

Faculty Scholarship

---

2004

# Testing Applicants with Disabilities

Gregory M. Duhl

*Mitchell Hamline School of Law*, [gregory.duhl@mitchellhamline.edu](mailto:gregory.duhl@mitchellhamline.edu)

Stuart Duhl

## Publication Information

73 Bar Examiner 7 (2004)

---

## Repository Citation

Duhl, Gregory M. and Duhl, Stuart, "Testing Applicants with Disabilities" (2004). *Faculty Scholarship*. Paper 216.  
<http://open.mitchellhamline.edu/facsch/216>

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

---

# Testing Applicants with Disabilities

## **Abstract**

All jurisdictions provide reasonable accommodations for applicants with disabilities who are otherwise qualified to sit for the bar examination. The provision of accommodations is primarily a result of the comprehensive federal law known as the Americans with Disabilities Act (“the ADA”), passed by Congress in 1990 to prohibit discrimination against persons with disabilities. The ADA protects both applicants with physical disabilities and those with mental disabilities, and accommodations include not only additional testing time, longer and more frequent breaks between testing sessions, and private testing rooms, but also other auxiliary aids and services designed to enable effective communication to and from bar examination applicants.

Prior to the adoption of the ADA in 1990, jurisdictions provided accommodations primarily to applicants with physical disabilities, including visual and motor impairments. While applicants have continued to request accommodations for physical disabilities under the ADA, the more challenging cases for bar examiners arise when applicants claim they have mental impairments, as those impairments are not always easily diagnosed or documented. A more detailed discussion of how the ADA affects testing accommodations for bar examination applicants follows, with recommendations as to how bar examiners should address requests for accommodations from applicants with disabilities.

## **Keywords**

ADA, Americans with Disabilities Act, testing accommodations, reasonable accommodations, bar examination

## **Disciplines**

Civil Rights and Discrimination | Disability Law

# TESTING APPLICANTS WITH DISABILITIES

*by Stuart Duhl and Gregory M. Duhl*

All jurisdictions provide reasonable accommodations for applicants with disabilities who are otherwise qualified to sit for the bar examination. The provision of accommodations is primarily a result of the comprehensive federal law known as the Americans with Disabilities Act (“the ADA”), passed by Congress in 1990 to prohibit discrimination against persons with disabilities. The ADA protects both applicants with physical disabilities and those with mental disabilities, and accommodations include not only additional testing time, longer and more frequent breaks between testing sessions, and private testing rooms, but also other auxiliary aids and services designed to enable effective communication to and from bar examination applicants.

Prior to the adoption of the ADA in 1990, jurisdictions provided accommodations primarily to applicants with physical disabilities, including visual and motor impairments. While applicants have continued to request accommodations for physical disabilities under the ADA, the more

challenging cases for bar examiners arise when applicants claim they have mental impairments, as those impairments are not always easily diagnosed or documented. A more detailed discussion of how the ADA affects testing accommodations for bar examination applicants follows, with recommendations as to how bar examiners should address requests for accommodations from applicants with disabilities.

## INTRODUCTION<sup>1</sup>

The Americans with Disabilities Act (ADA)<sup>2</sup> is the most comprehensive piece of civil rights legislation prohibiting discrimination against persons with disabilities.

The ADA consists of Title I, which prohibits discrimination in employment; Title II, which prohibits discrimination by public entities; and Title III, which prohibits discrimination in public accommodations by private entities. Unlike its predecessor, the Rehabilitation Act of 1973,<sup>3</sup> the ADA covers public entities that do not receive federal funding, including boards of bar examiners. Since taking effect on July 26, 1992, the ADA and its related regulations have provided bar examiners with an infrastructure for administering examinations to

WHILE APPLICANTS HAVE CONTINUED TO REQUEST ACCOMMODATIONS FOR PHYSICAL DISABILITIES UNDER THE ADA, THE MORE CHALLENGING CASES FOR BAR EXAMINERS ARISE WHEN APPLICANTS CLAIM THEY HAVE MENTAL IMPAIRMENTS, AS THOSE IMPAIRMENTS ARE NOT ALWAYS EASILY DIAGNOSED OR DOCUMENTED.

applicants with disabilities, as well as for conducting non-discriminatory character and fitness investigations.<sup>4</sup>

Title II of the ADA prohibits public entities from denying disabled persons access to or participation in services or programs run or sponsored by such entities.<sup>5</sup> The statute defines public entities as “instrumentalities of a State”;<sup>6</sup> these entities include boards of bar examiners, which are delegated authority over bar admissions by state supreme courts in accordance with individual state statutes and constitutions. All courts that have addressed the question of whether Title II covers state boards of bar examiners have found it applicable.<sup>7</sup> No state board has ever challenged the applicability of Title II to its administrative functions.

The applicability of Title III is less clear. Section 12189 of Title III states that “any person that offers examinations . . . related to . . . licensing . . . for professional purposes shall offer such examinations . . . in a place and manner accessible to persons with disabilities or [offer] alternative accessible arrangements [to] such individuals.”<sup>8</sup> Congress intended for Title III to regulate “private entities” (which would exclude state boards of bar examiners),<sup>9</sup> and the U.S. Department of Justice regulations promulgated under § 12189 appear to apply only to *private entities* that administer examinations.<sup>10</sup> However, § 12189 also refers to “any person that offers examinations,” and defines “any person” as including “government and government agencies.”<sup>11</sup>

Because boards of bar examiners receive their authority from state supreme courts and state constitutions, they are “government agencies” and therefore “persons” under the ADA.

Despite the view of some federal district courts<sup>12</sup> and at least two United States Supreme Court justices (Justices Scalia and Thomas)<sup>13</sup> that boards of bar examiners fall within the scope of Title III, the legislative history of the ADA suggests that Congress intended for Title III to protect against discrimination in public accommodations by all groups not

covered under Title II.<sup>14</sup> If that interpretation is correct, Title III does not cover boards of bar examiners because they are covered by Title II. Until it is resolved whether Title III covers bar examiners, obligatory compliance with Title III most likely rests with the facilities where applicants take the bar exam, such as hotels that provide space for administering the examination, and not with bar examiners themselves.<sup>15</sup> Therefore, the focus

of the analysis in this article will be on Title II, but there is likely no material difference between a bar examination applicant’s substantive rights under Titles II and III, if both are found to cover state boards of bar examiners.

In practice, the ADA requires bar examiners to extend “reasonable accommodations” to applicants with disabilities so as to level the playing field relative to non-disabled applicants, without giving applicants with disabilities an unfair advantage. The ADA also prohibits bar examiners, when conducting

IN PRACTICE, THE ADA REQUIRES BAR EXAMINERS TO EXTEND “REASONABLE ACCOMMODATIONS” TO APPLICANTS WITH DISABILITIES SO AS TO LEVEL THE PLAYING FIELD RELATIVE TO NON-DISABLED APPLICANTS, WITHOUT GIVING APPLICANTS WITH DISABILITIES AN UNFAIR ADVANTAGE.

character and fitness investigations, from considering any aspect of an applicant's character unrelated to the applicant's fitness to practice law.

This article analyzes the infrastructure of Title II of the ADA and discusses its implications for bar examiners. Part 1 defines the statute's critical terms, while Part 2 describes how courts have applied those terms to bar examination applicants who require testing accommodations. Part 3 contains a discussion of some ADA-related constitutional and procedural issues raised in litigation between bar examination applicants with disabilities and boards of bar examiners. Part 4 consists of practical suggestions for bar examiners wishing to comply with the ADA when deciding on requests for testing accommodations from applicants with disabilities. Last, Part 5 discusses some limitations that the ADA places on bar examiners in their character and fitness evaluations of applicants, although this is an area of the law that is not fully developed.

## PART 1: DEFINITIONS

According to the ADA, any bar examination applicant with a disability who is otherwise qualified to sit for a state bar examination has the right to reasonable accommodations when taking the exam. It is therefore necessary to understand the statute's definitions of "disability," "otherwise qualified," and "reasonable accommodations."

### ***Disability***

The ADA defines "disability" as:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.<sup>16</sup>

The law covers physical disabilities, including (i) "[p]hysiological disorder[s] or condition[s]" (e.g., blindness, deafness); (ii) "[c]osmetic disfigurement"; and (iii) "[a]natomical loss" (e.g., loss of an eye, paraplegia);<sup>17</sup> and mental disabilities, including "mental or psychological disorder[s] such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities" (e.g., autism, attention deficit hyperactivity disorder, schizophrenia, dyslexia).<sup>18</sup> Interestingly, the law protects even those applicants who have been misdiagnosed as disabled (if diagnostic records exist), as well as applicants who have overcome their disabilities. In all cases, bar examination applicants who file ADA-based lawsuits against state boards of bar examiners must prove the existence of a "disability" requiring the requested accommodation(s).<sup>19</sup>

The critical task for bar examiners is to evaluate an applicant's impairment in light of all available mitigating or corrective measures, including artificial mitigating measures (e.g., medicines and mechanical devices such as ritalin, insulin, glasses, and hearing aids) and natural measures available to all applicants (e.g., extra study, additional sleep, relaxation exercises, diet). Bar examiners can find some guidance from *McGuinness v. University of New Mexico School of Medicine*,<sup>20</sup> a case in which the United States Court of Appeals for the Tenth Circuit decided that test anxiety is not a "disability" under the ADA when it is possible to counteract the symptoms with additional studying.

The United States Supreme Court expanded on the principle outlined in *McGuinness* in three companion cases, essentially ruling that lower courts cannot categorically evaluate impairments in their uncorrected states.<sup>21</sup> In *Sutton v. United Airlines, Inc.*,

the airline refused to hire two twin sisters as pilots because they each had uncorrected vision of 20/200 or worse in the right eye and 20/400 or worse in the left eye—both below the company’s requirement of uncorrected 20/100 vision or better in each eye. The Court ruled that the sisters did not have “impairments” requiring protection under the ADA because both had at least 20/20 vision in each eye with corrective lenses. In *Albertson’s, Inc. v. Kirkingburg*,<sup>22</sup> the Court found that a truck driver’s untreatable amblyopia (an eye disease resulting in monocular vision) qualified as an “impairment” under the ADA. However, it also found that the impairment did not “substantially limit” the driver in any “major life activity” because of the coping mechanisms that he had developed in response to the disease.

After deciding those cases, the United States Supreme Court further narrowed the definition of “disability” in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>23</sup> Diagnosed with several nerve disorders, including carpal tunnel syndrome, the plaintiff in *Toyota* sued her employer, Toyota Motor Manufacturing, under the ADA. She claimed that Toyota had required her to continue such manual tasks as inspecting, wiping, and adding oil to new automobiles despite its knowledge of her impairment. In ruling against the employee, the Court held that while her impairment interfered with the performance of work-related manual tasks, it did not render her “unable to perform the variety of [manual] tasks central to most people’s daily lives.”<sup>24</sup> In that particular case, the Court refused to consider whether the plaintiff’s impairment “substantially limit[ed]” her capabilities in the “major life activity” of working. However, in *Sutton v. United Airlines, Inc.*, the Court did consider that issue and noted that “[w]hen the major life activity under consideration is

working, the statutory phrase ‘substantially limits’ requires . . . that plaintiffs allege that they are unable to work in a broad class of jobs.”<sup>25</sup> Similarly, bar examination applicants seeking testing accommodations must prove that their impairments have substantially impeded or precluded them from performing physical or mental tasks of central importance to their daily lives, and not tasks that are tied only to taking the bar examination or practicing law.

Bar examiners and courts have also wrestled with the appropriate universe of comparison when deciding whether testing applicants have “disabilities.” In evaluating whether a bar examination applicant’s impairment “substantially limits one or more major life activities,” should a comparison be made with other applicants or to average persons in the general population? A bar examination applicant with a reading impairment might read quite slowly in comparison to other applicants (thus qualifying as “disabled”), but might nonetheless read quickly compared to average persons in the general population (therefore not qualifying).

The two federal circuit courts that have considered the relevant universe in testing accommodations cases agree that when the “major life activity” in question is reading or learning, the applicant’s impairment should be measured against the average person in the general population.<sup>26</sup> However, those courts gave conflicting rulings when the “major life activity” in question involved the workplace. In *Bartlett v. New York State Board of Law Examiners*,<sup>27</sup> the United States Court of Appeals for the Second Circuit compared an applicant’s learning impairment against persons having “comparable training, skills[] and ability” (e.g., other bar examination applicants). But in *Gonzales v. National Board of*

*Medical Examiners*,<sup>28</sup> the United States Court of Appeals for the Sixth Circuit compared an applicant for a medical licensing examination to the average person in the general population. Bar examination applicants arguing that they are “substantially limited” in the “major life activity” of working will rely on *Bartlett* when litigating outside of the Sixth Circuit, while bar examiners litigating outside of the Second Circuit will use *Gonzales* for support.<sup>29</sup> Most commentators who have considered the issue believe that the average person in the general population is the appropriate measure for comparison, regardless of which “major life activity” is involved.<sup>30</sup>

### **Otherwise Qualified**

According to the ADA, a bar examination applicant with a “disability” should receive accommodations only if he or she is “otherwise qualified” to sit for the bar examination. The ADA applies to:

[a]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.<sup>31</sup>

Here the service or activity is taking the bar examination. An “otherwise qualified individual” is any applicant who has a “disability” and has satisfied the state board’s “essential eligibility requirements” (e.g., is of the minimum age, holds a degree from an accredited law school, has paid an exam fee) for taking the bar examination. In one instance, a federal

appellate court confused the issue of an applicant’s qualifications to sit for the bar examination with her qualifications for bar membership. In *Clement v. Virginia Board of Bar Examiners*,<sup>32</sup> an applicant with a learning disability failed the Virginia bar examination six times, despite the fact that the board provided her greater accommodations each time she sat for the exam. On her sixth and final attempt, the board permitted her to take the examination over four days instead of two, and to take three-hour rest breaks between the morning and afternoon testing sessions each day. After failing the exam for the sixth time, the applicant argued to the court that she should have

been permitted to take the examination over seven days (four days of testing with alternate days of rest). In finding for the Virginia board, the United States Court of Appeals for the Fourth Circuit found that the applicant failed to show that she was “otherwise qualified for Bar membership.” Under the ADA, the applicant’s qualifications to join the Virginia bar were not relevant.

The appropriate question was whether she was “otherwise qualified” to sit for the Virginia bar examination. The Fourth Circuit made a similar mistake in interpreting the “otherwise qualified” requirement of the Rehabilitation Act of 1973. In *Pandazides v. Virginia Board of Education*,<sup>33</sup> the court held that a determination of whether an individual taking a teaching certification examination was “otherwise qualified” required, in part, a factual inquiry into whether she could perform the “essential functions” of a teacher.

The Fourth Circuit misinterpreted the “otherwise qualified” requirement in both *Pandazides* and

**Clement:** nowhere does the ADA require that applicants for professional licensure examinations demonstrate qualifications or abilities to practice their chosen professions. Applicants must only satisfy the criteria spelled out by state licensing boards for taking the licensing examination. Because states use the bar examination as one measure of whether applicants are qualified to practice law, the only ADA-related issues pertinent to bar examiners (aside from character and fitness) are whether applicants with disabilities are qualified to sit for the bar examination, and, if so, whether they require reasonable accommodations.

### **Reasonable Accommodations**

According to the ADA, if applicants with disabilities are “otherwise qualified” to sit for the bar examination, state boards must provide them with “reasonable accommodations” to avoid discriminating against them. Such accommodations include “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination because of [a] disability” (e.g., additional breaks, separate testing room, Braille print or the assistance of a reader, access to a computer or a typewriter);<sup>34</sup> reasonable accommodations also include increasing the length of time permitted for completing the examination.<sup>35</sup>

Understanding what constitutes “reasonable accommodations” under the ADA requires guidance from the courts. Consistent with recent case law, bar examiners should give “primary consideration” to the accommodations requested by applicants with disabilities if the accommodations are supported by

credible medical opinion.<sup>36</sup> State boards may offer alternative accommodations if accommodations are not requested out of necessity, and if the requested accommodations (i) impose too great a financial burden; (ii) threaten the security of the bar examination; or (iii) challenge the validity or fairness of the examination.<sup>37</sup> When an applicant mounts a legal challenge to alternative accommodations offered by a state board, the board must prove that the accommodations requested by the applicant are unreasonable.<sup>38</sup> Thus, boards must carefully consider on a case-by-case basis how to accommodate individual applicants in light of efficiency, cost, feasibility, and test validity.

CONSISTENT WITH RECENT CASE LAW, BAR EXAMINERS SHOULD GIVE “PRIMARY CONSIDERATION” TO THE ACCOMMODATIONS REQUESTED BY APPLICANTS WITH DISABILITIES IF THE ACCOMMODATIONS ARE SUPPORTED BY CREDIBLE MEDICAL OPINION.<sup>36</sup>

Some courts have suggested that whenever a board fails to use its own expert to evaluate an applicant’s medical documentation, it must defer to any credible opinion offered by the applicant’s own physician(s) or expert(s). In *D’Amico v. New York State Board of Law Examiners*,<sup>39</sup> the New York board denied the request of a bar examination

applicant with a visual disability to take the exam over four days instead of two, but did give her extra time within the two-day exam period. In finding for the applicant, the New York federal district court noted that the board had acted unreasonably in denying the applicant her requested accommodations because it failed to obtain and offer any medical evidence of its own to rebut the recommendations offered by the applicant’s physician. Similarly, the Delaware Supreme Court held in *In re Petition of Kara B. Rubenstein*<sup>40</sup> that the Delaware State Board of Bar Examiners acted unfairly when it denied an applicant

certain accommodations recommended by her physician because the board failed to support its decision with clinical evidence of its own. Thus, it appears that bar examiners should retain their own medical experts for the purpose of evaluating accommodation requests, especially when contemplating denying those requests.

The ADA does not require bar examiners to afford applicants accommodations that compromise the validity or fairness of the bar examination. For example, courts have yet to require that a state board extend accommodations to an applicant if doing so would make the applicant's bar examination score invalid and frustrate the examination's objective of measuring "minimal competence" to practice law. In *Florida Board of Law Examiners re* SG,<sup>41</sup> an applicant with attention deficit disorder who was given 25 percent extra time to complete the Florida bar examination asked the Florida Supreme Court to order the Florida board to average her part A and part B scores from two different test administrations. The court refused, expressing concern over the validity of the applicant's final examination score, and holding that the ADA "does not require modifications that would fundamentally alter the measurement of the skills or knowledge [that] the exam is intended to test."

However, at least one court—the Delaware Supreme Court—has allowed an applicant to combine scores from two different test administrations. The petitioner in *In re Petition of Kara B. Rubenstein*<sup>42</sup> had failed the Delaware bar examination three times, although she did receive a passing Multistate Bar Examination (MBE) score on her third attempt. The applicant discovered that she had a learning disability and applied to take the examination a fourth time with accommodations, and the Delaware board allotted her one hour extra for each three-hour essay

section, but no additional time for the MBE. On her fourth attempt, the applicant passed the essay examination but failed the MBE, and the board refused to certify her for admission to the Delaware bar. She filed a petition with the Delaware Supreme Court, asking the court to suspend the requirement that she pass both the MBE and essay section of the examination during the same test administration. The court ruled in the applicant's favor, stating that the board had (i) acted inconsistently in giving the applicant extra time for the essay section but not for the MBE, and (ii) failed to follow the National Conference of Bar Examiners' (NCBE) recommendation that applicants with learning disabilities presumptively receive time and a half to take the bar examination. The Delaware court accepted the applicant's argument that she had not received the minimum accommodations mandated by the ADA.

Courts have made it clear through several rulings that applicants with disabilities must qualify to sit for the bar examination and pass it, with or without reasonable accommodations, "in spite of" their disabilities.<sup>43</sup> In *Anderson v. University of Wisconsin*,<sup>44</sup> a case decided under the Rehabilitation Act of 1973, the United States Court of Appeals for the Seventh Circuit noted that the primary issue for a law school that had denied readmission to a student was not whether the student could have maintained the school's minimum grade point average "but for" his disability—in that case, alcoholism. The court ruled in the university's favor because the law student-plaintiff could not maintain the minimum grade point average "in spite of" his disability.<sup>45</sup>

Courts have also refused to require bar examiners to reduce passing scores or waive bar examination requirements altogether for applicants with disabilities. According to the *ADA Title II Technical Assistance*

*Manual* published by the U.S. Department of Justice's Office of Civil Rights, "A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. Whether a specific requirement is essential will depend on the facts of the particular case."<sup>46</sup>

At least one federal district court has specifically ruled that the ADA does not require a state to waive an objective licensure examination if an applicant with a disability cannot pass it. In *Jacobsen v. Tillmann*,<sup>47</sup> the dyslexic plaintiff could not pass the Pre-Professional Skills Test (PPST) required of all teachers seeking licensure in Minnesota, even with "reasonable accommodations."

In denying her request that the Minnesota Board of Teaching be ordered to grant her a teaching license, the Minnesota federal district court offered the analogy of a law school graduate who could not pass the bar examination. In both situations, the court said that a state could require the objective evaluation of an applicant's competence to practice his or her profession as a prerequisite to licensure. Because the court's decision has solid support in Title II of the ADA, there is no reason to suspect that a different court might waive passing the bar examination as a prerequisite for a law school graduate to practice law.

Similarly, state boards must avoid providing accommodations to applicants with disabilities that may give them an unfair advantage. For example, if the essay section of a state's bar examination is a "speeded test,"—that is, if a positive correlation exists between time allotted and performance on that

section—giving applicants with disabilities unlimited time on that section would be unfair to the applicants without disabilities. But in practice, it is very difficult for bar examiners to determine where to draw the line between leveling the playing field for applicants with disabilities and giving them an unfair advantage. As one commentator has noted, bar examiners can never be certain that giving applicants with disabilities extra time does not affect the validity of their bar examination scores.<sup>48</sup>

## PART 2: DISABILITIES AND ACCOMMODATIONS

This section reviews how courts have applied the ADA to bar examination applicants seeking testing

COURTS HAVE ALSO REFUSED TO REQUIRE BAR EXAMINERS TO REDUCE PASSING SCORES OR WAIVE BAR EXAMINATION REQUIREMENTS ALTOGETHER FOR APPLICANTS WITH DISABILITIES.

accommodations for different types of disabilities. How courts treat applicants with one type of impairment offers insight into how they might treat applicants with other types of impairments. However, courts often treat applicants with the same disability differently (as should bar examiners), depending upon each applicant's medical evaluations and specific accommodation requests.

### *Visual Impairment*

Consistent with the ADA, bar examiners should usually accommodate an applicant who has a visual disability with extra time as well as with one or more of the following: a reader, a scribe, tapes, examination in Braille or large print, word processing device, or extra breaks, as recommended by the applicant's physician(s) or expert(s).<sup>49</sup> When an applicant with a visual disability presents credible medical evidence in support of a specific accommodation, a state board of bar examiners should provide that accommodation.

In *D'Amico v. New York State Board of Law Examiners*,<sup>50</sup> the New York board denied the request of an applicant who suffered from a severe visual impairment and acute ocular fatigue that she be allowed to take the bar examination over four days instead of two, the accommodation recommended by her ophthalmologist. The court agreed with that recommendation, holding that in light of the applicant's disability, the question of appropriate accommodation was a "medical" issue and not a "testing" issue. The court found that because the board failed to present any medical evidence of its own, it should have acted on the recommendation of the applicant's physician.

On the other hand, bar examiners are not required to provide applicants with accommodations that might compromise bar examination security, especially when such accommodations are not requested out of necessity. In *Barr v. National Conference of Bar Examiners*,<sup>51</sup> NCBE refused a blind registrant's request to use a computer equipped with a voice synthesizer capable of reading Multistate Professional Responsibility Examination (MPRE) questions from a computer diskette. NCBE cited security concerns arising from the potential copying of the diskette. (Although not mentioned in the case, we understand that the applicant's request for accommodations extended to the MBE.) Instead, NCBE offered the registrant a range of alternative accommodations from which to choose, including a qualified reader, a taped text, and a Braille version of the examination. The registrant filed a lawsuit under the ADA, but the federal district court ruled in favor of NCBE, stating that applicants with disabilities enjoy only the right to "reasonable" accommodations

ON THE OTHER HAND, BAR EXAMINERS ARE NOT REQUIRED TO PROVIDE APPLICANTS WITH ACCOMMODATIONS THAT MIGHT COMPROMISE BAR EXAMINATION SECURITY, ESPECIALLY WHEN SUCH ACCOMMODATIONS ARE NOT REQUESTED OUT OF NECESSITY.

in light of their disabilities, with no entitlement to "preferred" accommodations that might compromise the security of the bar examination. The United States Court of Appeals for the Tenth Circuit agreed with that finding, but ruled that the registrant's appeal was moot because he had already passed the MPRE without the requested accommodation before the appeal was heard.

### **Chronic Diseases**

As a corollary to the recommendation that bar examiners grant accommodation requests supported by credible medical opinion, bar examiners are not required to provide accommodations to applicants beyond those recommended by the applicant's physician(s) or expert(s). The applicant in *Ware v. Wyoming Board of Bar Examiners*,<sup>52</sup> who suffered from multiple sclerosis, requested time and a half, a legally trained scribe, and a change of venue for the Wyoming bar examination. The board gave her extra time as recommended by her physician, but not the full time and a half as requested; the board also offered her a scribe to transcribe her examination answers and an additional restroom break. Rather than take the examination with those accommodations, the applicant filed suit against the board in federal court, seeking damages and an injunction enjoining the board from denying her time and venue requests. The court denied the applicant's claim, finding that the accommodations offered by the Wyoming board were "reasonable" under the ADA. The decision in *Ware* stands as another example of a court deferring to a medical recommendation submitted on behalf of

an applicant, but in that case, the court's deference resulted in the applicant not receiving her requested accommodations.

### ***Learning Disabilities***

Even though learning and other mental disabilities are explicitly covered in United States Department of Justice regulations promulgated under the ADA,<sup>53</sup> no firm criteria currently exist for diagnosing applicants with the same accuracy as the criteria for diagnosing applicants with physical disabilities. Rather than arising out of any scientific consensus, many definitions of learning disabilities in current use are arbitrary because of the practical necessity of labeling students in instructional settings to accommodate their needs or provide special programming.<sup>54</sup> When confronted with applicant accommodation requests for learning disabilities, bar examiners must first decide whether the learning impairment in question is protected by the ADA; if so, bar examiners can then make decisions as to what constitutes "reasonable accommodations" for that impairment.

The landmark bar examination testing accommodations case on learning disabilities that produced five separate opinions, *Bartlett v. New York State Board of Law Examiners*, illustrates the difficulties that bar examiners encounter in determining whether an applicant has a learning "disability" protected by the ADA. Marilyn Bartlett had taken and failed the New York bar examination four times, and took and failed the Pennsylvania bar examination once. Before some

THE LANDMARK BAR EXAMINATION TESTING ACCOMMODATIONS CASE ON LEARNING DISABILITIES THAT PRODUCED FIVE SEPARATE OPINIONS, *BARTLETT V. NEW YORK STATE BOARD OF LAW EXAMINERS*, ILLUSTRATES THE DIFFICULTIES THAT BAR EXAMINERS ENCOUNTER IN DETERMINING WHETHER AN APPLICANT HAS A LEARNING "DISABILITY" PROTECTED BY THE ADA.

of the sittings of the New York bar examination, she requested accommodations for her reading disability, commonly referred to as dyslexia.<sup>55</sup> The New York Board of Law Examiners denied each timely request that she submitted, maintaining (as advised by its expert) that she did not have a "disability" because she scored above the 30th percentile on two standardized reading tests. On her fifth attempt at taking the New York bar examination, the board provided her time and a half to take the New York part of the examination (she elected to take the MBE in Pennsylvania), as well as use of an amanuensis to read the test questions to her and record her responses, and permission to mark her answers to multiple choice questions directly in the test booklet. Bartlett and the New York board stipulated that even if she passed the examination with those accommodations, she would be certified for admission to the New York bar only upon prevailing in her lawsuit that she had initiated in federal court against the New York board. However, she failed the New York bar examination for the fifth time even with those accommodations.

After a 21-day trial, the federal district court<sup>56</sup> concluded that Bartlett's reading rate compared unfavorably with "persons of comparable training, skills and ability." From the court's viewpoint, her reading impairment "substantially limited" her capabilities in the "major life activity" of working because it prevented her from competing fairly on the bar examination and securing employment in law—her chosen field. Consequently, the court held

that Bartlett had a reading “disability,” and that she was entitled to double time over four days, the use of a computer, permission to circle multiple choice answers in her test booklet, and an examination in large print if she chose to take the New York bar examination a sixth time.

The district court did not find that Bartlett’s reading impairment “substantially limited” her in the “major life activity” of reading when compared with the average person in the general population, as did the United States Court of Appeals for the Second Circuit when it heard the case on appeal.<sup>57</sup> The appellate court criticized the board’s arbitrariness in applying “bright-line tests” (the two standardized reading tests) to determine that Bartlett’s disability did not interfere with her “major life activity” of reading. The appellate court refused to defer to the board’s learning disabilities expert in an area outside of the board’s expertise, which was testing, and found that Bartlett’s disability did “substantially limit” her reading. Despite the fact that the two courts focused on different life activities, the outcome of both *Bartlett I* and *Bartlett II* were the same: Bartlett had a “disability” and was entitled to her requested accommodations.

The United States Supreme Court granted *certiorari* and remanded the case to the appellate court because the Second Circuit had not considered Bartlett’s ability to self-accommodate (as required by the recently decided *Sutton v. United Airlines, Inc.* and its companion cases).<sup>58</sup> In turn, the United States Court of Appeals for the Second Circuit asked the district court on remand whether (i) “Bartlett [was]

substantially limited in the major life activity of reading”; and (ii) “whether it [was] Bartlett’s impairment, rather than factors such as her education, experience or innate ability that ‘substantially limit[ed]’ her ability to work.”<sup>59</sup> The district court<sup>60</sup> did an about-face in reasoning without changing its conclusion. After considering additional testimony, the court ruled that Bartlett was “disabled” in the “major life activity” of reading as compared to the average person in the general population. In reaching that conclusion, the district court focused on the qualitative rather than the quantitative effect that her impairment had on her reading and learning skills. Furthermore, the court once again found that Bartlett had a “disability”

that “substantially limited” her in the “major life activity” of working. The court ordered the New York board to provide Bartlett with the accommodations that she had originally requested if she chose to retake the New York bar examination.

At least in its second decision, the district court expressed its preference for the subjective and qualitative observations of Bartlett’s experts to the objective bright-line measures emphasized by the New York board. The court thus effectively precluded New York bar examiners from articulating and applying objective tests for diagnosing learning disabilities, a position that courts in other jurisdictions are likely to follow. In the absence of litigation, applicants with disabilities are rarely evaluated by board-appointed experts. Based on *Bartlett*, a board’s experts now must analyze and react to subjective medical evaluations conducted by other clinicians and not merely rely on objective test results. Such a ruling serves to increase uncertainty among bar examiners regarding

BASED ON *BARTLETT*, A BOARD’S EXPERTS NOW MUST ANALYZE AND REACT TO SUBJECTIVE MEDICAL EVALUATIONS CONDUCTED BY OTHER CLINICIANS AND NOT MERELY RELY ON OBJECTIVE TEST RESULTS.

whether applicants have “disabilities,” resulting in increased costs and risks. Once again, we find courts deferring to credible medical opinions offered by an applicant’s physician(s) or expert(s).<sup>61</sup>

By contrast, bar examiners have no obligation to defer to clinical evaluations they do not find credible. In *Haddon v. Montana Board of Bar Examiners*,<sup>62</sup> the Montana Supreme Court refused to order the board to provide the accommodations recommended by the applicant’s psychologist. The court criticized the applicant’s psychologist for describing his client’s “cognitive handicap” (in a letter to the Montana board) without providing evidence in support of his diagnosis of the applicant’s “learning disability.” The court found that (i) the psychologist’s letter was not credible because it took the form of a legal argument; and (ii) any applicant with the plaintiff’s claimed limitations (i.e., difficulties with “concept formation, problem solving, strategy generation and hypothesis testing”) would have trouble passing the bar examination even in the absence of any “disability.”

Because most applicants with learning disabilities ask for extra time, the question arises as to how much extra time they should be given—another issue that the courts have yet to respond to with any consistency. Bar examiners have narrow windows for error; if they give applicants with disabilities too much time, they compromise test validity, but if they provide too little time, they expose themselves to litigation. Further, bar examiners will often be second-guessed by courts. In *Weintraub v. Massachusetts Board of Bar Examiners* (a non-ADA case),<sup>63</sup> the

BAR EXAMINERS HAVE NARROW WINDOWS FOR ERROR; IF THEY GIVE APPLICANTS WITH DISABILITIES TOO MUCH TIME, THEY COMPROMISE TEST VALIDITY, BUT IF THEY PROVIDE TOO LITTLE TIME, THEY EXPOSE THEMSELVES TO LITIGATION.

Supreme Judicial Court of the Commonwealth of Massachusetts, after an administrative hearing, held that the appropriate accommodation for an applicant with a learning disability was double time, and not the extra thirty minutes per examination section that the Massachusetts board had offered.

NCBE recommends time and a half as the presumptive accommodation for applicants with documented learning disabilities, double time for applicants who have histories of severe impairments, and a case-by-case determination for applicants with newly diagnosed disabilities.<sup>64</sup> In one case, the Delaware Supreme Court criticized its state board of bar examiners for giving an applicant with a learning disability less than the amount of time recommended by NCBE.<sup>65</sup> But, while NCBE recommendations are a useful starting point, the ADA requires that bar examiners consider the needs of all applicants on a case-by-case basis.

The difficulty remains for bar examiners in how to respond appropriately to applicants with various disabilities while still preserving the validity of test scores for all applicants.<sup>66</sup> Perhaps the best standard for bar examiners (at least in cases where applicants have well-documented learning disabilities) is to align bar examination accommodations with accommodations previously afforded to the applicant in instructional settings—for instance, in law school, and on standardized tests—for example, on the Law School Admissions Test (LSAT).<sup>67</sup>

#### ***Attention Deficit Hyperactivity Disorder (ADHD)***

ADHD, of which there are three subtypes (the most well-known of which is attention deficit disorder, or

ADD), is a neurobiological disorder that produces inattentiveness (e.g., poor organization, lack of attention to detail, easy distraction by external stimuli), impulsiveness (e.g., not waiting one's turn, interrupting others), and hyperactivity (e.g., fidgeting, talking excessively).<sup>68</sup> Listed in the *Diagnostic and Statistical Manual of Mental Disorders IV* (DSM-IV) as a psychiatric disorder, ADHD qualifies as a "mental impairment" under the ADA. ADHD is difficult to diagnose because, even though it is not a learning disability, it has similar manifestations, and individuals with ADHD tend to suffer from learning disabilities as well.<sup>69</sup> Furthermore, individuals without disabilities can exhibit inattention, hyperactivity, and impulsiveness (although not as consistently as those with ADHD), as can individuals who suffer from a variety of other psychiatric disorders.<sup>70</sup> With an increasing number of ADHD-related accommodation requests coming from bar examination applicants in recent years, bar examiners face tasks in determining whether individual applicants in fact deserve ADA protection for ADHD. One of the most important and expensive challenges for bar examiners is evaluating the broad range of medical documents that bar examination applicants submit with their ADHD-related accommodation requests.<sup>71</sup>

Dr. John Ranseen, an ADHD expert who has consulted with bar examiners on ADHD-related accommodation requests, suggests that bar examiners look at evaluations submitted by applicants who claim they have ADHD for the following: (i) objective evidence of a developmental history of ADHD, because ADHD usually begins in childhood; and (ii) evidence

ONE OF THE MOST IMPORTANT AND EXPENSIVE CHALLENGES FOR BAR EXAMINERS IS EVALUATING THE BROAD RANGE OF MEDICAL DOCUMENTS THAT BAR EXAMINATION APPLICANTS SUBMIT WITH THEIR ADHD-RELATED ACCOMMODATION REQUESTS.<sup>71</sup>

of an impairment that extends beyond an applicant's difficulty with taking tests.<sup>72</sup> However, like the judges in the *Bartlett* cases, Ranseen is skeptical of experts who rely on objective cognitive tests as the sole indicator in ADHD evaluations. For applicants whose ADHD was not diagnosed in childhood, bar examiners should insist that a comprehensive clinical report (which includes an exhaustive review of the applicant's educational background and psychological testing results) accompany any ADHD-related accommodation request.<sup>73</sup>

The critical question for bar examiners is whether an applicant with ADHD is "substantially limited" in the "major life activity" of learning. In *Price v. National Board of Medical Examiners*,<sup>74</sup> a West Virginia federal district court, in comparing medical students with ADHD to average persons in the general population, found that certain U.S. Medical Licensing Examination applicants were not "disabled" because they could learn as well as the average person. The court found that while the applicants' impairments affected their abilities to learn, their superior intellectual capabilities and past academic performance negated any claim that their learning was "substantially limit[ed]." Accordingly, bar examiners who review ADHD evaluations submitted by bar examination applicants must find evidence that goes beyond an applicant's difficulties in law school or in taking tests with time limitations. Those applicants suffering from an ADHD "disability," as opposed to solely an ADHD "impairment" are more likely to have histories reflecting significant academic, employment and interpersonal relationship problems.<sup>75</sup>

Once bar examiners decide that an applicant's ADHD is a "disability," Dr. Ranssen recommends that they look for reasonable evidence that the requested accommodations are intended to "ameliorate [the] disability . . . [and] not simply to provide hope of improved test performance."<sup>76</sup> One common myth is that all individuals with ADHD require separate testing rooms in order to minimize distractions;<sup>77</sup> further, as with learning disabilities, no evidence exists showing that extra time does anything more than give applicants with ADHD an unfair advantage that affects test validity.<sup>78</sup> With an increase in the number of clinicians acting as advocates for bar examination applicants diagnosed with ADHD, bar examiners must require documentation that clearly shows the extent of an applicant's past difficulty with test taking, as well as past accommodations provided to the applicant in instructional settings.<sup>79</sup>

### ***Test Anxiety***

While it has no uniform definition, one expert has defined test anxiety as a combination of subjective distress (e.g., fear, apprehension), physical symptoms (e.g., trembling, sweating, clammy hands, voice tremors, muscular tension, increased heart rate), negative thoughts (e.g., "I cannot pass this test," "I am a failure"), and cognitive impairment (e.g., the anxiety causes a test taker's mind to go blank).<sup>80</sup> Bar examination applicants seeking accommodations for test anxiety present at least two challenges for bar examiners: (i) to determine whether those applicants have "mental impairments" as defined by the ADA; and (ii) if so, to evaluate whether the impairments "substantially limit[] one or more [of the applicant's] major life activities."

The ADA and the regulations promulgated thereunder contain no reference to test anxiety. The

legislative history of the ADA directs courts to the DSM-IV as the authoritative source regarding which disorders qualify as "mental impairments."<sup>81</sup> While the DSM-IV has no definition for test anxiety, at least one expert has classified it within the DSM-IV category of "social phobia,"<sup>82</sup> which would qualify it as a "mental impairment" under the ADA. The lack of federal case law on test anxiety precludes certainty as to whether courts would agree with that classification, or whether courts would even consider test anxiety "a mental impairment" at all.

Even if test anxiety is an "impairment," bar examination applicants seeking accommodations face a much more difficult task in proving that the impairment "substantially limits one or more major life activities." They have two possible arguments: (i) test anxiety interferes with the "major life activity" of thinking; and (ii) test anxiety interferes with the "major life activity" of working.<sup>83</sup> The problem with the first argument is that courts will not likely rule that an applicant's test anxiety "substantially limits" his or her thinking, when by definition it limits thinking only in the context of test taking.<sup>84</sup> Regarding the second argument, bar examination applicants might claim that test anxiety "substantially limits" them in the "major life activity" of working because it prevents them from passing the bar examination, and therefore from practicing their chosen profession.<sup>85</sup> However, the United States Supreme Court has ruled that an "impairment" does not "substantially limit" an individual's ability to work when it excludes the individual from only "one type of job, a specialized job or a job of choice."<sup>86</sup> Thus, it is doubtful that a court would accept a bar examination applicant's argument that he or she is disabled because test anxiety precludes him or her from practicing law, especially in light of the narrow definition

of “disability” articulated by the United States Supreme Court.

At least one court has ruled that test anxiety is not a “disability” under the ADA. In *McGuinness v. University of New Mexico School of Medicine*,<sup>87</sup> a medical student wanted accommodations for his chemistry and mathematics examinations because of the level of anxiety he had experienced during previous exams in those subject areas. The medical school refused to accommodate him and the federal appellate court agreed, ruling that the student did not have a “disability.” The court reasoned that the student’s anxiety did not “substantially limit one or more of his major life activities” because he had already earned a bachelor’s degree in chemistry and physics, a degree in physiological psychology, and a doctorate in clinical psychology, and he had work experience as a practicing clinical psychologist.

With the U.S. Supreme Court restricting the scope of the ADA, bar examiners appear to have increasing justification for not granting accommodations to applicants whose test anxiety symptoms do not interfere with aspects of their lives outside of testing. However, if applicants with test anxiety request separate rooms for taking the bar examination (which alleviates test anxiety for many applicants),<sup>88</sup> bar examiners can grant such accommodations with minimal cost and without much threat to test score validity. But, if those same applicants request extra time, bar examiners must make difficult distinctions between those individuals who are simply anxious about taking the bar examination

and those with documented histories of test anxiety. For the latter group, it is likely that bar examiners need only offer accommodations when the test anxiety affects the applicants in aspects of their lives outside of the examination room.

### PART 3: ADA LITIGATION ISSUES

A major challenge for bar examiners and applicants who litigate ADA-related claims is untangling the current web of unresolved constitutional, jurisdictional, and procedural issues that arise in such litigation. The most important of these issues are discussed below.

#### ***Procedural Due Process***

With one exception, courts have yet to decide whether bar examination applicants with disabilities have a constitutional right to hearings before state boards of bar examiners refuse their requests for testing accommodations.<sup>89</sup> The lone exception is the Delaware Supreme Court, which considered the issue outside the context of the ADA. In *In re Petition of Thomas E. Cahill*,<sup>90</sup> that court found that the Delaware Board of Bar Examiners had violated an applicant’s Fourteenth Amendment right to procedural due process when it denied his request for “special accommodations” without granting him a hearing. Despite acknowledging that the board had consulted its own expert who concluded that the applicant did not have a disability, the court ruled that the applicant had a right to a hearing as to the factual issue of whether he, in fact, was disabled. At least in part, the court based its decision on existing board rules giving applicants the right to a hearing to resolve factual disputes regarding character and

WITH ONE EXCEPTION, COURTS HAVE YET TO DECIDE WHETHER BAR EXAMINATION APPLICANTS WITH DISABILITIES HAVE A CONSTITUTIONAL RIGHT TO HEARINGS BEFORE STATE BOARDS OF BAR EXAMINERS REFUSE THEIR REQUESTS FOR TESTING ACCOMMODATIONS.<sup>89</sup>

fitness, and a right to a hearing to request a discretionary fifth opportunity to take the Delaware bar examination. After the decision in *Cahill*, the Delaware Board of Bar Examiners promulgated Rule 29<sup>91</sup> establishing procedural due process for applicants with disabilities who seek testing accommodations. Board Rule 29 refers to an older rule (Rule 15, regarding “special accommodations”) in stating that “[i]f an application has not been approved by the Board because there exists disputed issues of fact with regard to the subject matter of . . . Board of Bar Examiners . . . Rule 15 . . . the applicant may petition the Board for a hearing.”

Regardless of whether the ADA requires hearings in connection with denials of testing accommodations, it is likely that the due process clause of the Fourteenth Amendment requires bar examiners to consider requests for accommodations on a case-by-case basis. Under the Rehabilitation Act of 1973, the U.S. Department of Justice issued an administrative civil rights opinion regarding the Hawaii Board of Education’s policy for special education students.<sup>92</sup> The Department noted that the due process clause requires educators to evaluate disabilities on a case-by-case basis because the needs of special education students vary, even among students suffering from the same disability.<sup>93</sup> There is little reason to doubt that bar examiners must do the same under the ADA because the ADA rejects categorization of persons by “disability” in favor of considering the unique needs of each individual.<sup>94</sup>

### **Federal and State Court Jurisdiction**

No universal answer exists regarding whether applicants with disabilities should litigate claims related to testing accommodations in state or federal court, as the answer largely depends on the jurisdiction in which the applicant applies to sit for the bar examination.

In certain states, such as New Jersey, the state supreme court has delegated all administrative authority for bar examinations to the state board of bar examiners; therefore, in New Jersey and other such states, boards do not allow appeals arising from their decisions on testing accommodations.<sup>95</sup> Applicants in those states have no choice but to file their claims in federal district court, despite the limitations that Eleventh Amendment immunity places on recovery.

However, a federal district court might invoke the *Rooker-Feldman* doctrine to refuse consideration of an applicant’s claim, even though some federal courts, despite the *Rooker-Feldman* doctrine, have afforded injunctive relief to applicants seeking reasonable accommodations under the ADA.<sup>96</sup> The *Rooker-Feldman* doctrine arose from the decisions in *Rooker v. Fidelity Trust Co.*<sup>97</sup> and *D.C. Court of Appeals v. Feldman*.<sup>98</sup> In *Rooker*, the United States Supreme Court recognized that federal district court jurisdiction is original, and therefore lower federal courts could not hear appeals of final decisions by state supreme courts. In *Feldman*, the Court held that decisions by the D.C. Court of Appeals (the highest court in the District of Columbia) regarding bar admissions constituted final judicial decisions and as such, could be reviewed only by the United States Supreme Court and not by federal district or intermediate appellate courts. In so deciding, the Court extended its previous ruling in *Rooker* to the District of Columbia, even though it is not a state. Those two decisions preclude any federal court (apart from the United States Supreme Court) from reviewing the final decisions of state courts, even when those decisions raise federal issues.

There is reason to think that the *Rooker-Feldman* doctrine does not apply to litigation initiated by bar

examination applicants in states like New Jersey, where full authority for bar admissions is delegated to state boards. First, the doctrine applies only to final decisions made by state supreme courts, and the decisions of bar examiners to deny testing accommodations are always made before applicants take the bar examination and before state supreme courts either certify or do not certify applicants for admission to the state bar.<sup>99</sup> Second, the doctrine bars appeals only from judicial decisions; the denial of testing accommodations is most likely administrative rather than judicial because bar examiners do not hold hearings before making such decisions, unlike hearings before an adverse character and fitness review.<sup>100</sup> Last, a board's adverse decision on testing accommodations does not, in and of itself, deny an applicant a substantive right (i.e., the right to practice law). Just as the New York and Wyoming federal courts exercised jurisdiction over applicants' claims related to the denial of testing accommodations,<sup>101</sup> it is likely that a federal district court would exercise jurisdiction over any similar claim by a bar examination applicant.

However, in many other states, such as Delaware, applicants have the right to appeal adverse decisions on testing accommodations to the state supreme court after taking and failing the bar examination. In such states, applicants probably cannot seek relief in federal court after exhausting their state law remedies, which they must do under federal law.<sup>102</sup> Once such an applicant has a hearing and subjects him or herself to a state supreme court ruling, an effort to obtain relief in federal court would trigger the *Rooker-Feldman* doctrine and bar federal court jurisdiction. In those jurisdictions, the applicant's only federal avenue of appeal would be to the United States Supreme Court on a petition of *certiorari*.

### ***State Immunity***

The question of whether bar examination applicants may recover monetary damages in ADA lawsuits brought against state boards of bar examiners in federal court has not been resolved. The Eleventh Amendment of the United States Constitution renders states and state officers who act in their official capacities immune from suits for monetary damages initiated by private individuals in federal court.<sup>103</sup> However, Congress is empowered to abrogate that immunity under Section V of the Fourteenth Amendment to remedy a pattern of irrational state discrimination.<sup>104</sup> In *Board of Trustees of the University of Alabama v. Garrett*,<sup>105</sup> the United States Supreme Court found that Congress lacked the authority to abrogate state immunity under Title I (employment) of the ADA. The Court held that the Eleventh Amendment precluded state employees from suing non-consenting states in federal court for monetary damages under Title I. However, the Court explicitly limited its holding in *Garrett* to suits for monetary damages against state employers, and noted that employees could still seek injunctive relief against state officials in federal court.

It is possible that the United States Supreme Court will decide whether the Eleventh Amendment immunizes state entities (including boards of bar examiners) from suit under Title II of the ADA. The Court granted *certiorari* to the United States Court of Appeals for the Ninth Circuit to consider the issue in *Medical Board of California v. Hason*,<sup>106</sup> but then dismissed the case. The Court may find that Congress did not have the authority to enact Title II because it failed to show a pattern of state discrimination against persons with disabilities in the provision of public services. Regardless of whether and how the Court decides that issue, bar examination applicants

with disabilities would still be able to seek injunctive relief against individual bar examiners under Title II of the ADA, and possibly be able to seek monetary damages and injunctive relief against state boards under Title III.

### ***Injunctive Relief***

Bar examination applicants with disabilities who are denied testing accommodations might, however, face obstacles in obtaining injunctive relief. Applicants who litigate under the ADA often seek preliminary injunctions enjoining state boards from denying them certain “reasonable accommodations” on the subsequent administration of the bar examination. But even when applicants with disabilities present meritorious substantive claims under the ADA (a likelihood of success on the merits), they must show that irreparable harm would result if an injunction were not granted.<sup>107</sup> If an applicant with a disability has yet to sit for the bar examination at the time of seeking injunctive relief, a court could find that no irreparable harm would occur if the applicant failed the bar examination on the first try,<sup>108</sup> and consequently postpone any decision on injunctive relief until after the applicant has taken the examination without the requested accommodations. If the applicant passes, the issue is moot; if the applicant fails, the court can issue an injunction in anticipation of the next administration of the bar examination.

Two federal district court decisions illustrate those obstacles. In *Pazer v. New York State Board of Law Examiners*,<sup>109</sup> a New York federal district court considered an applicant’s position as a first-year associate in a Manhattan law firm as one factor in its

finding that the applicant would not suffer irreparable harm if his request for testing accommodations were rejected. Similarly, in *Christian v. New York State Board of Law Examiners*,<sup>110</sup> another New York federal district court found that a delay in a bar examination applicant’s legal career that could result from the applicant not receiving reasonable accommodations and failing the New York bar examination once was insufficient proof of irreparable harm, and that any harm could be remedied with monetary relief. The court failed to note that the applicant might not be able to recover monetary damages if the *Garrett* rationale were to apply to Title II of the ADA.

### ***Attorneys’ Fees***

The ADA contains a provision that allows the “prevailing party” in ADA-related litigation to recover attorneys’ fees from the losing party.<sup>111</sup> In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,<sup>112</sup> the United States Supreme Court rejected the “catalyst theory” adopted by many lower courts, under which a plaintiff in an ADA-related lawsuit could recover attorneys’ fees even if the case settled pre-judgment, as long as the plaintiff had induced a voluntary change in the defendant’s conduct.<sup>113</sup> The Court limited the circumstances under which a prevailing plaintiff could recover fees to those in which the plaintiff had secured a judgment or favorable court-sanctioned consent decree.<sup>114</sup> Because of *Buckhannon*, bar examiners have greater incentive to settle applicants’ ADA claims because they no longer run the risk of a court ordering them to pay the applicant’s attorneys’ fees after a settlement.<sup>115</sup>

HOWEVER, BECAUSE FEDERAL LAW ON TESTING ACCOMMODATIONS IS IN A STATE OF FLUX, BAR EXAMINERS SHOULD KEEP ABREAST OF NEW DEVELOPMENTS IN ADA-RELATED LITIGATION.

### ***Statute of Limitations***

At least one federal circuit court has suggested that the statute of limitations in testing accommodations cases tolls at the occurrence of the discriminatory act (the denial of testing accommodations), and not when the applicant fails the examination. In *Soignier v. American Board of Plastic Surgery*,<sup>116</sup> the United States Court of Appeals for the Seventh Circuit held that the limitations period for the applicant's cause of action arising under the ADA began to toll when the American Board of Plastic Surgery denied his request for accommodations on the oral plastic surgery exam and not when he failed the exam.<sup>117</sup>

## **PART 4: RECOMMENDATIONS FOR BAR EXAMINERS**

The following recommendations will help bar examiners comply with the ADA. However, because federal law on testing accommodations is in a state of flux, bar examiners should keep abreast of new developments in ADA-related litigation.

1. Individual boards should make their ADA testing accommodation policies available to all applicants in written form. These policies should state procedures for applicants with disabilities to follow when making their accommodation requests, the standards used to evaluate those requests, and the appeal procedure, should any of those requests be denied.<sup>118</sup> Ideally, bar examiners should include hard copies of their policies in all registration materials sent to applicants and law schools, in addition to posting the policies on their websites.
2. Accommodation request deadlines should be set well in advance of test

administration dates. Examiners need sufficient time to review requests, consult with outside medical experts, and ask applicants for supplemental information or documentation if necessary. Likewise, bar examiners should notify applicants of adverse decisions early enough to accommodate appeals prior to test administration dates.

3. Boards of bar examiners should provide applicants with detailed descriptions of all information and documentation required to support their accommodation requests. It is in the interest of boards to be as specific as possible regarding what they require in the way of medical evaluations and medical histories for different disabilities, especially as to mental disabilities, which are harder to diagnose and document than physical disabilities. Boards should not hesitate to seek supplemental information or documentation from applicants whose initial submissions are inadequate. It is against the interests of bar examiners to leave decisions regarding documentation to the discretion of individual applicants. Specific requirements will allow boards to defend more easily requests for supplemental information from applicants, should legal challenges arise.
4. Boards should establish criteria to determine on a case-by-case basis whether a "disability" exists and what are "reasonable" accommodations for that disability. Such criteria may include a list of presumptive accommodations for various

disabilities. The criteria may be more detailed than the testing accommodation policies provided to applicants. However, to withstand judicial scrutiny, bar examiners should not include objective bright-line tests among their criteria.

5. If a board of bar examiners is inclined to reject an applicant's requested accommodations despite the presence of all required medical information and documentation, it is imperative that the board consult with an independent medical expert to support its decision. The expert should, at a minimum, review the applicant's file, and if the board denies the request(s), the expert should be prepared to testify as to why the accommodations recommended by the applicant's physician(s) or expert(s) are medically "unreasonable."

## PART 5: CHARACTER AND FITNESS

The ADA also affects character and fitness investigations, though not to the same extent that it affects testing accommodations. Most disabilities do not trigger concerns about applicants' character and fitness, and most concerns about applicants' character and fitness do not relate to disabilities. However, the degree to which bar examiners can inquire into an applicant's mental health history has been heavily litigated. In the 1990s, there were a number of challenges to character and fitness applications that asked applicants about their mental health histories despite that certain applicants had mental impairments that had no bearing on their fitness to practice law. As a result of those successful challenges, boards have largely limited their mental health questions to

specific queries about serious mental illness that could impact the applicant's ability to practice law.

### ***Jurisdiction***

While applicants in most states who are denied testing accommodations have no right to an evidentiary hearing or review by the state supreme court, applicants are generally entitled to both a hearing before the state board's character and fitness committee and review by the state supreme court before they are denied licensure because of unsuitable character and fitness. Until applicants exhaust all appeals in the state system, the federal courts will abstain. In ***Edwards v. Illinois Board of Admissions to the Bar***,<sup>119</sup> the Illinois board denied a hearing to an applicant who had received treatment for major depression because she refused to sign a blanket medical release authorizing access to her mental health records. Although the Illinois board eventually offered her a hearing despite the fact that she did not sign the release, the Illinois federal district court to which she applied for relief refused to intervene and dictate the extent to which bar examiners could consider the applicant's mental health records. The court abstained, noting that the applicant could only exercise her right of review before the state supreme court.

The federal district court in that case found that the abstention doctrine applies when: (i) there is a pending state proceeding; (ii) a compelling state interest is at stake; and (iii) the complaining party has the ability to raise his or her federal claims in a state court hearing. The court abstained after finding that: (i) state proceedings regarding attorney licensure are judicial in nature; (ii) the state has a compelling interest in assessing and ensuring the professional conduct of the attorneys it licenses; and (iii)

the applicant has a right of review of her claim before the state supreme court.

However, applicants must also contend with the *Rooker-Feldman* doctrine, which bars federal courts, except the United States Supreme Court, from reviewing character and fitness decisions rendered after board hearings and state supreme court review. In *Campbell v. Greisberger*,<sup>120</sup> the state board and state supreme court rejected the character and fitness application of an applicant with schizophrenia, but the applicant was told that he could reapply for admission to the state bar if he could present new evidence of his fitness to practice law. The United States Court of Appeals for the Second Circuit ruled that the *Rooker-Feldman* doctrine barred the federal district court from reviewing decisions of the state character and fitness committee and supreme court that related only to an individual applicant.

The court in *Campbell*, however, noted that federal district courts did have jurisdiction over general challenges to character and fitness application questions or procedures related to all applicants. For example, in *Ellen S. v. Florida Board of Bar Examiners*,<sup>121</sup> the federal court struck down the Florida board's character and fitness question about mental health history as overbroad, exercising jurisdiction over the case because the applicant was making a general challenge to a question directed at all applicants rather than asking for review of her individual case. Similarly, in *Roe No. 2 v. Ogden*,<sup>122</sup> the United States Court of Appeals for the Tenth Circuit found that the lower federal court had jurisdiction over general challenges to the Colorado board's character and fitness questions about past treatment for drug, alcohol, and narcotic use, and mental illness—all of which triggered the submission of additional information if they were answered affirmatively.

### ***Mental Health Inquiries***

Boards of bar examiners may ask applicants narrowly tailored questions about their mental health histories as long as those questions are related to the applicants' fitness to practice law. For example, in *Applicants v. Texas State Board of Law Examiners*,<sup>123</sup> the Texas federal district court found that the state board's character and fitness question to applicants about adolescent or adult histories of "bipolar disorder, schizophrenia, paranoia, and psychotic disorders" did not run afoul of the ADA. The court approved the state board's practice of further investigating the mental health histories of applicants who had such "serious mental illnesses" because those illnesses could affect applicants' fitness to practice law. The court distinguished the Texas board's practice from those involving questions that asked applicants about their mental health histories regardless of what mental illness they had and during what time frame.

Two decisions from a Virginia federal district court illustrate the limits on character and fitness inquiries into applicants' mental health histories. In *Clark v. Virginia Board of Bar Examiners*,<sup>124</sup> the court struck down as overbroad a question that asked, "Have you[,] within the past five (5) years, been treated or counseled for a mental, emotional or nervous disorder[s]?" An affirmative response necessitated that the applicant answer an additional set of questions about his or her mental health history. The court found that the Virginia board, in its use of mental health questions similar to the types of questions asked in eighteen states, discriminated against applicants with mental illness by singling them out on the basis of their illnesses instead of evaluating them on the basis of characteristics that could affect their fitness to practice law.

After *Clark*, the Virginia board rewrote the question to read:

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

In *O'Brien v. Virginia Board of Bar Examiners*,<sup>125</sup> the court refused to enjoin the Virginia board from asking the revised question and seeking a release of medical records from applicants who answered the question affirmatively. The court found that the revised question was "carefully tailored to respect the privacy rights of the individual applicant." The court concluded that the plaintiff was not likely to succeed on the merits of his case because the Virginia question and release sought only medical records relevant to the applicant's fitness to practice law.

#### **Independent Determination**

In *Rothman v. Emory University*,<sup>126</sup> an applicant with a seizure disorder brought an action against the university and law school from where he graduated. He claimed that the school's dean, in the applicant's school certification sent to the Illinois board, wrote how the applicant was openly hostile to students and faculty members during his time at the school because of his chronic epilepsy. The federal district court found that the applicant had stated a viable claim under the ADA against the university because the university would have violated the ADA if the

dean had given the applicant a bad or qualified recommendation due to his disability or his complaints about the law school's disability policies. The applicant filed his case only after the Illinois board had required the applicant to interview with the state's character and fitness committee, the committee had deemed him fit to practice law, and he was admitted to practice law in Illinois. The Illinois board did what other boards should do in similar situations: make an independent determination as to an applicant's fitness to practice law rather than risk relying strictly on outside assessments that could be influenced by the applicant's disability.

#### **CONCLUSION**

The ADA has presented bar examiners with new challenges in providing appropriate testing accommodations for bar examination applicants with disabilities. Whether an applicant has a disability, and, if so, what reasonable accommodations should be afforded the applicant, are complex, novel, fact-specific inquiries that bar examiners need to consider within the infrastructure of the ADA and the regulations promulgated thereunder. The recommendations provided in this article will hopefully assist bar examiners and bar administrators in complying with the ADA and avoiding ADA-related litigation. 

#### **ENDNOTES**

1. Gregory M. Duhl wishes to thank Jan M. Levine, Associate Professor of Law and Director of Legal Research & Writing at the James E. Beasley School of Law, Temple University, for his insights into the issues raised in this article.
2. Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1998 & Supp. 2004).
3. Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West 1998 & Supp. 2004). Various courts have used cases decided under the Rehabilitation Act of 1973 to interpret terms in the ADA identical to those in the Rehabilitation Act.
4. Prior to passage of the ADA, boards of bar examiners

- primarily relied on self-imposed standards when deciding what constituted a disability and what accommodations, if any, should be offered to applicants with disabilities. On October 27, 1990, the National Conference of Bar Examiners (NCBE) rewrote Standard 22 of the *Code of Recommended Standards for Bar Examiners* to read, “Without impairing the integrity of the examination process, the bar examining authority should adopt and publish procedures allowing applicants with documented disabilities to have assistance, equipment or additional time as is reasonably necessary under the circumstances to assure their fair and equal opportunity to perform on the examination.”
5. 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(a) (1999).
  6. 42 U.S.C.A. § 12131; 28 C.F.R. § 35.104(5)(1) (1999).
  7. Stephen Fedo and Kenneth M. Brown, *Accommodating the Disabled Under the ADA: The Issues for Bar Examiners*, 61 BAR EXAMINER 3:6 (Aug. 1992); see, e.g., *Argen v. N.Y. St. Bd. of L. Examiners*, 860 F. Supp. 84, 87 (W.D.N.Y. 1994) (suggesting that New York State Board of Law Examiners is subject to Title II of the ADA and to U.S. Department of Justice regulations promulgated thereunder requiring reasonable accommodations for applicants who demonstrate certain learning impairments).
  8. 42 U.S.C.A. § 12189; 28 C.F.R. § 36.309(a) (1999).
  9. Fedo and Brown, *supra* note 7, at 9 n.1.
  10. See, e.g., 28 C.F.R. §§ 36.209(b)(1), 36.309(a), 36.309(b)(3), 36.309(c)(1), 36.309(c)(3) (1999).
  11. 42 U.S.C.A. § 12189.
  12. See, e.g., *Pazer v. N.Y. St. Bd. of L. Examiners*, 849 F. Supp. 284, 286-287 (S.D.N.Y. 1994).
  13. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 697 n.1 (2001) (Scalia and Thomas, J.J., dissenting).
  14. Fedo and Brown, *supra* note 7.
  15. *Id.*
  16. 42 U.S.C.A. § 12102(2).
  17. 28 C.F.R. § 35.104.
  18. *Id.*
  19. Fedo and Brown, *supra* note 7, at 7.
  20. *McGuinness v. U. of N. M. Sch. of Med.*, 170 F.3d 974, 978-79 (10th Cir. 1998).
  21. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 521 (1999) (refusing to accept a truck driver's claim that his high blood pressure was a “disability” under the ADA because he had controlled it for most of his adult life with medication).
  22. *Albertson's*, 527 U.S. at 563.
  23. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002).
  24. The Court looked at the word “substantially” in the definition of “disability” and concluded that it “clearly precludes impairments that interfere in only a minor way with the performance of manual tasks as qualifying as disabilities.” *Id.* at 197. The Court also looked at the phrase “major life activities” in the same definition and concluded that it only includes “activities of central importance to daily life.” *Id.*
  25. *Sutton*, 527 U.S. at 491.
  26. See *Gonzales v. Natl. Bd. of Med. Examiners*, 225 F.3d 620, 626-27 (6th Cir. 2000); *Bartlett v. N.Y. St. Bd. of L. Examiners*, 226 F.3d 69, 81-82 (2d Cir. 2000) (*Bartlett IV*). As discussed in Part II, *infra*, there were five opinions issued in *Bartlett*. This article numbers the opinions chronologically.
  27. *Bartlett IV*, 226 F.3d at 82-83.
  28. *Gonzales*, 225 F.3d at 626-27.
  29. Robert A. Burgoyne and Caroline Mew, *ADA Update: Bartlett V, Gonzales, Garrett, Buckhanon, and Edwards*, 70 BAR EXAMINER 31:36 (Nov. 2001).
  30. See, e.g., John D. Ranssen, *Reviewing ADHD Accommodation Requests: An Update*, 69 BAR EXAMINER 3:6,11 (Aug. 2000). See also 28 C.F.R. § 36, App. B (individuals are described as being “substantially limited” when their “important life activities are restricted as to the condition, manner, or duration under which they can be performed in comparison to most people”).
  31. 42 U.S.C.A. § 12131(2); 28 C.F.R. § 35.104(5)(3).
  32. *Clement v. Va. Bd. of B. Examiners*, 1997 U.S. App. LEXIS 27591,\*3 (4th Cir. Oct. 10, 1997) (unpublished).
  33. *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 833 (4th Cir. 1994).
  34. 28 C.F.R. § 35.130(7) (1999).
  35. 28 C.F.R. § 36.309(2) (1999).
  36. See Fedo and Brown, *supra* note 7, at 8.
  37. *Id.*
  38. *Id.*
  39. *D'Amico v. N.Y. St. Bd. of L. Examiners*, 813 F. Supp. 217, 221-23 (W.D.N.Y. 1993).
  40. *In re Pet. of Kara B. Rubenstein*, 637 A.2d 1131, 1137-39 (Del. 1994).
  41. *Florida Bd. of L. Examiners re*: SG, 707 So.2d 323, 325 (Fla. 1998).
  42. *Rubenstein*, 637 A.2d at 1137-39.
  43. Fedo and Brown, *supra* note 7, at 8.

44. *Anderson v. Univ. of Wis.*, 841 F.2d 737, 740 (7th Cir. 1988).
45. *See also Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979) (holding that under the Rehabilitation Act of 1973, the school did not have to modify its criteria for admission to its nursing program to admit a hearing-impaired applicant because the applicant's diminished hearing would have precluded her from performing certain duties required of all nurses).
46. *ADA Title II Technical Assistance Manual* (Civil Rights Division of the United States Department of Justice, undated), p.14.
47. *Jacobsen v. Tillman*, 17 F. Supp. 2d 1018, 1024-26 (D. Minn. 1998).
48. Ranseen, *supra* note 30, at 8.
49. See Jane Peterson Smith, *NCBE Guidelines for Testing Disabled Applicants*, 60 BAR EXAMINER 28:29 (Feb. 1991).
50. *D'Amico*, 813 F. Supp. at 221-23.
51. *Barr v. Natl. Conf. of B. Examiners*, 1999 U.S. App. LEXIS 9741, \*4 -\*8 (10th Cir. May 20, 1999) (unpublished).
52. *Ware v. Wyo. Bd. of B. Examiners*, 973 F. Supp. 1339, 1356-58 (D. Wyo. 1997).
53. *See* 28 C.F.R. § 35.104.
54. Frank R. Vellutino, *Documenting the Existence of 'Dyslexia'*, 63 BAR EXAMINER 4:6 (Nov. 1994).
55. Dyslexia, a reading disability, is the most common of all learning disabilities. However, there is no uniform agreement as to its definition or causes. There is some agreement that a dyslexic individual has "a significant and severe deficiency in identifying printed words as whole units and/or in identifying them phonetically, through the use of letter sounds." *Id.* at 7-9. Vellutino has attributed dyslexia to a language deficit or a lack of proper reading instruction. *Id.*
56. *Bartlett v. N.Y. St. Bd. of L. Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997) (*Bartlett I*).
57. *Bartlett v. N.Y. St. Bd. of L. Examiners*, 156 F.3d 321 (2d. Cir. 1998) (*Bartlett II*).
58. *N.Y. St. Bd. of L. Examiners v. Bartlett*, 527 U.S. 1031 (1999) (*Bartlett III*).
59. *Bartlett IV*, 226 F.3d at 69.
60. *Bartlett v. N.Y. St. Bd. of L. Examiners*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. August 15, 2001) (*Bartlett V*).
61. However, in *Pazer*, 849 F. Supp. at 287, the court deferred to the board's expert, who testified that he had reviewed the applicant's medical documentation and concluded that the applicant did not have a learning "disability." The court likely deferred to the expert in that case because (i) the applicant did not have a history of receiving accommodations, and (ii) the applicant's own expert had presented some objective data suggesting that the applicant did not suffer from a learning disability.
62. *Haddon v. Mont. Bd. of B. Examiners* (Mont. 1994) (unpublished).
63. *Weintraub v. Mass. Bd. of B. Examiners*, SCJ-06058 (Mass. 1992).
64. Smith, *supra* note 49, at 29-30.
65. *Rubenstein*, 637 A.2d at 1138-39.
66. Ranseen, J.D. and Campbell, D.A., *Adult Attention Deficit Disorder: Current Concepts and Controversies*, 65 BAR EXAMINER 49:54 (Feb. 1996).
67. *See, e.g.*, Martha L. Thurlow, Judith L. Elliott, Ronald N. Erickson, James E. Ysseldyke, *Learning Disabilities and Accommodations: Best Practice for Bar Examinations*, 66 BAR EXAMINER 4:17, 24 (Nov. 1997).
68. *See, e.g.*, National Institutes of Health, National Institute of Mental Health, *Attention Deficit Hyperactivity Disorder*, <http://www.nimh.nih.gov/publicat/adhd.cfm> (accessed Dec. 15, 2002).
69. Ranseen, *supra* note 30, at 7.
70. *See* Michael Gordon, Kevin R. Murphy, and Shelby Keiser, *Attention Deficit Disorder (ADD) and Test Accommodations*, 65 BAR EXAMINER 4:26, 27 (Nov. 1998).
71. *See* Ranseen, *supra* note 30, at 6-7.
72. *Id.* at 7-8.
73. *Id.* at 6-8.
74. *Price v. Nat. Bd. of Med. Examiners*, 966 F. Supp. 419, 424-27 (S.D. W.Va. 1997).
75. Ranseen, *supra* note 30, at 10-12.
76. *Id.* at 8-9.
77. *Id.* at 8.
78. *Id.* at 9.
79. *Id.*
80. G. E. Zuriff, *Accommodations for Text Anxiety Under the ADA*, 68 BAR EXAMINER 1:15, 16 (Feb. 1999).
81. *Id.* at 17-18.
82. *Id.* at 18. Zuriff defines "social phobia" as a "psychiatric disorder in which there is a marked and persistent fear of one or more social or performance situations in which embarrassment may occur."
83. *Id.* at 19.
84. *Id.*
85. *Id.*
86. *See, e.g., Sutton*, 527 U.S. at 491 (holding that appellants, who

were excluded from becoming pilots for the airlines because of their poor uncorrected vision, did not have a “substantial-ly limit[ing] impairment” because they were excluded from only one particular job); *see also Toyota*, 534 U.S. at 200-201.

87. *McGuinness*, 170 F.3d at 974.
88. *See* Zuriff, *supra* note 80, at 16.
89. The Fourteenth Amendment of the United States Constitution prohibits any state from depriving “any person of life, liberty, or property, without due process of law;” bar examination applicants have a liberty interest in practicing their chosen profession—law. *See Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963) (holding that applicant rejected by character and fitness committee had both the right to learn the reasons for his rejection and to rebut those reasons at a hearing). If a state denies an applicant with a disability accommodations for an administration of the bar examination, the state also interferes with the applicant’s liberty interest, though to a lesser extent. An applicant without suitable character and fitness does not practice law, while an applicant with a disability who does not get testing accommodations can still take and pass the bar examination. Thus, the question arises as to whether due process of law is required under the Fourteenth Amendment when a state board denies accommodations to a bar examination applicant with a disability.
90. *In re Petition of Thomas E. Cahill*, 677 A.2d 40, 42-45 (Del. 1996). Here we use the phrase “special accommodations” and not “reasonable accommodations” in the same manner as did the Delaware Board of Bar Examiners. There was no mention of the ADA in the court’s decision.
91. Del. Bd. of B. Examiners R. 29 (Sept. 19, 2002).
92. *Hawaii State Department of Education* (Civil Rights Division, United States Department of Justice, 1990).
93. *See* S. E. Phillips, *High-Stakes Testing Accommodations: Validity Versus Disability Rights*, 64 BAR EXAMINER 3:8, 22-23 (Aug. 1995).
94. Fedo and Brown, *supra* note 7, at 8.
95. *See* N.J. Sup. Ct. R. 1:23-1, 1:24-2 (2004); New Jersey Board of Bar Examiners, *Admission to the Bar Booklet* § I.C.8 (2004); *compare* N.J. Bd. Bar Exam. Comm. on Character R. 304 (2004) (providing process for an appeal to a Hearing Panel, then to the New Jersey Supreme Court, for matters involving character and fitness).
96. *See, e.g., D’Amico*, 813 F. Supp. at 217.
97. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).
98. *D.C. Ct. of App. v. Feldman*, 460 U.S. 462, 476-87 (1983).
99. *See Ware*, 973 F. Supp. at 1356 (holding that because the board’s decision regarding an applicant’s request for accommodations on the Wyoming bar examination was interlocutory, the *Rooker-Feldman* doctrine did not apply).
100. Even if the applicant did have a right to a hearing, as long as the hearing was not subject to review by a state supreme court, it would have been a final judicial decision of a state’s highest court.
101. *See supra* notes 12, 39, 52, and 56.
102. *See Duncan v. Walker*, 533 U.S. 167, 217-218 (2001) (state law remedies must be exhausted before federal courts can exercise jurisdiction).
103. The Eleventh Amendment immunizes state officers as well as states because judgments against state officials acting in their official capacities (e.g., bar examiners) are paid with funds from state treasuries.
104. *See* Burgoyne and Mew, *supra* note 29, at 31.
105. *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356, 363-74 (2001).
106. *Medical Board of Cal. v. Hason*, 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 561 (November 18, 2002).
107. *See D’Amico*, 813 F. Supp. at 219.
108. Of course, such an argument overlooks the shame and humiliation that comes with not passing the bar examination on the first attempt, which could put applicants in precarious positions with their current or future employers.
109. *Pazer*, 849 F. Supp. at 288.
110. *Christian v. N.Y. St. Bd. of L. Examiners*, 899 F. Supp. 1254, 1256 (S.D.N.Y. 1995).
111. 42 U.S.C.A. § 12205.
112. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 600-21 (2001).
113. *See* Burgoyne and Mew, *supra* note 29, at 31.
114. *Id.*
115. *Id.*
116. *Soignier v. American Board of Plastic Surgery*, 92 F.3d 547, 550-53 (7th Cir. 1996).
117. In *Soignier*, the parties agreed that the two-year Illinois statute of limitations for personal injury actions applied. The ADA does not have a uniform statute of limitations; therefore each state must determine its own for ADA-related cases.
118. While no federal court (and no state court besides the Delaware Supreme Court) has stated that bar examiners must hold hearings before denying requests for testing accommodations, courts would likely defer to board decisions more easily if bar examiners had established

opportunities for applicants to appeal the denial of accommodations, either orally or in writing, after learning of board decisions denying their requests.

119. *Edwards v. Ill. Bd. of Admissions to the Bar*, 2000 WL 343333, \*2-\*4 (N.D. Ill. Mar. 29, 2000).
120. *Campbell v. Greisberger*, 80 F.3d 703, 705-07 (2d. Cir. 1996). *See also McCready v. Mich. St. Bar Comm. on Character and Fitness*, 881 F. Supp. 300, 303-05 (W.D. Mich. 1995) (declining to exercise jurisdiction over applicant's individual challenge to state character and fitness committee's decision to consider applicant's physical and mental impairments and alcoholism); *McCready v. Ill. Bd. of Admissions to the Bar*, 1995 WL 29609, \*2-\*6 (N.D. Ill. Jan. 24, 1995) (refusing to exercise jurisdiction over applicant's appeal of adverse decision by state character and fitness committee).



STUART DUHL is a partner in the law firm of Michael Best & Friedrich LLP, Chicago. He is a former member of the Illinois Board of Admissions to the Bar (1979-2002), and former chair of the National Conference of Bar Examiners (1991-1992). He is a member of the Editorial Advisory Committee—National Conference of Bar Examiners, and editor of *The Bar Examiners' Handbook*, second and third editions. Stuart is a graduate of Northwestern University Law School.

121. *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489, 1492-96 (S.D. Fla. 1994).
122. *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1228-30 (10th Cir. 2001).
123. *Applicants v. Tex. St. Bd. of L. Examiners*, 1994 WL 776693, \*9 (W.D. Tex. Oct. 10, 1994).
124. *Clark v. Va. Bd. of Bar Examiners*, 880 F. Supp. 430, 446 (E.D. Va. 1995). *See also In re Applications of Underwood and Plano*, 1993 WL 649283, \*2 (Me. Dec. 7, 1993) (striking down question similar to Virginia's on ground that question unnecessarily singled out applicants on the basis of their disabilities).
125. *O'Brien v. Va. Bd of Bar Examiners*, 1998 WL 291019, \*3-\*4 (E.D. Va. Jan. 23, 1998).
126. *Rothman v. Emory Univ.*, 828 F. Supp. 537, 541-42 (N.D. Ill. 1993).



GREGORY M. DUHL graduated from Harvard Law School in 1995, and is currently an Hon. Abraham L. Freedman Fellow at Temple University's James E. Beasley School of Law. He teaches courses in commercial law and legal research and writing. Since graduating from law school, he has worked in various capacities with the Illinois Board of Admissions to the Bar.