.2d 618, 621 (2022) (finding that the Applicant testified that he did not inform the law school about his arrests for MIP and hindering police because he “was under the impression they were off [his] record and they were expunged”).

108. See Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 79, 80 (2014).

109. See APPLICATION FOR ADMISSION, *supra* note 44.

110. Simon, *supra* note 108, at 96.

111. See S.C. CODE ANN. § 22-5-910 (2018); *id.* § 22-5-920.

112. See Simon, *supra* note 108, at 107.

to a person's present and future ability to obtain employment or education.¹¹³ Therefore, weighing expunged convictions when considering an applicant's character and fitness contravenes the policy and intent of expungement statutes.

Second, the requirement to disclose expunged offenses is confusing for applicants and can provide an arbitrary basis for denial or delay in the application process.¹¹⁴ The requirement to disclose expunged convictions creates confusion due to the conflicting advice that is given to applicants, as noted above.¹¹⁵ This confusion can lead to inadvertent nondisclosures on the bar application, as it did for the anonymous bar applicant, and eventual inquiries into character and the bar applicant's candor.¹¹⁶ Any inquiries into character or questions surrounding a bar applicant's candor can raise an arbitrary basis for denial or cause a delay in the application process.¹¹⁷ For instance, the failure to disclose expunged violations of law can harm applicants because "[Character and Fitness] Committee members may attribute an improper and potentially disqualifying motive to the applicant's failure to disclose prior offenses."¹¹⁸ The Application for Admission to the South Carolina Bar should be amended to avoid potential confusion and harm. In doing so, South Carolina should model North Carolina's application and not require the disclosure of lawfully expunged offenses.¹¹⁹ Accordingly, questions pertaining to lawfully expunged violations should be removed from the South Carolina Bar Application.¹²⁰

113. *See id.* at 90–91.

114. *See id.* at 103.

115. *See id.* at 107.

116. *See id.*

117. *See id.*

118. *Id.* at 81–82.

119. *See* N.C. GEN. STAT. § 15A-153 (2013).

120. *See generally* Amy F. Kempel, *Paying for a Clean Record*, 112 J. CRIM. LAW. AND CRIMINOLOGY 439, 463–69 (2022). Additionally, consideration must be given to the potential access to justice problem presented in no longer requiring expunged convictions to be disclosed. Expunging a conviction from an individual's record is often very costly. *Id.* at 439. Therefore, "[d]efendants with means, who tend to be predominantly White, can often pay for a clean record. But the indigent, who are unable to pay, and disproportionately Black and Brown, are saddled with the stigma of a criminal record." *Id.* This clearly creates a problem if non-white applicants, who possibly had lesser access to expungement, were required to disclose convictions that they were unable to pay to be expunged, while their white counterparts did not have to disclose an expunged conviction or unexpunged conviction.

B. Additional Recommendations

In addition to the recommendations made pertaining to questions 14¹²¹ and 12¹²² of Part B of the Application for Admission to the South Carolina Bar, changes should be made to increase the overall clarity of the application. First, question 18,¹²³ a “catch-all” question, should be eliminated from the application because it is too vague.¹²⁴ By including this “catch-all” question in the application, the bar application poses a question that is “inappropriate and unreasonable” to respond to because it opens applicants up to any and all possible disclosures without limitation.¹²⁵ In addition to removing question 18, South Carolina should include a comprehensive preamble or FAQ section to the Application that addresses the entirety of the application and clarifies what must and what need not be disclosed. The addition of a preamble or FAQ section would be in accordance with the recommendations from the ABA Center for Professional Responsibility.¹²⁶ The ABA report recommends that the preamble and/or FAQ clarify what must and what need not be disclosed by incorporating examples of the types of conduct “that would be disclosable, such as criminal incidents, financial mismanagement, or chronic absenteeism.”¹²⁷ However, the ABA report also stated it is “essential that the FAQ clarify that there is no requirement of disclosure of medical conditions, treatment, or past history of substance use or mental health.”¹²⁸ Additionally, law schools, with the help of the bar, should provide guidance on seeking mental health care and other disclosures.¹²⁹

These recommendations make sense for South Carolina, especially when considering the initiatives that the South Carolina Bar is already advancing. In November 2008, the South Carolina Bar formed the HELP Task Force to raise awareness and promote prevention of depression, suicide, and substance

121. *See supra* text accompanying notes 80–85.

122. *See supra* text accompanying notes 96–97, 117.

123. APPLICATION FOR ADMISSION, *supra* note 44, at 12. Question 18 of Part B of the Application for Admission to the South Carolina Bar reads: “Are there any other facts not disclosed by your answers herein but concerning your background, history, experience, or activities which in your opinion may have a bearing on your character, moral fitness, or eligibility to practice law in South Carolina and which should be placed at the disposal or brought to the attention of the examining authorities?” *Id.*

124. Stone, *supra* note 56, at 344.

125. *Id.*

126. *See* Jaffe & Stearns, *supra* note 59, at 13.

127. *Id.*

128. *Id.*

129. *See id.*

abuse within the legal profession.¹³⁰ The South Carolina Bar also has a confidential service called Lawyers Helping Lawyers which assists lawyers suffering from substance abuse and mental illness.¹³¹ Making changes to the questions pertaining to mental health would further destigmatize seeking mental health care within the South Carolina legal profession. Additionally, the South Carolina Bar has a Diversity Committee that works to “promote full and meaningful participation in the legal profession in South Carolina by people of diverse backgrounds.”¹³² The South Carolina Bar also implemented a Five-Year Strategic Plan in 2020, which included the key action item “to perform a comprehensive survey of Bar members’ diversity and experiences to understand the climate on the state of diversity and inclusion in the South Carolina legal profession.”¹³³ Therefore, changes to the bar application that would target racial disparities in the bar admission process and work systematically to increase diversity in the profession would be in line with the current goals of the South Carolina Bar.

C. Predictive Power of Character and Fitness Evaluations

Along with the potentially discriminatory impact of bar application questions about mental health, criminal convictions, or expungements, the actual predictive power of character and fitness evaluations is arguably extremely low.¹³⁴ One study analyzed the “admissions records of 1,343 lawyers admitted to the Connecticut bar from 1989 to 1992 and their subsequent disciplinary history.”¹³⁵ The results of that study identified factors that made discipline more or less likely,¹³⁶ while also noting that the overall baseline likelihood of future attorney discipline is only 2.5% of all admitted lawyers.¹³⁷ Factors that made future discipline more likely included “having delinquent credit accounts, having been a party to civil litigation (excluding divorce), higher student loan debt, more traffic violations, and a history of a

130. C. Stuart Mauney, *The Lawyer’s Epidemic: Depression, Suicide and Substance Abuse*, S.C. BAR, https://www.scbare.org/media/filer_public/3d/25/3d25d564-bc05-468b-9cc0-6317004adb38/outline_for_lawyers_epidemic.pdf [https://perma.cc/P7JW-M2C3].

131. *Id.*

132. S.C. Bar, *Diversity Committee*, S.C. BAR, <https://www.scbare.org/lawyers/sections-committees-divisions/committees/diversity-committee/> [https://perma.cc/TQK4-G8BP].

133. S.C. Bar, *Your Bar: Your Voice Membership Survey Results 2021*, S.C. BAR, https://www.scbare.org/lawyers/sections-committees-divisions/committees/diversity-committee/survey_results_2021/ [https://perma.cc/26k7-8HNT].

134. Leslie C. Levin et al., *The Questionable Character of the Bar’s Character and Fitness Inquiry*, 40 L. & SOC. INQUIRY 51, 51 (2015).

135. *Id.* at 52.

136. *See id.*

137. *Id.*

diagnosis of or treatment for psychological disorders.”¹³⁸ However, the research report emphasized that “even if some variable (for example, having defaulted on a student loan) doubles the likelihood of subsequent disciplinary action, the probability of subsequent discipline for someone with a student loan default is still only 5%.” Applicants who had a prior criminal conviction were 1.2% more likely to be subject to future attorney discipline.¹³⁹ Factors that made future discipline less likely included “[h]igher law school grades, attendance at a more prestigious law school, and being female.”¹⁴⁰ Women have a 1% chance of being subject to future attorney discipline, while men have a 3.5% chance of being subject to future attorney discipline.¹⁴¹ When comparing those factors that increase or decrease the likelihood of attorney discipline, it is striking to notice that being male is associated with a higher likelihood of discipline than a prior criminal conviction.

The study found that none of these factors actually increased or decreased the likelihood of discipline in a meaningful way.¹⁴² While analyzing the data, researchers determined that “[t]he information collected during the character and fitness inquiry does not appear to be very useful in predicting subsequent lawyer discipline.”¹⁴³ For instance, researchers noted that “one of the most powerful predictors of the likelihood that a lawyer would be disciplined is simply being male.”¹⁴⁴ These findings strengthen the argument that, when looking at the cost-benefit analysis of character and fitness evaluations, applicants continue to bear the cost of overly broad and burdensome disclosures, while the legal profession reaps a small benefit from some minimal predictive power. Therefore, when considering the types of information and amount of detail applicants are required to disclose, character and fitness evaluations should require only the amount of information that is necessary to achieve its stated goal of public protection.

Questions pertaining to mental health conditions, alcohol abuse, and substance abuse exemplify the lack of predictive power in bar application questions. As previously noted, law students frequently struggle with mental health conditions, alcohol abuse, and substance abuse. Law students then go through the bar application process, undergoing questioning about mental health, alcohol abuse, and substance abuse that are meant to screen those with issues that could affect their work in the legal field from entering the field. However, after students graduate law school and are admitted to the bar, mental health conditions, alcohol abuse, and substance abuse are still

138. *Id.*

139. *Id.* at 66.

140. *Id.* at 52.

141. *Id.* at 66.

142. *Id.* at 78.

143. *Id.*

144. Levin, *supra* note 50, at 22.

prevalent in the legal profession despite any identification and prevention that may occur at the character and fitness level.¹⁴⁵ When reviewing mental health in the legal profession, studies have shown that 28% of lawyers suffered from depression, 19% of lawyers had severe anxiety, and 11.5% of lawyers had “suicidal thoughts at some point during their career.”¹⁴⁶

These issues primarily affect younger lawyers; trends show that, as lawyers grow older, the rates of depression and substance abuse decline.¹⁴⁷ The legal profession has higher reported rates of problematic drinking behaviors when it comes to other populations: it has been reported that nearly 20.6% of lawyers and other legal professionals could be considered problem drinkers.¹⁴⁸ Additionally, concern about heavy drinking in the legal profession is not just the product of twenty-first century alarmism: a 1990 study assessing problem drinking behaviors among lawyers found that 18% were problem drinkers, as compared to a 10% prevalence rate in the United States at the time.¹⁴⁹ Many may quickly chalk a tendency to engage in problematic drinking behaviors up to a stressful career choice. However, a recent survey of legal professionals indicated that 36.4% of respondents had scores on the Alcohol Use Disorders Identification Test, version C (AUDIT-C), consistent with problematic drinking whereas in comparison, AUDIT-C scores consistent with problematic drinking have been self-reported by only 15% of physicians and surgeons.¹⁵⁰ Therefore, it appears that trying to identify substance abuse or mental health conditions on the bar application does not prevent law students who have struggled with those issues from continuing to struggle or prevent law students from struggling with those issues as young attorneys.

D. Comparison of Other States' Character and Fitness Evaluations

1. Regional Comparison

a. North Carolina

The North Carolina Bar Application currently includes three sections of relevance to character and fitness: (1) Applications, Authorizations, and Conduct, (2) Character and Fitness, (3) and Character References. The “Applications, Authorizations, and Conduct” portion inquires into the

145. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 52 (2016).

146. *Id.* at 46, 50.

147. *Id.*

148. *Id.* at 48.

149. *Id.* at 46.

150. *See id.* at 51.

applicant's past conduct in reference to bar applications, bar admissions, and attorney discipline.¹⁵¹ The "Character and Fitness" portion asks applicants questions very similar to the Application for Admission to the South Carolina Bar.¹⁵² Pertaining to mental health, the North Carolina Bar application asks questions concerning mental health that are substantially similar to the questions asked on the South Carolina Bar Application.¹⁵³ Pertaining to criminal convictions, the North Carolina application first provides a preamble that clarifies the information the questions following the preamble are seeking.¹⁵⁴ The preamble identifies a key difference in the South Carolina and North Carolina applications: South Carolina requires expunged charges or convictions to be disclosed whereas North Carolina does not.¹⁵⁵ The North Carolina application then asks the applicant "[h]ave you EVER IN YOUR ENTIRE LIFE been arrested, given a written warning, or taken into custody, or accused, formally or informally, of the violation of a law for an offense other than traffic violations?"¹⁵⁶ The North Carolina Application also includes two follow-up questions asking for information specifically about DWI/DUI charges and vehicular manslaughter/vehicular homicide.¹⁵⁷

b. Georgia

The Application for Admission to the Georgia Bar asks applicants about past traffic violations, suspended licenses, DUI, and criminal proceedings.¹⁵⁸ When asking applicants to identify mental health conditions, the Georgia application includes a lengthy preamble.¹⁵⁹ This preamble highlights and

151. See N.C. BD. OF L. EXAM'RS., GENERAL APPLICATION [hereinafter NORTH CAROLINA BAR APPLICATION], <https://www.ncble.org/browseprintform.action?applicationID> [<https://perma.cc/4EKF-K8RW>].

152. See *id.*

153. The North Carolina application asks, "[w]ithin the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?" *Id.* The following question asks, "[d]o 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?" See *id.*

154. The preamble, in relevant part, reads: "North Carolina allows you to omit reference to any arrest, charge or conviction that has been expunged by a duly entered order of expunction pursuant to Article 5 of Chapter 15A of the General Statutes of North Carolina. For charges other than minor traffic offenses, set out in detail the facts surrounding said charges." See *id.*

155. See *id.*

156. *Id.*

157. See *id.*

158. See GA. OFF. BAR ADMISSIONS, CHARACTER & FITNESS QUESTIONNAIRE (2022) [hereinafter GEORGIA BAR APPLICATION].

159. The preamble reads:

explains many of the issues identified with asking questions about an applicant's mental health, specifically addressing a fear of seeking treatment or help and easing applicant's fears by stating most applicants are admitted.¹⁶⁰ Although the Georgia Bar application includes a preamble that the South Carolina Bar Application does not, the Georgia Bar application appears to require a greater amount of detail than the South Carolina application.¹⁶¹ The Georgia application asks applicants to identify "any condition or impairment (including, but not limited to, substance use, alcohol use, or a mental, emotional, or nervous disorder or condition)" from the past two years.¹⁶² However, "[t]he application does disclaim that '[i]f you have been or are being treated for a condition so that it does not currently affect your ability to practice law in a competent, ethical, and professional manner, then you need not disclose it.'"¹⁶³ The application then goes on to ask about monitoring or a support group, the name of the applicant's treating physician, how the applicant has functioned while in law school with the condition or impairment, and if the condition or impairment has been used as a defense.¹⁶⁴

2. *States with Revised Bar Application Questions*

Several states from different parts of the country have adopted the positions advocated in this Comment and revised their bar application questions concerning mental health. By removing or amending questions about mental health on the Application for Admission to the South Carolina Bar, South Carolina will not be "lowering the bar" for admission because the solicited information about mental health does not have predictive power and,

The purpose of the following questions is to determine the current fitness of an applicant to practice law. All information provided in this application is kept strictly confidential. The vast majority of applicants are certified as fit to practice law; the Board on very rare occasion denies certification to applicants whose current ability to function is significantly impaired in a manner relevant to the practice of law or to applicants who demonstrate a lack of candor by their responses. This is consistent with the public purpose that underlies the Board's responsibilities. Conversely, the Board does not deny certification to applicants based on their decision to seek treatment or support for a mental health condition. In fact, the Board encourages applicants to seek treatment if needed and believes that an applicant's decision to obtain necessary treatment is indicative of a person who possesses the character and fitness requisite to be a member of the Bar of Georgia.

Id.

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.*

164. *See id.*

therefore, already does not protect the public. Connecticut, Virginia, Oregon, and New Hampshire provide confirmation that the legal profession can still be well regulated without prying into applicants' mental health in a broad and burdensome manner.

In January 2018, the Connecticut Bar application was changed to remove all questions related to mental health from the bar application.¹⁶⁵ When making the change, the Connecticut Bar Examining Committee clarified that the conduct they were interested in was misconduct in which mental health conditions or substance abuse was offered to explain the misconduct.¹⁶⁶ “For example, an applicant [may] reveal that a severe episode of depression contributed to chronic absenteeism in past employment.”¹⁶⁷

In January 2019, the Virginia Bar application was changed to remove questions pertaining to the applicant's mental health conditions and treatment.¹⁶⁸ Law students urged the Virginia Board of Examiners to change the question based on the argument that such questions prevent law students from seeking help.¹⁶⁹ The original question asked applicants to identify “any condition or impairment (including, but not limited to, a substance or alcohol use disorder, or a mental, emotional, or nervous disorder or condition)”¹⁷⁰ that might impact their ability to be a lawyer.¹⁷¹ The new question asks: “[w]ithin the past five (5) years, have you exhibited any conduct or behavior that could call into question your ability to perform any of the obligations and responsibilities of a practicing lawyer in a competent, ethical and professional manner?”¹⁷²

In November 2019, the Oregon Bar application was changed to remove a question that asked: “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 affects your ability to practice law in a competent, ethical and professional manner?”¹⁷³ The question now reads: “Have you been subject to any discipline or remediation for

165. See Jaffe & Stearns, *supra* note 59, at 11.

166. See *id.*

167. Kevin Bank & Emily Cooper, *Changes to the Character and Fitness Rules: Amendments for a New Era*, 70 NWLAWYER 13, 16 (2016).

168. Jaffe & Stearns, *supra* note 59, at 12.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Jillian Daley, *Putting the Emphasis on Conduct: Oregon State Bar Shifts Its Admissions Process away from Mental Health and Substance Abuse Labels*, 80 OR. ST. B. BULL. 34, 36 (Mar. 2020).

unprofessional or disruptive behavior?”¹⁷⁴ The change was made to shift the focus to recent conduct rather than mental health or substance use.¹⁷⁵

In June 2020, the New Hampshire Judicial Branch decided to remove questions pertaining to mental health history, diagnoses, or treatment from the character and fitness portion of the bar application.¹⁷⁶ The New Hampshire Supreme Court decided to remove the questions to reduce or eliminate the stigma and fear surrounding receiving help for mental health conditions during law school.¹⁷⁷ The New Hampshire character and fitness committee chair shared that “[a] diagnosis standing alone does not equate to misconduct that reflects on an applicant’s character or ability to practice law in a professional manner. [The committee] believe[s] removing these questions will encourage law students and attorneys to stay healthy and seek treatment when needed.”¹⁷⁸

IV. CONCLUSION

The Character and Fitness Committee has a very difficult task: they must carefully weigh an applicant’s conduct, moral character, and any potential risk to the public. “Moral character” is an extremely subjective idea, exacerbated by the self-regulatory nature of the legal field, which like any self-regulatory licensing system can lend itself to “a significant amount of discretion” and subjectivity.¹⁷⁹ With that level of discretion, individuals that sit on character and fitness committees can exclude applicants “based on a variety of subjective reasons that ostensibly show that applicants lack the requisite character and fitness.”¹⁸⁰ For example, in 1979, the Virginia State Bar initially denied admission to a lawyer licensed in a different jurisdiction because she was living with a man out of wedlock.¹⁸¹ Additionally, while making decisions on an applicant’s admission status, those on the Character and Fitness Committee are “more likely to err by choosing to license those applicants with whom they most closely identify.”¹⁸² Character and fitness determinations can be made less susceptible to discrimination and bias, and the process can be made fairer and more effective, if the scope of disclosure

174. *Id.*

175. *See id.*

176. Press Release, N.H. Judicial Branch, New Hampshire Removes Questions on Mental Health Conditions from Bar Admissions Applications (June 19, 2020) (on file with author).

177. *See id.*

178. *Id.*

179. *See Boyd, supra* note 67, at 369–70, 380.

180. *Id.* at 370.

181. *Id.* at 371.

182. *Id.* at 375.

is limited to information that is reflective of an applicant's recent conduct and qualifications.

Furthermore, it is important to emphasize that the character and fitness process has a very important role in protecting the public.¹⁸³ Some bar applicants do need to be screened, whether it be because of a history of severe criminal convictions or other substantive conduct that highlights a pattern of poor character.¹⁸⁴ The central issue with the character and fitness portion of the bar exam is that it is too far-reaching and vague, thus leading the character and fitness evaluation to have potentially discriminatory effects.¹⁸⁵ Furthermore, along with the risk of discrimination, it has been shown that questions can be a deterrent to law students when seeking mental health care.¹⁸⁶

Finally, the possible negative outcomes of the character and fitness process do not seem to be outweighed by the predictive power of the character and fitness process.¹⁸⁷ After putting bar applicants through lengthy and burdensome applications and requiring them to disclose intimate details of their personal lives, without any limitation as to the amount of information they need to disclose or how far back in their past they must reach, their investment in this process should pay off and provide for a better bar and safer public. However, studies show that the character and fitness process does not always yield quality results.¹⁸⁸ Therefore, it is imperative that the bar application and character and fitness process be amended to decrease any discriminatory effect and increase the rate of predictive power of the solicited information. Amending the bar application will ensure that those who are qualified to practice law do not face undue impediments while still allowing the Committee to protect the public and ensure that those admitted to the bar possess the requisite character and fitness.

183. See Levin, *supra* note 50, at 19.

184. Joukov & Caspar, *supra* note 58, at 385.

185. See *supra* Section III.A.

186. See *supra* Section III.A.1.

187. See *supra* Section III.C.

188. See *supra* Section III.C.