

Passing the Lawyering Test

By Lara M. Krieger

The California Bar Exam results were recently announced. California historically has one of the toughest exams, and this year was no exception. Only 62 percent of test-takers passed. And this is where you come in: You are approached by one of the 38 percent who failed the exam. Your prospective client tells you that she has a learning disability, and that she applied to take the bar exam with accommodations under the Americans with Disabilities Act, 42 U.S.C. Sections 12101-12213. She wants to sue the State Bar of California because it did not accommodate her disability and she says that's why she failed the exam.

The complaint should undoubtedly allege that the bar failed to accommodate your client's disabilities, but you need to figure out which sections of the massive ADA and its enabling regulations are applicable. There are two obvious possibilities. Section 12132 prohibits a public entity from discriminating in providing public "services, programs, or activities[.]" Section 12189 requires that "[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."

Based on this statutory language, it may seem like Section 12189 is the clear winner — the section expressly requires that "any person" "offering" licensing exams accommodate applicants' disabilities. And many state and federal courts have held that Section 12189 applies to state boards of bar examiners. But those courts are wrong. Section 12189 has nothing to do with the state agencies administering bar exams. That doesn't mean that your client has no recourse — she

can sue the State Bar under Section 12132.

Title III and the State Bar

The ADA is divided into three titles. Title I prohibits employment discrimination (42 U.S.C. Section 12111 et seq.); Title II prohibits discrimination by public entities providing public services (Section 12131 et seq.); and Title III prohibits discrimination by private entities operating public accommodations (Section 12181 et seq.).

At first glance, it looks like your client's failure to accommodate claim is governed by Section 12189, which is part of Title III. This section expressly prohibits discrimination in licensing examinations, and its enabling regulation (28 C.F.R. Section 36.309) details the mandatory accommodations. The Code of Federal Regulations' section-by-section analysis says that this regulation applies to bar exams.

And there are a host of out-of-state cases holding that a plaintiff may sue a board of bar examiners under Section 12189. See, e.g., *Ware v. Wyoming Board of Law Examiners*, 973 F.Supp. 1339 (D. Wyo. 1997), *aff'd*, 161 F.3d 19 (10th Cir. 1998); *Argen v. New York State Board of Law Examiners*, 860 F.Supp. 84 (W.D.N.Y. 1994). Justice Antonin Scalia even noted in dicta that the California Bar Exam is covered by Section 12189. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

But there's a problem. Title III — in which Section 12189 is codified — prohibits discrimination by private entities. Yet, the State Bar is undoubtedly a public entity. So, it's worth reviewing all those cases holding that Section 12189 requires a state board of bar examiners to accommodate an applicant's disabilities. The genesis of this line of cases appears to be a 1993 New York federal case, *D'Amico v. New York State Board of Law Examiners*, 813 F.Supp. 217 (S.D.N.Y. 1993). *D'Amico* reasoned that "person" — as used in Section 12189 — is de-

fined in Title I of the ADA. Title I's Section 12111(7) defines "person" as having the same meaning as defined in 42 U.S.C. Section 2000e. Section 2000e defines "person" to include "governments, governmental agencies, political subdivisions[.]" From that, *D'Amico* (and almost all other courts and commentators addressing the issue) concluded that although Title III generally governs only private entities, Section 12189 is unique and it governs the state agencies administering bar exams. See, e.g., *Florida Board of Bar Examiners re S.G.*, 707 So.2d 323 (Fla. 1998); *Pazer v. New York State Board of Law Examiners*, 849 F.Supp. 284 (S.D.N.Y. 1994); *In re Petition of Rubenstein*, 637 A.2d 1131 (Del. 1994).

That analysis, however, makes no sense. *D'Amico*, and all those that followed it, wrongly engrafted Title I's expansive definition of "person" to Title III's Section 12189. Title I's definitions apply only to Title I — and the definitions cannot be imported to Title III. See 42 U.S.C. Section 12111 (defining terms "[a]s used in this subchapter"). Title I's use of an expansive definition of "person" is reasonable given that Title I concerns employment discrimination. But outside of the employment discrimination context, the ADA divides up the private and public world. Title II governs state and local entities, and Title III governs private ones. This is backed up by the express language of Section 12189's enabling regulation, which repeatedly says that it applies only to private entities. See 28 C.F.R. Section 36.309.

But there's a loose end. The Code of Federal Regulations' analysis of the Title III regulations says that "[e]xaminations covered by this section would include a bar exam or the Scholastic Aptitude Test prepared by the Educational Testing Service." This sentence is anomalous, but may make sense in context. A few paragraphs earlier, the analysis explains the purpose of Section 12189 and the regulation: It is a gap-filler to regulate "licensing, certification, and testing authorities" that accept no federal money and therefore aren't covered by the Rehabilitation Act of 1973, but that aren't covered by Title II either because they're not state or local agencies. In this light,

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the reference to “bar exam” may actually mean the National Conference of Bar Examiners, the folks who bring us the Multistate Bar Examination, rather than the state agencies administering bar exams. In any event, the reference to “bar exam” is sloppy and confusing. This confusion is accentuated given the virtually unbroken line of cases misinterpreting Section 12189.

Title II and the State Bar

There's an easy answer to all of this confusion — and that answer is right in Title II of the ADA.

State bars are public entities, and therefore are subject to Title II of the ADA. See, e.g., *Clark v. Virginia Board of Bar Examiners*, 880 F.Supp. 430 (E.D. Va. 1995); *Ellen S. v. Florida Board of Bar Examiners*, 859 F.Supp. 1489 (S.D. Fla. 1994). Nothing in Title II or its enabling regulations expressly prohibits discrimination in licensing matters. But that's because no such express provision is required, and the Department of Justice specifically rejected calls to enact such a regulation. Instead, the Code of Federal Regulations' analysis of the Title II regulations explains that the provisions already on the

books are “sufficient to ensure that courses and examinations administered by public entities meet the requirements of [28 C.F.R. Section 36.309].” Therefore, your client's failure to accommodate lawsuit should allege violation of Section 12132 and 28 C.F.R. Section 35.130, which are Title II's general anti-discrimination provisions. And, of course, additional Title II sections and regulations may be relevant depending on your client's case.

Additional Considerations

The basics of your client's failure to accommodate complaint should be coming together now. Before filing, however, you'll need to address a couple of other hurdles. First, consider whether California's Tort Claims Act is applicable. See Government Code Section 900 et seq. The Tort Claims Act doesn't cover federal claims or requests for injunctive relief; therefore, an administrative claim need be filed only if your client seeks money damages under California law. See *Williams v. Horvath*, 16 Cal.3d 834 (1976); *Canova v. Trustees of Imperial Irrigation District Employee Pension Plan*, 150 Cal.App.4th 1487 (2007). Second, choose the forum

carefully.

Although there isn't much governing law, it is possible that the California Supreme Court has exclusive, original jurisdiction over any lawsuit challenging bar examination procedures, even if the lawsuit alleges an ADA violation. See Business and Professions Code Section 6000 et seq.; *Smith v. California State Bar*, 212 Cal.App.3d 971 (1989). For example, Maryland's highest court concluded that it has exclusive jurisdiction to adjudicate an ADA challenge to bar examination procedures under a statutory scheme similar to California's. See *In re Application of Kimmer*, 896 A.2d 1006 (Md. 2006). So, consider filing the complaint directly with California's high court.

Assuming that there are facts backing up your client's charges, this discussion should give you enough to start crafting an ADA complaint. Everything else is up to you to use those lawyering skills that helped you pass the country's toughest bar exam.

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