Why Law Matters

How ADA Has Facilitated “Liberty” in the Legal Profession

For Those with Mental Health Challenges

AALS Annual Meeting

Disability Law Section

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Coverage of the Presentation

Background of the issue – history of mental health history and substance abuse questions in the licensing process for legal profession

Recent developments

Why law matters

 -- potential impact of new presidential administration

How to use current law and not lose progress

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Background

Mental health history and substance abuse questions in the licensing process for legal profession

What “law” was in place initially?

 Constitution?

 Rehabilitation Act? No ffa

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Americans with Disabilities Act (1990) – Title II (state governmental entities)

 - New focus on these questions –
“Have you ever…been diagnosed, counseled, etc….”

IMAGE – Mental health counseling

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After the ADA passed, all states changed their questions…

All states limited them in time

Some became more specific about stated conditions

 (Texas)

Some eliminated them altogether (Minnesota)

Some clarified that “situational counseling” need not be reported

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Court cases

IMAGE – Photograph of front of Supreme Court

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Several legal challenges brought early on

Clark v. Va. Bd. of Bar Exam’rs, E.D. Va. 1995(striking down a question asking whether an applicant has been treated or counseled for any mental, emotional, or nervous disorders within the past five years as being impermissible under Title II)

Campbell v. Greisberger (2d Cir. 1996) (indicating that New York had changed its mental health status question)

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Other cases…

Stoddard v. Fla. Bd. of Bar Exam’rs (11th Cir. 2007)

 (no ADA when reviewing mental health and financial history or unprofessional conduct, especially since applicant had many issues that raised concerns)

Doe v. Judicial Nominating Comm’n for the Fifteenth Judicial Circuit of Fla.,S.D. Fla. 1995)

 (questions asked of judicial appointment applicants were overly broad when they concerned any physical impairment, hospitalization, treatment of mental illness, or addiction to drugs or alcohol regardless of whether they would affect applicant’s job performance capabilities)

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More cases

Applicants v. Tex. State Bd. of Law Exam’rs, (W.D. Tex. 1994)

 (permitting narrowly drawn questions asking about treatment for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorders within the past ten years or since age eighteen, whichever time period was shorter)

Med. Soc. of N.J. v. Jacobs (D.N.J. Oct. 5, 1993) (denying preliminary injunction to prohibit a state medical board from asking about alcohol or drug abuse and mental or psychiatric illness)

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More cases…..

*In re* Frickey (Minn. 1994)

 (ordering the board of bar admissions to remove certain mental health treatment questions from Minnesota’s Bar Application because these types of questions would deter law students from seeking appropriate counseling)

 -- Minnesota no longer asks any questions about mental health history

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Substantial scholarly attention and legal education and legal education attention – early work

Key article

Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 Vill. L. Rev. 635, 637 (1997)

IMAGE – Picture of the late Stanley Herr

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ABA and AALS Activities

COLAP work

AALS report on substance abuse

AALS report on disability issue

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Recent developments

More research on deterrent effects

Media attention to attorney suicide issues

DOJ taking active roll in enforcement

 Louisiana

 Ohio

 Florida ???

ACLU giving attention in some states

Some states are changing questions

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Why individual state efforts are not sufficient

Current changes are jurisdiction by jurisdiction

Students do not always know where they intend to practice

Still stigmatizing and mistrust about reporting

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Why Law Matters….
Because it provides a framework… but can it last?

IMAGE – Book cover of book “The Liberal Hour: Washington and the Politics of Change in the 1960s”

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Trump Administration and Disability Rights

IMAGE – Photo of Donald Trump

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Statutory amendment or repeal?

IMAGE – photograph of Congress building

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Statutory Repeal or Amendment? Significant changes unlikely

IMAGE – book cover of “Enabling Acts: The Hidden Story About How the Americans with Disabilities Act Gave the Largest US Minority Its Rights

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Bipartisan Legislation –
Strong advocacy organizations will spotlight attention on proposed changes

IMAGE – President George H.W. Bush signing the ADA

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Shrinking Resources
reduced appropriations for grants and reduced staffing for enforcement

IMAGE – picture of shrinking $100 bill

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Regulations and agency guidance

IMAGE – seals of DOJ, HHS, and Department of Education

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Administrative Agency Oversigh

Regulations

Regulatory guidance, opinion letters, etc.

Internal agency structure and prioritization

Enforcement priorities

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Enforcement –
Department of Education –
Betsy Devos

IMAGE – Donald Trump with Betsy Devos

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Enforcement – Department of Health & Human Services
Rep. Tom Price

IMAGE – Tom Price

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Enforcement –
Department of Justice –
Senator Jeff Sessions

IMAGE – Jeff Sessions

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Primary agency for mental health history questions – DOJ

State bar authorities are Title II agencies

DOJ has primary responsibility for enforcing Title II

Under President Obama, OCR has focused attention on

* Drafting regulations on range of issues
* Issuing regulatory guidance
* Enforcement

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Appropriations for federal implementation -- enforcement

IMAGE – kid in a toy cop car

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Mental Health Issues: Why Important to Law Schools?

* High levels of stress in law school
* High incidence of suicide
* High profile events often involve colleges and college students (or former students)
* Concerns about stigma and discrimination

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Character and Fitness Questions: an issue needing attention

As part of the professional licensing process

 Mental health and substance abuse

Differing state approaches to

 History

 Behavior and conduct

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Strategies Going Forward

Leaders in legal education and the profession must continue to educate state bar admission authorities and work for change

Questions about diagnosis and treatment should be removed.

Questions about behavior and conduct should continue and given serious attention

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Final Thoughts

“Knowledge is essential to understanding, and understanding should precede judging.”

-- Louis D. Brandeis (appointed to the Supreme Court in 1916)

IMAGE – Photo of Louis Brandeis