Medical and Psychological Evaluations and the ADA: Straight Talk and Practical Advice
Questions and Answers from 2008 IACP Session

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The questions listed below were prepared for discussion at the November 8, 2008 joint session with the Psychological Services and Medical Officers sections. Some of these questions were discussed in San Diego; others were not. However, we offer the full set of questions and answers here.

Note: THESE ANSWERS REPRESENT INFORMAL GUIDANCE AND DO NOT REPRESENT AN OFFICIAL OPINION OF THE EEOC OR POST.

1. **<u>Pre vs. Post-Offer Assessments</u>: Can a "personality assessment" be conducted pre-offer if it includes direct involvement of a clinical psychologist in interpreting test responses and conducting an interview, even if the test items and interview questions are not themselves "medical?" Does *any* direct contact between a clinical psychologist and a candidate pre-offer expose the department to an ADA violation because a psychologist cannot put "on hold" his/her training and experience? Or, is it more ADA-compliant to do this assessment pre-offer in order to determine if the individual is "otherwise qualified**?"

<u>Sharon Rennert</u>: The Americans with Disabilities Act prohibits medical examinations and disability-related questions prior to a job offer. Such examinations and questions can be asked only at the post-offer stage. The basic rules are set out in the EEOC's Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations, www.eeoc.gov/policy/docs/preemp.html.

The direct involvement of a psychologist is one of the possible factors that would be assessed in determining whether the "personality assessment" is a medical examination. (See Guidance: whether a test is administered or its results interpreted by a health care professional.) But, as the Guidance makes clear, no one factor necessarily signals whether a test is a medical examination (and thus prohibited during the pre-offer period). This question states that the personality assessment, reviewed alone, is not a medical examination. The concern is that the direct involvement of a psychologist will convert a non-medical examination into a medical one.

EEOC is not an expert in all the possible fields of work practiced by psychologists. But, it is our understanding that not all psychologists are trained in patient care. Therefore, such psychologists would not have the license, training, or experience to assess whether a candidate has a psychological impairment. Some might argue that a psychologist's education, training, expertise, and practice may well influence whether s/he would be deemed a medical practitioner

such that his/her direct involvement "taints" the test and thus converts it into a medical examination. However, I doubt that the involvement of such a psychologist alone would be sufficient to convert a non-medical test into a medical one.

I cannot answer whether a medically-trained psychologist could theoretically put "on hold" his/her medical training/knowledge so that the individual is not converting a non-medical test into a medical one. (Please excuse my use of the phrase "medically-trained psychologist" which I'm sure is not a term you would use. But, I hope it makes clear that I'm referring to psychologists who by education, training, and licensure are able to assess, diagnose, and treat mental illnesses or disorders). Perhaps there could be a question as to whether a non-medical personality assessment becomes "medical" based solely on the participation of a medically-trained psychologist. The questions would focus on what input the psychologist provided and whether any of it was medical in nature.

While it might be prudent to avoid having a medically-trained psychologist involved in the interpretation of a non-medical, pre-offer personality assessment and interview, the ADA would not necessarily require that approach. There may be legitimate and important reasons for wanting a medically-trained psychologist's involvement that have nothing to do with assessing and diagnosing a mental impairment. As long as the psychologist can put "on hold" his/her medical training and experience, then the direct involvement in a pre-offer non-medical test is permissible. If it is not possible to put medical training and experience on hold, then the psychologist should not be involved pre-offer.

Spilberg's Comments: As Sharon points out, this is a rather grey area without any consistent case law to base a definitive answer. It would appear that the involvement of a clinical psychologist in interpreting written test items is less problematic if (1) the test was not designed to detect or diagnose emotional or mental conditions and, (2) test interpretation is not limited to licensed clinical psychologists and others with expertise in the diagnosis of mental and emotional disorders). Based on my review of case law (e.g., Thompson v. Borg-Warner Protective Services, Barnes v. Cochran, Karraker v. Rent-a-Center), it would appear that a key factor is whether the information provided during the evaluation would even allow an expert to make disability-related diagnoses. In other words, a situation where the psychologist must put his/her medical training and experience "on hold" could be difficult to defend as being acceptable pre-offer.

2. **Returning Vets/Bases for Medical Decision-Making: A peace officer candidate is a veteran of the Iraq War and is currently receiving benefits based on his diagnosis of PTSD, supported by documentation from the VA verifying the diagnosis and compensation status. Nevertheless, he denies any current psychological distress during the psychological evaluation. Is he protected by the ADA, since he denies any mental/emotional condition? Can he be lawfully disqualified based on the VA documentation?**

Sharon Rennert: It is unclear from the question whether the candidate denies ever having PTSD or is saying he currently is experiencing no symptoms of the disorder. Is it medically possible that although he has PTSD he might not be experiencing any symptoms at the moment, either

because of treatment (medication?) he is receiving or another reason (no exposure to anything that might bring on symptoms)?

Certainly there seems to be a disconnect between his receiving VA disability benefits for PTSD, which would seem to indicate a more serious form of the disorder, and his denial of experiencing any current psychological distress. I would need more information on what the candidate means before I could say whether he's covered under the ADA.

The law enforcement agency is entitled under the ADA to get further information from the VA on his current medical status. I do not know how old the VA documentation is and whether it says anything in detail about the nature of his condition. The VA documentation verifying the diagnosis and compensation status may be 6 months old, a year, or more and thus it may not tell us much about his current medical condition (which would be relevant in assessing whether he is substantially limited in performing a major life activity currently as a result of PTSD and it is relevant to determining his current ability to do the job at issue). And it is a current assessment that is required rather than simply relying on the VA documentation, especially if the documentation simply states that candidate has PTSD and is eligible for disability benefits. Under the ADA, it would still be advisable to probe further to get as complete a sense as possible of his current medical condition and how that would impact his ability to perform safely and effectively the essential functions of a police officer. Besides perhaps getting more from the VA (than is available in the documentation presented) the law enforcement agency should also get further information from whoever is treating the candidate for the PTSD.

(As I remember it, certain psychologists said they'd had trouble getting information from the VA, but others said there was a specific process that should be used to get the VA to disclose the information you'd be seeking. I'll let you all figure that part out.)

It seems implausible, but if the candidate is denying ever having had PTSD, or he's claiming to be cured of it, then the issue is whether it's true or not. In other words, the candidate's claim of never having the disorder or being cured seems highly improbable, and if the psychologist gathers medical data that contradicts the candidate, and further shows him to be unqualified (i.e., he poses a direct threat to self or others that cannot be addressed through reasonable accommodation) then the psychologist will recommend the candidate not be hired for medical reasons. If the psychologist gathers data that the candidate has somehow committed fraud against VA and has never had PTSD, then the psychologist is free to choose to turn over what it has to the VA and to recommend disqualification based on committing fraud to get VA benefits.

If, as I think more likely, the candidate is saying he's not currently experiencing symptoms but is acknowledging the diagnosis, then that claim needs to be explored. I'm obviously no expert on PTSD, but it would be critical to know what symptoms the candidate has experienced, and under what conditions, when he last experienced symptoms and what might have triggered them, what accounts for any lessening in symptoms, and what might trigger symptoms to return. If the candidate is correct that he's not currently experiencing symptoms (e.g., because he's taking medication and is not exposed to anything that could trigger a return of symptoms), the candidate is still likely to be covered under the ADA thanks to the ADA Amendments Act of 2008. Under the revised definition of "disability," we would ignore the beneficial effects of the medication

and assess whether the candidate would likely be experiencing a substantial limitation in a major life activity if he was not taking the medication. Given that the ADA now uses a lower threshold to determine a substantial limitation, and the list of major life activities has been expanded, it is highly likely this candidate would be covered as having a "disability." (There also could be a determination that the individual meets the "record of a disability" definition. In any event, coverage as a disabled person under the ADA is probably likely so the real issue will be whether the individual is qualified given the PTSD.)

A law enforcement agency would need to be sure that any disqualification due to the PTSD for posing a direct threat complied with the ADA requirements and included an assessment about whether any reasonable accommodation would eliminate any finding of a significant risk of substantial harm.

Spilberg's Comments: I'm aware that Mike Roberts and Bill McIntyre have been working on guidelines for screening returning vets who are receiving compensation for PTSD. In a nutshell, their policy involves obtaining all relevant, current medical records, and weighing that information against the candidate's claims of asymptomology. I agree with them, and I think Sharon's response is also consistent with their position that passing a candidate with a current diagnosis of PTSD, despite his claims to the contrary, would be inconsistent with California law which stipulates that peace officers must be free of any mental or emotional condition that would impair job performance.

3. **Substance Abuse: A police officer candidate admits that he used cocaine a total of 5 times within the past 5 years. The employing agency's standard forbids any cocaine use within the past 5 years, so the candidate is removed from further consideration. He appeals, claiming that he was drug dependent but as a result of having attended the Maharishi Mahesh Yogi's Spiritual Wellness Institute in Katmandu, Nepal, he is rehabilitated and he requests reasonable accommodation. The agency refuses, claiming that even if his "rehabilitation" is true, his illegal use of cocaine was recreational in nature, and therefore there is no obligation to provide reasonable accommodation. Is he protected? Does the EEOC have a "threshold" for what constitutes "recreational" drug use? Is the agency allowed to have a drug use standard if it disqualified those who would be protected under the ADA?**

Sharon Rennert: The ADA does not protect anyone who is currently engaged in the illegal use of drugs. There is no definition of "currently engaged" other than it must be use recent enough to suggest an on-going problem. A rehabilitated drug addict may indeed have coverage under the ADA as long as s/he no longer currently engages in illegal use and has (1) "successfully completed a supervised drug rehabilitation program," (2) "otherwise been rehabilitated successfully" or (3) is "participating in a supervised rehabilitation program."

The ADA does not define (and neither the EEOC or courts have defined) what it means to "successfully complete" a "supervised drug rehabilitation program" or to have been "otherwise rehabilitated successfully." The Spiritual Wellness Institute (SWI) may not fit anyone's definition of a supervised drug rehabilitation program, but it could well fall into the category that

the candidate has "otherwise been rehabilitated successfully" (assuming he has not used cocaine or any other illegal substance since then).

The other issue is when the last use of cocaine occurred. If it occurred January 1, the candidate then left for Nepal on January 10, returned on February 10, and applied to the law enforcement agency on March 10, there is a strong argument that the last use is recent enough to suggest an on-going problem, despite having gone to the SWI. However, if the last usage was four years ago, and he completed his time at the SWI 3 ½ years ago and has not used since, then I do not think EEOC would view him as a current user.

But, there is another issue. To be covered under the ADA as a rehabilitated drug addict means that one has to have been an addict. Yet, the law enforcement agency claims that using cocaine five times signals recreational use, not addiction. Certainly, it would need to be shown that the drug at issue is capable of causing addiction and that it did. I'm not an expert on whether using cocaine 5 times means that a person has become an addict, a person cannot become addicted based on using cocaine 5 times, or some people might be addicted after 5 times and others would not. If it is possible, but not absolutely certain that the candidate may have been addicted after 5 uses, then that would make it harder for the candidate to prove he is covered under the ADA (in any legal challenge it is the candidate who must prove he meets the definition of "disability"). His decision to attend the SWI as opposed to a licensed rehabilitation facility may have hurt him in this regard if the people there are not qualified to make such a diagnosis.

After saying all of this, it's impossible on these facts to say whether this candidate has a "disability" as defined by the ADA. But, assume that he does. That does not mean he's qualified for this job. A law enforcement agency may have a drug use standard. If that standard screens out a person based on a disability, then the agency must be prepared to show it is related to the job in question and addresses something related to the successful and safe performance of one or more essential functions.

So, assume that the candidate's fifth use of cocaine occurred 4 ½ years ago, that he successfully completed a drug rehabilitation program, and he has not used cocaine or any other illegal substance in the past 4 ½ years. Under the 5-year standard used here, the candidate is unqualified. If the candidate pursued an ADA challenge to his disqualification, the law enforcement agency would have to justify the 5-year standard. Does the standard have to do with signaling something about a candidate's health and his reliance/addiction to drugs? Does it have to do with engaging in illegal behavior? Or both? Or something else? The law enforcement agency has to be clear on its reason(s) for having a drug use standard and why it believes that 5 years is the appropriate cut-off. I cannot say that this particular standard is right or wrong under the ADA, just explain what a law enforcement agency must consider in deciding to use this standard.

<u>Shelley's Comments</u>: Since this person claims he has been rehabilitated, it would appear that the only accommodation he is asking for is a waiver of the drug policy. I know of no case law that would suggest that law enforcement agencies would be on less than solid ground in implementing a hiring policy that screens candidates based on their adherence to the law, unless they appear to single out past illegal drug use relative to other types of infractions. Ideally, the

candidate's alleged uses of cocaine would be only one (albeit compelling) data point that would be corroborated by other pieces of information (collected during the background investigation and/or psychological evaluation) related to the individual's integrity, impulse control, etc.,

4. **<u>Decision-Making Criteria</u>: In a 6-level psychological rating system (A, B, C, C-, D, F) that passes the top four levels and fails the bottom two, is it compliant with the ADA for a Department in consultation with its psychologist to raise the pass point based on a study of negative ratings and failure rates of C- recruits (assuming that recruit school ratings reflect necessary job competencies)? If raising the pass bar is compliant, how strong must the data be?**

<u>Sharon Rennert</u>: First, my answer assumes that the disability causes or in some way contributes to a candidate obtaining a C-. If the disability plays no role in getting a C-, then the question is irrelevant because the law enforcement agency can treat this candidate like all others and eliminate him from further consideration. No special justification is required other than showing that this candidate was treated like all other candidates who received a C-.

But, assuming that a disability did play a role in getting the C-, there may be ADA implications. Unlike Title VII of the Civil Rights Act, which prohibits discrimination based on sex and race (among other characteristics) and the Age Discrimination in Employment Act (ADEA), the ADA relies more heavily on an individualized assessment of a specific person rather than on generalized data. This is not to say that the data is irrelevant, but only that the ADA still comes back to the person at issue and whether, despite the data, this person could still be found to be qualified.

Put another way, the ADA approaches "disparate impact" claims differently than is done under either Title VII or the ADEA. Under the latter two statutes, a neutral criterion can be potentially challenged as having a disparate, or greater, impact on applicants or employees based on race, sex, or age. Hence, the fact that so many studies are done to validate certain requirements. These challenges are based on a neutral criterion having a detrimental impact on a group, i.e., a group of people over a certain age, or women in general, or people of a certain race.

But, the ADA approaches disparate impact in a different manner. Instead of focusing on a group it focuses on one person. Under the ADA, if a neutral requirement screens out, or might screen out, a person based on disability, then an employer must show that the requirement is job-related and consistent with business necessity. While this approach may be used to argue that a group of disabled persons is adversely affected by a neutral criterion, it's only necessary to have one person affected to make a challenge. In contrast, disparate impact under Title VII or the ADEA must show that a group is affected.

I understand the need to have cut-offs, and there is no way I can say at what level to put it. Nor can I say how "strong" the data must be. I am no statistician, but I assume that the data shows a strong link between the C- and ultimately failing as an officer. But, whether the cut-off is C- or D, in terms of the ADA, is irrelevant. Even under the current system, if a person could show that his/her disability caused them to get an F, then the employer could still be called on to justify using that neutral job criterion to disqualify them. As long as a candidate can show that his/her

disability was the reason for the C-, D or F, then the employer would have to justify use of the requirement by showing that it relates to successful performance of one or more essential functions.

As noted above, the data you compile on the correlation between a C- and ultimate failure as an officer would be relevant, but it would be important, if possible, to address why this particular individual would not be able to overcome the poor grade and still be a good officer. In other words, I'm assuming that the data doesn't show a 100% failure rate for those who scored a C- but a very high correlation. So, the question in an ADA case would be why this candidate would be in the group that fails as opposed to the minority that still successfully perform the duties of an officer.

Shelley's Comments: First off, I must admit that I have never quite understood what a hiring authority is expected to do with information that a candidate was rated "C" or "C-"? Hire them regardless of their shaky rating? Consider disqualifying them for other, non-psychological reasons? I see the psychological evaluation as a probabilistic risk assessment. The psychologist is the risk assessor, but it is the hiring authority who is the risk manager. In other words, the establishment of risk tolerance thresholds is the purview of the hiring authority, just as is the establishment of what constitutes effective, safe job performance. If those risk thresholds result in the disqualification of a disabled candidate, the employer/psychologist must be prepared to show that the decision is job-related and consistent with business necessity, based on an individualized assessment of available objective and specific evidence.

5. **Risk Management: How much risk must an agency accept? More-likely-than-not? Significantly greater than that posed by the general population? Some other standard? Does it matter whether the risk is to self vs. others? Can the likelihood of risks in the future be considered?**

Sharon Rennert: The ADA gives us the standard that all employers must use to assess the health or safety risk posed by an individual, due to a disability, either to himself or to others. A "direct threat" is a "significant risk of substantial harm." A "significant risk" should signal a high probability that the potential harm will occur, and that the potential harm is quite serious in nature. An assessment of risk must be based on objective medical or other factual evidence regarding a particular individual (rather than relying only on generalized studies). The standard does not treat risk to self or others differently; the same considerations apply to either type of risk.

There are at least four factors to assess:

1. the nature and severity of the potential harm (i.e., what exactly is an employer concerned could happen to this person and/or others while performing the job and how severe is the harm that the employer is concerned about)
2. the duration of the risk (i.e., is the risk present throughout the work day or only at certain times or under certain conditions)
3. the likelihood that the potential harm will occur
4. the imminence of the potential harm.

The last factor focuses on how soon the potential harm could occur. The risk must be a current one, not one that is speculative about risk sometime in the future. The farther away in time that the potential harm might occur, the less likely that EEOC would view it as a direct threat. The purpose behind this factor is to avoid disqualifying someone based on speculation about a future risk when nobody knows what may happen in the future. The person may end up dropping out of the training academy, or quit the police force after a year or two. Or, the person may be dismissed from the police force long before the risk might occur because it was always something too far in the future. Or, maybe something will occur medically in the future that makes it more unlikely that there will be significant risk of substantial harm.

Shelley's Comments: Our (California POST) Medical Screening Manual includes a brief discussion of balancing the severity vs. the likelihood of risk:

"The severity of harm can be balanced against the degree of harm… In EEOC v. Exxon Corp. (2000), the court stated that an 'acceptable probability of an incident will vary with the potential hazard posed by the particular position… the probability of the occurrence is discounted by the magnitude of its consequences.' In an ADA case involving HIV-infected prisoners, the court stated that 'the potential gravity of the harm…imbues certain odds of an event with significance … we are far more likely to consider walking a tightrope to pose a significant risk if the rope is 50' high than if it is 1' off the ground. This is even if the odds of losing our balance are the same however far we have to fall" (Onishea v. Hopper, 1999)… in Huber v. Howard County, Md. (1995), the court found an asthmatic firefighter candidate who had a 10% risk of incapacitation during a fire to be a direct threat because, "given the life and death circumstances facing firefighters, the employer does not have to assume such a 10% risk."

6. **Return to Duty Statements: A "Return-to-Duty" statement is written by a police psychologist to a police administrator regarding an officer on administrative leave following a lethal incident. The psychologist's statement is based on clinical evaluation that is part of a confidential debriefing. The officer has read the statement and has signed a release of information. The letter includes a statement that the return-to-duty opinion is not a fitness-for-duty evaluation. What are the ADA implications for Return-to-Duty statements? Are they really just Fitness-for-Duty Evaluations?**

Sharon Rennert: As I remember, it was explained that "Fitness-for-Duty" is the term used for a medical evaluation when there is a question about a police officer's performance or conduct that suggests a medical cause. And "Return-to-Duty" is the term used in the context of returning an officer to work after some sort of lethal incident where the officer has not been accused of a performance or conduct problem and there is no belief that the officer has any medical conditions that caused the lethal incident but rather it is protocol after such an incident to remove an officer from duty temporarily.

The ADA does not care whether you call it a "Fitness-for-Duty" examination or a "Return-to-Duty" examination but only whether the examination would constitute a medical examination, and if so, whether it is job-related and consistent with business necessity. This is the standard an

employer must meet to justify ordering an employee to undergo a medical examination or answer disability-related questions. (See EEOC's Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, www.eeoc.gov/policy/docs/guidance-inquiries.html.) I assume that a "clinical evaluation" is a medical examination (or at least involves disability-related questions) so the ADA would require that this evaluation be job-related and consistent with business necessity. I think such an evaluation would meet the ADA standard given the obvious stress that would be present after a lethal incident and a wish to ensure that the officer is able to handle the aftermath of such an incident and return to duty.

7. **Prohibited Inquiries/Evaluations: Are there questions or areas of investigation that cannot be addressed during the post-offer medical or psychological evaluations or a fitness-for-duty examination?**

Sharon Rennert: During a post-offer medical or psychological evaluation, you may use whatever questions or pursue whatever areas of investigation you choose. The only ADA requirement is that the same initial questions/examination be given to all applicants accepted for the same job rather than singling out a particular applicant.

A fitness-for-duty examination, as I understand it, is given only to employees. As such, the ADA requires that such an examination be job-related and consistent with business necessity. (See Question 6 for the link to the EEOC Guidance that addresses this standard.) This standard can be met when there is a reasonable belief, based on objective evidence, (1) that an employee might be unable to perform an essential function of the job due to a medical condition or (2) that an employee might pose a direct threat due to a medical condition. It would seem that a fitness-for-duty examination would be called for in one of these two situations. The resulting medical examination should be specific to the concerns that have been raised. In other words, the scope of the medical examination should be based on the objective evidence that has led to a reasonable belief that a performance or conduct problem or a possible direct threat situation might be rooted in a medical problem.

Shelley's Comments: The California Fair Employment and Housing Act stipulates that, even at the post-offer stage, all questions and examinations must be job-related and consistent with business necessity. Even for those who practice outside of California, it is important to check to ensure there are no similar state or local requirements.

8. **Incumbent Medical Examinations: An officer has been diagnosed with a benign auditory nerve tumor. It is slow growing, has caused some hearing loss in upper frequency range, but hasn't caused any balance issues yet and isn't expected to cause psychiatric concerns. No mental health concerns have been observed and no functional impairment identified. Is it lawful to conduct a baseline mental evaluation?**

Sharon Rennert: No. Based on the information provided, there is no reasonable belief based on objective evidence to justify doing a baseline mental evaluation. (See Question 6 for the link to the EEOC Guidance that addresses this standard.) The nerve tumor is not expected to cause

psychiatric concerns so under the ADA a mental evaluation of any kind at this point would be unlawful.

9. **<u>Medical Information Confidentiality</u>: Is it lawful for a medical/psychological report to include: (a) specific diagnoses/bases for determination and/or (b) suggested treatment or other potential reasonable accommodations? Or, should there simply be a "fit or not fit" determination? Does the answer differ for pre-employment and fitness for duty evaluations**?

<u>Sharon Rennert</u>: Whether the medical/psychological report is done as a post-offer medical examination or as a fitness-for-duty examination of an employee, the ADA permits the report to include specific diagnoses/bases for determination where such information is being shared with someone who needs it in order to make an employment decision. Indeed, since these reports must be submitted to the law enforcement agency, and it is the agency that will have the final say on whether it proceeds with hiring the individual, or allowing the individual to continue in his/her job, I think the agency needs to know the diagnosis/bases for determination if that diagnosis/bases is the reason a doctor/psychologist is recommending against hiring someone or putting an employee back to work. Any decision to omit such information and simply say "not fit" because of a belief that the ADA requires leaving out the diagnoses/bases is wrong. Moreover, leaving out this information could prevent the law enforcement agency from understanding why the psychologist is making this recommendation.

Remember that a doctor/psychologist is working as an agent of the law enforcement agency, and thus it is the law enforcement agency that will decide who you must share your information with. If there is a violation of the ADA confidentiality provision, it is the law enforcement agency that will be held liable, not the psychologist who was only passing on the information the law enforcement agency asked for. It is important to understand the ADA requirements, but it is the law enforcement agency that must think about what it needs to know from the psychologist. This is not to say that you should turn over all your records to the law enforcement agency, but just that a psychologist and the law enforcement agency should discuss what information may be necessary for specific agency personnel to make sense of the psychologist's recommendation and help in determining if the recommendation should become the final employment decision, be modified, or be reversed.

In its ADA Pre-employment Guidance (see Question 1) the EEOC recognized that there may be more than one decision-maker involved in determining who is hired (or put back to work). Thus, there will be no violation of the ADA confidentiality provision to share the diagnoses/bases for determination in either the post-offer medical examination or fitness-for-duty context WHERE such information seems necessary to share with someone who must make an ultimate employment decision. If you're not sure whether it's necessary, then discuss with the law enforcement agency.

If the question is asking whether <u>any</u> diagnosis revealed during a post-offer medical/ psychological examination should be shared with the law enforcement agency, even where the conclusion is that the person is perfectly fit to be hired, that may be a different situation. For example, if it is revealed during a post-offer psychological examination that a person was treated

for 6 months for depression at the age of 15 when his father died, but that 10 years later the person is fine and there has been no further psychological illnesses/disorders of any kind, I do not think that information needs to be shared with the law enforcement agency. If the psychologist is recommending that the hiring proceed, then what purpose does it serve to share the information with the law enforcement agency? If you share this information, do you basically turn over everything from your medical examination to the law enforcement agency? Based on the ADA Pre-employment Guidance, I would say the psychologist should not reveal this information because I can't see why the agency would need it to make its hiring decision.

As for suggested treatment and potential reasonable accommodation, this is more complicated. Is the suggested treatment part of a requirement to proceed with the hiring or returning someone to work (e.g., if this person begins taking a medication for X then he is fit to be hired/returned to work)? Or, is the suggested treatment simply the psychologist trying to do what s/he believes is best for the individual separate from the recommendation about hiring/return to work?

An employer that imposes treatment requirements in order to be hired or return to work is, potentially, setting themselves up for a disparate treatment claim. That is, the employer is imposing a condition it does not routinely impose on others. Why is there a need to recommend treatment for this person but not others? Is it the type of medical condition? I would think that a lot of applicants/officers have medical conditions where medical treatment might be appropriate, even desirable. But, I doubt that a doctor/psychologist routinely recommends such treatment. So, why in one particular instance does it wish to do so?

As an attorney, I get nervous about doctors/psychologists making medical recommendations for persons who are not their patients. This is not simply an ADA issue, but could raise liability concerns for the employer when it starts acting like a treating physician/psychologist (remember, you are working at the behest of the law enforcement agency). My concern here is not about the ADA confidentiality provision, but concerns that an employer may have bigger problems if its doctor/psychologist is making treatment recommendations. Especially if it involves medication or psychotherapy.

A doctor/psychologist should stick to evaluating a candidate to determine if the law enforcement agency should proceed with hiring the individual or returning the employee to work.

Finally, the report certainly can list potential reasonable accommodations. Or, it can suggest that the law enforcement agency may want to discuss potential reasonable accommodations with the applicant/employee. Again, there is no confidentiality violation that a law enforcement agency's doctor/psychologist is passing on necessary information about potential reasonable accommodation, or limitations that might be addressed through reasonable accommodation.

<u>Shelley's Comments</u>: Sharon makes the important but often misunderstood point that, in the eyes of the ADA, the psychologist (and the M.D. and everyone else involved in the pre-employment evaluation process) is considered an agent of and therefore indistinct from the employer. That is why, by the way, it is unlawful for psychologists/M.D.s to conduct their evaluation pre-offer but shield the information from the employer until the post-offer stage – they <u>are</u> the employer in the eyes of the ADA.

Note that other statutes and regulations (federal, state or local) can also influence the respective roles of the psychologist/M.D. and the hiring authority. For example, although the hiring authority has the final say on whether the peace officer candidate will ultimately be hired, an agency in the California POST program would be found out of compliance if the police chief hired a candidate despite a psychologist's "unfit" evaluation (and absent a second opinion refuting the original evaluation). (Note, however, that the reverse is not true; the chief is not compelled to hire a candidate who "passes" the psychological evaluation). The newly-revised POST selection standards specify that, beyond the suitability determination, "… any additional information reported (by the psychologist) to the department shall be limited to that which is necessary and appropriate, such as the candidate's job-relevant functional limitations, reasonable accommodation requirements, and the nature and seriousness of the potential risks posed by the candidate."

10. **<u>Exchange of Medical Information</u>: What information can be exchanged among background investigators, psychologists, physicians and hiring authorities? What are the proper, lawful roles of these evaluators and the hiring authority during the screening process?**

<u>Sharon Rennert</u>: Some of the answer to this question is contained in the answer to Question 9. In the ADA Pre-employment Guidance, EEOC states that information from any post-offer medical examination should be shared only with those individuals who require such information in order to make an informed hiring decision. It is possible, based on the circumstances, that it might not be appropriate for a psychologist to share any specific information from a post-offer psychological evaluation with anyone. It is also possible that, based on circumstances, it might be appropriate for the psychologist to share some, but not all, information with a background investigator and/or hiring authorities. The psychologist is not the ultimate hiring authority, and therefore the medical information to be shared depends on the role of each person in the post-offer hiring process and what each of them needs to know in order to make an informed decision. If a specific person needs medical information in order to carry out his/her role in the hiring process, then the ADA would permit the disclosure.

As indicated above, the ADA does not require that a psychologist be coy about sharing information. If an applicant has a psychological impairment that might well affect his qualification to be an officer the psychologist's concern/recommendation, and the facts underlying the concern/recommendation, should be shared with the hiring authority. If the psychologist needs a background investigator to get additional information based on something learned from the post-offer psychological evaluation, the psychologist should share whatever level of information is necessary to enable the investigator to seek the additional information you believe is relevant either to conclude the psychological evaluation (and make a recommendation) or to enable the hiring authority to follow up your evaluation with additional inquiries necessary to make a final hiring decision.

<u>Shelley's Comments</u>: Regulations related to the exchange of information among pre-employment background investigators, psychologists and physicians, as necessary and appropriate, is threaded throughout the new POST selection standards. For example,

information from the background investigation must be "… shared with others involved in the hiring process, such as screening physicians and psychologists, if it is relevant to their respective evaluations." In addition, psychologists are required to review personal history information from the background investigation (or collected from a separate personal history questionnaire) in the course of their evaluations.

11. <u>Information Requirements for Candidates</u>: Are candidates legally entitled to a description of the medical or psychological bases/issues of concern that resulted in their disqualification?

<u>Sharon Rennert</u>: An employer is not legally required to disclose to a candidate the reason that s/he is being rejected. However, failure to do so may have negative consequences for the employer. A rejected candidate who gets no response or a vague answer as to the reasons for his disqualification may speculate, and act on that speculation by filing a discrimination charge. Also, an employer that avoids stating the reason for disqualification may do itself a disservice by failing to learn that its decision was based on inaccurate or insufficient information, or flawed reasoning. Telling the candidate the reason for the disqualification may prompt the candidate to clarify or present certain information, or it may result in the discovery that a full ADA analysis was not done (e.g., the possibility of reasonable accommodation was not considered).

Telling a candidate that a psychological condition resulted in his disqualification may prompt an ADA challenge. But, such a challenge will not necessarily be avoided by hiding or disguising the reason for the rejection. Indeed, the worst thing an employer can do is to give a candidate one reason for disqualification (e.g., lack of experience) while actually basing the rejection on another reason (e.g., psychological condition disqualifies the candidate). If there is an ADA challenge (or any type of legal challenge to the disqualification), the employer's actions will look highly suspicious and undermine its credibility. Therefore, it may be in everyone's interest to tell the candidate the medical or psychological bases for disqualification. This allows the candidate a final chance to present additional information that may reverse the hiring decision. As long as a law enforcement agency has taken into consideration all ADA issues, and is prepared to defend its decision as lawful under the ADA, then telling a candidate the reason for his disqualification should not be an issue.

<u>Shelley's Comments</u>: This is a very touchy area, given the stigma attached to a psychological disqualification. Unlike medical evaluations, detailing the bases for the psychological DQ can be a lose-lose proposition. As Sharon notes in her response, a rejected candidate who gets no response or a vague answer as to the reasons for his disqualification may file a disability charge, despite the fact that the vast majority of psychological DQ's are based on the identification of unacceptable personality traits rather than the detection of psychological conditions. However, to provide detail may only invite refutations and additional consternation. There is no easy answer, although it is certainly acceptable and perhaps helpful to indicate that a psychological disqualification is not based on the detection of a mental or emotional impairment, if that is in fact the case.

12. Reasonable Accommodation: How is it decided if a candidate is to be accommodated, or whether the condition itself is disqualifying? Are there limits to the extent and nature of the accommodations? For example, what reasonable accommodation would be required for a peace officer candidate with ADHD?

Sharon Rennert: Under the ADA, a law enforcement agency has an obligation to provide reasonable accommodation to an applicant or employee with a "disability" as long as the accommodation does not constitute an undue hardship. The EEOC provided a lot of information about this obligation in its Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, www.eeoc.gov/policy/docs/accommodation.html.

Generally, a candidate would need to request a change or modification due to a medical condition to signal to the law enforcement agency that a reasonable accommodation may be required. The candidate does not have to use legal terms or reference the ADA; the candidate only needs to use plain English to say that s/he needs the law enforcement agency to do something for the individual because of a medical condition.

At this point, the law enforcement agency and individual should enter into an "interactive process" designed to provide the agency with any missing information it needs to make an appropriate decision about the request. There are two major areas of potential discussion: (1) whether the individual has a "disability" as defined by the ADA (or your state discrimination law) and (2) whether the candidate needs a reasonable accommodation because of the disability. If the existence of a disability and the need for accommodation is not known or obvious, the employer is entitled to request medical documentation to support the candidate's assertions. The employer is not required to seek such documentation, but may do so if it wishes. An employer should always begin, however, by fully discussing the matter with the candidate and then choose whether and what documentation it wishes to seek (e.g., based on conversations with the candidate the employer decides that it wants corroboration that the individual has been diagnosed with ADHD but does not require any documentation on the accommodation requested).

Under the ADA Amendments Act of 2008, which went into effect on January 1, 2009, the ADA now has an expanded definition of disability. As a practical matter, this means that there should not be the same need to establish whether the individual has a disability as in past years. The purpose of these amendments is to make it easier to establish that more conditions are "disabilities" and to focus an employer's attention on issues such as a request for reasonable accommodation rather than on whether a condition is a disability. Thus, the major focus of the interactive process should be whether the disability necessitates a reasonable accommodation, and if so, what would be an effective accommodation that meets the candidate's needs while not causing an employer an undue hardship.

The goal of providing a reasonable accommodation is to enable a candidate to have an equal opportunity to compete for the peace officer position (just as the goal of providing a reasonable accommodation to an employee is to provide an individual with an equal opportunity to perform the job). If a candidate needs a reasonable accommodation, but it is clear no accommodation will enable her to qualify for a position, then the employer has no obligation to provide one.

However, it may not always be clear whether an accommodation will or will not help the candidate to compete for a position. In such cases an employer should provide the accommodation, absent undue hardship.

For example, an individual may request 30 additional minutes to take a test due to a learning disability. Putting aside (legitimate) issues about whether this signals the need for extra time to do the essential functions of a peace officer and whether such a reasonable accommodation could be granted, and focusing only on the need for a reasonable accommodation to take a test, an employer should provide the accommodation if the learning disability necessitates it. Nobody knows whether the candidate will pass the test with the accommodation, but if the employer is satisfied that the candidate needs the extra time in order to have an equal opportunity to demonstrate her knowledge, then she should have the accommodation. The purpose of the accommodation is not to have the candidate pass the test but rather to give the candidate an equal opportunity to try to pass the test.

As noted above, an employer does not have to provide any accommodation that would cause an undue hardship, i.e., significant difficulty or expense. An employer does not have to provide an accommodation that would undermine the purpose of the test (e.g., the specific amount of time allotted for the test relates to time constrictions in performing an essential function and thus allowing more time undermines the purpose of the test). Whether there is an undue hardship depends on the facts of a given case.

It is hard for me to offer suggestions about possible reasonable accommodations for a peace officer candidate with ADHD without knowing more. As a preliminary matter, an agency should be clear what the problem is, i.e., what is the barrier or limitation that is preventing the candidate from an equal opportunity to compete because of the ADHD? It is difficult to discuss possible accommodations without understanding exactly what the problem is that is meant to be addressed by an accommodation. Next, the agency should explore with the candidate what accommodation s/he is seeking. Organizations like the Job Accommodation Network may also assist in identifying accommodations once the agency knows exactly what the problem is.

It is understandable that a request for reasonable accommodation and the disclosure of certain disabilities may raise concerns about a candidate's ability to be a peace officer. The ADA permits an employer to explore those concerns (see the Enforcement Guidance mentioned in Question 1). But, if a disability is not clearly disqualifying, then an agency would be well advised to provide a reasonable accommodation (assuming that one is needed and it would not cause undue hardship) and see what happens as the candidate progresses through the hiring process.

I am hesitant, even in the law enforcement field, about saying that too many disabilities would always be "disqualifying." Blindness or deafness would be examples of conditions that would always be disqualifying, but I think for many other disabilities there may be some people with the condition who could qualify to be a peace officer even if most people with the condition would not. I certainly do not think ADHD should be viewed as always disqualifying.

Shelley's Comments: Reasonable accommodation lies at the heart of the ADA, yet the accommodation options for individuals with psychological disabilities – especially peace officers – can appear quite limited. The interactive process that Sharon refers to is a statutory requirement in California, and it's a process that I believe should include the involvement, or at least oversight of legal counsel or a human resource ADA-expert. Note that there is a Job Accommodation Network – a service provided by the Dept. of Labor – which provides information and one-on-one support for exploring accommodations (including for PTSD, ADHD, etc.) on both a general or case-by-case basis. Their website is http://www.jan.wvu.edu. It should be noted that the use of medication is not considered a reasonable accommodation, but rather a mitigating measure that is solely up to the individual to decide.

13. **Employee Monitoring: Are pre-placement agreements requiring periodic compliance checks (e.g., wearing contact lenses, taking prescription medication, etc.) legal, especially if the candidate would otherwise pose a "direct threat?" What about on-the-job monitoring?**

Sharon Rennert: The EEOC has stated that it is "job-related and consistent with business necessity to require employees in positions affecting public safety [e.g., police officers] to report when they are taking medication that may affect their ability to perform essential functions." (See Question 8 at www.eeoc.gov/policy/docs/guidance-inquiries.html.) This means that the ADA permits law enforcement agencies to require officers to disclose when they are using medication that could affect their ability to perform key job functions, but agencies cannot necessarily require that officers disclose all prescriptions medications they are using because many of them would not have any impact on an officer's ability to perform essential functions safely and adequately.

But, this question seems to start with the premise that a law enforcement agency knows that an officer is taking prescription medication and wants to ensure that the officer continues to use it. In most instances, pre-placement agreements requiring periodic compliance checks would violate the ADA as a form of "disparate treatment." In other words, the ADA prohibits imposing separate requirements on employees with disabilities that are not placed on non-disabled employees. I am assuming that a law enforcement agency does not create a pre-placement agreement for everyone who is taking prescription medication. So, why would the agency single out people with disabilities, or certain types of disabilities, and impose such a requirement? Why does the agency believe that merely having a certain type of disability and using a certain type of prescription medication signals a need to distrust the individual and instead require the agency to monitor the employee's behavior?

Is there any evidence, other than a "concern" about what would happen if the individual did not continue to use the medication or follow other treatment that prompts the wish to have such an agreement? Is there any evidence where this individual failed to take medication in the past? Imposing such an agreement because of the possible consequences if an individual failed to take medication, no matter how dire the consequences, would be discriminatory under the ADA because it is making a presumption based solely on the disability and the type of medication and not on any evidence that the individual has demonstrated irresponsible behavior in the past.

The fact that failure to take a medication <u>might</u> create a "significant risk of substantial harm" (i.e., direct threat) is insufficient to establish that a direct threat exists. For example, a law enforcement agency could not justify a requirement that it periodically checks to see if an officer is taking his anti-seizure medication because if the person failed to do so he could have a seizure while on-duty and thus jeopardize the health and safety of himself, his partner, and the public. This is mere speculation based on no objective evidence about the particular individual's history of taking medication and thus it would not support a direct threat claim. Hence, it could not support a pre-placement agreement, either.

"On-the-job" monitoring would also be considered disparate treatment where it was based on speculation rather than objective evidence.

But, suppose a law enforcement agency has objective evidence that a candidate (or police officer) has a history of non-compliance with medication? Such evidence certainly would be sufficient to justify asking questions about the behavior (both to the individual and his/her treating doctor) and, potentially, a medical examination to determine if a direct threat exists, or more generally the individual's ability to perform the essential functions of an officer. Certainly, a history or even an episode of non-compliance with medication (or other treatment) could be the basis for a direct threat finding, and thus the basis for action on the part of the employer. An employer is less likely to face a disparate treatment charge where medication monitoring is based on a showing of an actual direct threat rather than speculation about one. But, even if a direct threat is shown to exist, I would still recommend that a law enforcement agency think carefully about why it wishes to employ a pre-placement agreement or "on-the-job" monitoring. It is important to note that the EEOC has stated that medication monitoring is not a form of reasonable accommodation and therefore an employer has no obligation to do it, even if a direct threat exists. (See Question 37 in the Reasonable Accommodation Guidance, mentioned in Question 12.) I certainly would advise an employer to provide a reasonable accommodation (assuming one exists) that would address this direct threat situation rather than imposing medication monitoring.

But, what if there is no form of reasonable accommodation that will address the direct threat? While an employer is always free to go beyond the ADA's requirements (e.g., by imposing medication monitoring in response to a direct threat), it is worth asking why it wishes to do so. In this situation, an employer is taking over a responsibility that belongs to the individual, an individual who works (or wants to work) in a position of high responsibility. It may be helpful to explore the reasons that medication monitoring is being proposed as well as practical considerations (e.g., what happens if the individual is again found to have stopped taking the medication, how long would the monitoring continue). Then, an employer can decide if the most appropriate response to actual evidence of direct threat is to require medication monitoring or whether a different response is better, including exploring whether there are reasonable accommodations that could be provided to address the issue (e.g., the person needs time off for treatment) or perhaps, revoking a job offer or termination because the person is not qualified, i.e., the person poses a direct threat and no reasonable accommodation exists that will lower or eliminate the high level of risk.

*Shelley's Comments: In her answer, Sharon states "**I am assuming that a law enforcement agency does not create a pre-placement agreement for everyone who is taking prescription medication**." I would encourage law enforcement agencies to have a written policy, stating that all officers must inform the department of any medication (or at least prescription medication) they are or begin taking. It would then be up to the department's health care professional to determine – on a case by case basis – whether, when or under what circumstances the individual can continue to perform full duties. Conversely, it would seem appropriate for departments to require officers - via a signed agreement or otherwise - to notify the department if they have not complied with their medication regimen, if as a result they could pose a direct threat while performing at full duty.*

14. Consistency vs. Individualized Assessment: How can an agency have uniform medical and psychological screening standards, yet provide individualized assessment as required by the ADA?

Sharon Rennert: It is hard to answer this question without talking about a specific medical or psychological screening standard. I think there is a high possibility that I could make a statement that misrepresents such standards and how the ADA would view them. So, I offer the most general of thoughts.

The ADA is concerned about the rigid application of any standard that would screen out a person based on disability when the person can still show s/he is qualified for the job. In other words, the ADA is reacting to years of using standards, medical or otherwise, that were used too liberally to exclude persons with disabilities from jobs when objectively the person was qualified, i.e., could perform the essential functions, with or without reasonable accommodation, and posed no direct threat.

Blanket exclusions of persons with all disabilities, or specific disabilities, will invite the most scrutiny because they allow for no individualized assessment. I do not know if the medical or psychological screening standards referenced in this Question would cover blanket exclusions, e.g., insulin-dependent diabetics are not eligible to be police officers. Such a standard would not allow for an individualized assessment that considers whether a specific person who is insulin-dependent could nonetheless perform the essential functions without posing a direct threat. (I assume such a standard would be based on direct threat concerns.)

Clearly, persons with certain medical conditions would never be qualified to be a police officer (e.g., a person who is blind). But, that leaves many other disabilities where it is not clear that all individuals with the disability will be unqualified. Hence, the need may arise for an individualized assessment even when using a medical or psychological standard. The ADA does not require that law enforcement agencies abandon uniform medical and psychological standards. They serve a useful purpose. But, I would suggest that there may be circumstances where one of these standards screens out a person because of a disability and that the agency should ensure that it can justify the exclusion. This means not simply pointing to the standard but rather showing that this individual's failure to meet the standard demonstrates an inability to perform the essential functions (with or without reasonable accommodation) or there is a direct threat.

Shelley's Comments: Unlike the group-level validation strategies (i.e., content, criterion-related, construct) discussed in the Uniform Guidelines on Employee Selection Procedures, the ADA requires individual-level proof that an adverse decision is job-related and consistent with business necessity. As expressed by EEOC Commissioner Christine Griffin during a May, 2007 public meeting on employment testing and screening, "The hallmark of successful individual evaluation is individual evaluation for the job and the person … there often is no easy one-step test (and)... look beyond meta analysis and group-based studies to the individual assessment … so that the standards … are ones which are based upon the goals of the ADA to avoid stereotyping and to look at individual assessment of people with disabilities."

15. **Confidentiality of Medical Information: A police officer candidate is rejected by Department A based on a medical/psychological examination. The candidate subsequently applies to Department B. In addition to signing all kinds of disclosure waivers, the candidate indicates that he applied to Department A, but was rejected at the post-offer stage. Someone from Department B contacts the M.D./Ph.D. who conducted the evaluation at Department A to find out more. What can Dr. A offer?**

Sharon Rennert: First, Department B has violated the ADA if it makes an inquiry about the person's medical condition (whether as the basis for rejection or generally) at the pre-offer stage. Such questions are illegal at the pre-offer stage whether asked directly of the applicant or of a third party (e.g., Department A). Department B can make this request only at the post-offer stage.

But, making the request at the post-offer stage will be a useless exercise if Department A is complying with the ADA. The doctor for Department A cannot disclose any medical information about the rejected candidate to Department B because the information is protected by the ADA's confidentiality provision. The timing of Department B's request is irrelevant; regardless of when the request is made the confidentiality provision will prohibit Department A from disclosing any medical information to Department B.

Shelley's Comments: As Sharon noted, it is unlawful for an employer to disclose medical information to other prospective employers; however, that the mere fact that a candidate was disqualified based on their psychological/medical evaluation is not necessarily medical information.