



**An Examination of the Professional  
Experiences and Challenges Faced  
by Attorneys with Disabilities Who  
Work at Large Law Firms**

**2009**

# **An Examination of the Professional Experiences and Challenges Faced by Attorneys with Disabilities Who Work at Large Law Firms**

*By Veta T. Richardson, Executive Director, Minority Corporate Counsel Association*

Earlier this year, the Minority Corporate Counsel Association (MCCA) released a groundbreaking research report on the professional experiences of attorneys at Top 200 law firms, finding that while there have been commendable improvements to diversity programs in large law firms since MCCA's earlier studies completed in 2002 and 2003, there is much work to be done before this sector of the legal profession becomes truly inclusive of all groups.

The research study, the ninth one conducted by MCCA, is titled *Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity & Inclusion in Large Law Firms*<sup>1</sup>. Reporting on the views of more than 4,400 practicing attorneys from more than 120 of the nation's top 200 most profitable law firms, MCCA's research is the most comprehensive and credible study to date about the professional experiences of big law firm attorneys.

Reflecting a broad sector of the legal profession, the respondents were diverse in terms of gender, race/ethnicity, sexual orientation, disability status, age, experience, geographic location, and academic background. In fact, an outside statistician determined that the response rate gives MCCA's survey a confidence level of 99%, with a potential deviation of less than 2% for any one question.

The research analyzed the experiences and comments of a diverse group of law firm attorneys from a variety of academic backgrounds and in various stages of their law careers and compared these responses across the different demographics of the lawyers. The questions sought to measure experiences and perspectives in four key areas:

- Strategic Leadership and Commitment

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<sup>1</sup> This paper was prepared in supplement to the MCCA research report titled: "Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity & Inclusion in Large Law Firms." A free copy of the full report is available at [www.mcca.com](http://www.mcca.com) – "Research"

- Recruiting and the Myth of the Meritocracy
- Inclusion and Work Environment
- Professional Development and Retention

While progress is apparent and the majority of attorneys reported that their law firms are making strides to advance diversity, MCCA believes that some of the key findings from the research analysis signal areas of concern that necessitate spotlighting and problem-solving.

Of the more than 4,400 attorneys from AmLaw 200 law firms who responded to the MCCA survey, approximately two percent self-identified as a person with a disability. The survey did not request clarification about the nature of the disability.

### ***Strategic Leadership and Commitment***

Consistent with the views of all other respondents, attorneys with a disability gave their law firms high marks regarding the firms' strategic leadership and commitment to diversity. However in all cases, the responses by the women with disabilities suggest that law firms may need to focus more intently on making sure they strongly communicate their diversity values and work being done by the diversity committee. It appears that these messages may have been diluted or simply not communicated as strongly to the disabled women.

For example, disabled women were slightly less positive (86%) than their male counterparts (92%), although the overwhelming majority of both groups responded that their firms' leaders had done a good job communicating the importance of diversity. In addition, both groups felt generally well informed about the work of the diversity committee, although the men (92%) felt much more informed than the women (82%).

Yet although most attorneys with disabilities gave their firms overall high marks for leadership and diversity committee activity, one area where firms appear to be falling short is the level of support that attorneys with disabilities have in place to discuss concerns or complaints they may have about the work environment. In addition, there was an underlying concern that while the firm is making strides with respect to diversity, the firms are not doing as well as they could to include and address the concerns of attorneys with disabilities. Many of the open narrative comments submitted by attorneys with disabilities along with their more objective survey

responses underscored this sentiment. Thus, MCCA recommends that law firms audit their existing diversity efforts and initiatives with a view to making sure that they are broad and inclusive of the concerns and challenges faced by lawyers with disabilities. It also must be clearly communicated that as with race/ethnicity, gender, and sexual orientation, the firm is equally committed to providing a workplace that is open and inclusive of attorneys with disabilities.

Only 76% of disabled women and 83% of men reported that they had someone at the firm to whom they could turn to seek resolution of a workplace concern. Thus, while overall leadership and commitment were viewed positively, the translation down to the day-to-day work lives of attorneys with disabilities showed room for improvement.

This finding supports MCCA's recommendation that all law firms designate at least one person in each office to serve in the role of an "ombudsperson" and to widely communicate who that person is to all members of the firm. Not all attorneys, particularly young lawyers, may feel that they have a mentor or sponsor at the firm to whom to turn with questions or concerns. Thus, through the appointment of an ombudsperson, the firm makes it clear to all attorneys that someone has been designated as a person to whom all attorneys may turn to discuss their experiences or concerns. This ombudsperson should be a senior member of the firm who is well-regarded and well-informed and he/she possesses the interpersonal skills and empathy required of someone to whom others will turn for guidance.

### ***Recruiting and the Myth of the Meritocracy***

Diversity was an important issue for both the men and women with disabilities. Both groups responded identically regarding their firms' recruitment efforts at diverse law schools (60% said the firm does). But just as with non-disabled men and women, the men and women with disabilities had contrasting views about what mattered most in the hiring process. The women tended to place a higher value on interview performance, GPA and prior work experience, but were less inclined to place a high value on factors such as a judicial clerkship, class rank, law review or community service. The men tended to place a very high value on interview performance, GPA, and prior work experience in addition to class rank, federal clerkships, and law review. Neither considered community service records to be particularly relevant.

However, when asked how important should diverse backgrounds be in recruitment/hiring decisions at their firms, equal percentages of the men and women felt it should be irrelevant, but 57% of men said it should be relevant and 52% of women said it should be relevant.

### ***Inclusion and Work Environment***

The only survey question to enjoy a 100% positive response concerned whether the women respondents preferred to work in a diverse and inclusive law firm. All of the women with disabilities said that they did, with the majority (64%) strongly agreeing so. While none of the men with disabilities disagreed with the preference in favor of working in a diverse and inclusive law firm, only 88% agreed (71% strongly agreed and 16% agreed), with the remaining 12% being neutral/unsure.

Yet although the women with disabilities overwhelmingly wanted to work in a diverse and inclusive law firm, they were not as inclined as their male counterparts to support their firm's efforts to recruit and hire a diverse group of attorneys.<sup>2</sup> Moreover, men and women with disabilities responded virtually identically regarding whether they actively participate in the firm's diversity-related events and initiatives – only a little more than half do so<sup>3</sup>. In addition, when asked if they would be comfortable voicing disapproval if they overheard a bigoted comment, only 58% of women said that they would be, whereas, 77% of men stated they would voice disapproval.

When asked whether they felt they were treated as equals by their law firm peers, the results for attorneys with disabilities were quite disappointing, particularly for the women. While 86% of the men reported positively (*i.e.*, that they were treated as equals), only 55% of women with disabilities responded that they were treated equally by their law firm peers.

With such a disappointing experience regarding equality reported by women with disabilities, it is important to attempt to discern whether their “unequal” treatment is largely the result of issues around having a disability or something else, like gender or race/ethnicity. Closer examination of

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<sup>2</sup> 80% of males said they actively support their firms efforts to recruit and hire a more diverse group of attorneys, but only 71% of the women said that they did.

<sup>3</sup> 52% of men and 52% of women said that they do.

this data however, reveals that the issue is more likely to be a combination of disability status and gender.

When asked whether they felt their race/ethnicity resulted in their being treated differently by their peers, 78% of the women said this was not a concern<sup>4</sup>. But when asked the same question with respect to their gender, only 43% said this was not a concern. The majority (57%) were either neutral/unsure or responded that they felt they had been treated differently (18%) by their peers because of their gender.

A more illuminating theme emerged through the answers to one simple statement: “I believe that my gender will not hinder my advancement in this firm.” Not surprisingly, 98% of the men felt that their gender was not a hindrance. But only 41% of women with disabilities responded that they felt the statement was true. In fact, almost one-third of the women (31%) reported in the negative – meaning that they felt their gender *will* hinder their advancement at the firm, and 28% of the women were neutral or not sure how their gender would impact their ability to advance.

### ***Professional Development and Retention***

Nearly all attorneys with disabilities reported confidence in their professional presentation, interpersonal skills and substantive abilities, including possession of the necessary technical skills to succeed at their law firms. They further reported that they generally found the formal and informal feedback about their research/writing ability and technical lawyering skills to be accurate, and the women with disabilities (91%) were slightly more pleased than their male counterparts (85%) with the accuracy of feedback received regarding technical lawyering skills. But the women were more inclined to report that the timing of the feedback was not as timely as needed to understand what to do to improve – only 44% felt they were receiving timely, constructive feedback.<sup>5</sup>

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<sup>4</sup> The percentage of women with disabilities who responded that they felt they had been treated differently because of their race was 4%; however, this was likely due to the fact that the majority of respondents in this category were not members of a racial/ethnic minority group. The remainder (18%) were neutral/unsure.

<sup>5</sup> 61% of the men with disabilities reported that their feedback was timely received and useful to understanding what they needed to do to improve.

When it came to coaching and mentoring, again the men with disabilities reported a superior experience to the women. 93% of the men reported that they had at least one mentor in the firm who supported their careers, but only 74% of the women did. And, it appears that the mentors the men have are doing a better job assisting them to obtain high-visibility assignments and assistance with conflict resolution. Only 35% of the women said their mentors help them obtain key assignments, but 61% of the men said their mentors were helping them with this.

However, it was clear that like most women attorneys, those with disabilities felt the pressure of the billable hour and it had the result of clouding their level of commitment to their career at the firm. In fact, almost a quarter of the women reported that they had received less than positive feedback about their time management skills (translation: their billable hours) and only about half of the women with disabilities reported receiving the assignments they needed in order to meet the firm's billing requirements. In contrast, a little more than two-thirds of the males with disabilities expressed no concern about sufficiency of assignments and billable hours. Male attorneys with disabilities reported a high degree of commitment to their careers and to the firm (94%), but this declined significantly for females with disabilities (76%). Moreover, although the men were highly committed, only 79% of the men felt positive regarding the formal and informal feedback they had received regarding their client relationships skills and a sizable percentage expressed some personal reservations or self doubt about whether they possessed and exhibited the necessary client relationship skills they would need to succeed at their firms. .

The percentage of women with disabilities who felt uncertainty about this was likewise fairly high (26%), however the women felt even less positive about the accuracy of the informal and formal feedback they were receiving about their client relationship skills (33% not positive).

Thus it would appear that both male and female attorneys with disabilities expressed concerns about the feedback they had received regarding client relationship skills, and a good number expressed self doubt about their own abilities in this area. This finding underscores the need for law firms to focus more intently on providing appropriate training and mentoring in this area for attorneys with disabilities so that they are empowered to approach client relationships more confidently and skillfully. In addition, law firm managers should receive training to ensure that they have the ability to provide honest, constructive feedback and take the additional step of developing plans of action to address and fill any professional development gaps experienced by attorneys with disabilities.

On the issue of adequacy of training for the work that they do, there was a sharp contrast between the experiences of males with disabilities and females with disabilities. By and large,

most of the men felt that the training they were receiving was appropriate for the work that they do (71%). In contrast, less than half of all women with disabilities (only 46%) responded that they were receiving appropriate levels of training to do their work!

Another factor which serves as an indicator of who will advance professionally at the firm versus who will not is whether the attorney understands the “unwritten” rules of the game. When queried about whether they understand the criteria for advancement at their law firms, the men with disabilities reported being much better clued in than their female counterparts. Almost three-quarters of the men with disabilities felt they had a good knowledge of what it takes to advance and it is interesting to note that this number is roughly on par with the finding for men who are not disabled. Females with a disability share the same lack of knowledge about what it takes to get ahead as their fellow women who are not disabled. Only about half (52%) of women with disabilities responded that they understood the rules, while the other half either admitted they did not the rules or they were not sure.

Yet although the rules of the game may be clearer to some than to others, one thing that was equally clear for women and men with disabilities is that they have identical aspirations to advance into leadership positions in their law firms. The responses to this were virtually identical: 74% of men and 75% of women aspired to leadership. Similarly, the numbers who clearly did not so aspire were identical: 10% of men and 11% of women do not seek to advance to leadership levels, and the numbers unsure were the same (16% unsure/neutral men and 14% unsure/neutral women).

Overall, MCCA’s findings regarding the professional development that women with disabilities receive in AmLaw 200 law firms should sound an alarm bell for the profession. On all indicators, women with disabilities reported very serious concerns, which included the timeliness of feedback received, understanding of the rules of the game to advance, receipt of appropriate training to do the work, exposure to client relationships, adequacy of coaching and mentoring, and sufficiency of assignments to meet the firm’s billable hour requirements. Add to this a desire for greater flexibility and related concerns that by seeking flexibility one may damage her career, women with disabilities paint a bleak picture of their place in today’s AmLaw 200 firm.

### ***Special Findings re Work/Life Balance Concerns of Attorneys with Disabilities***

Attorneys with disabilities are no different from their peers on issues of work/life balance; they are encountering some challenges, with the women expressing a higher degree of concerns.

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A whopping 43% of all attorneys with disabilities responded that if they chose to work a reduced hours schedule or telecommute, they believed the result would be negative career consequences.<sup>6</sup>

However, an overwhelming percentage of women with disabilities (85%) replied that if their firm were to establish effective formal policies for reduced/alternative work arrangements, the impact on their careers would be significantly positive.<sup>7</sup> The women also suggested that the workplace policies that currently exist may not be consistently applied and as a result, greater consistency in implementation would positively benefit their careers.

Both men and women with disabilities reported that their firms' policies regarding alternative work arrangements/schedules were not as easy to access, understand, and utilize as ideally they should be. In fact, 41% of the women with disabilities said their firm's policies were inaccessible and unclear.

Finally, when asked what effect greater flexibility in order to accommodate their personal lives would have upon their careers, high numbers of men and women with disabilities responded that more flexibility would definitely be a positive benefit. In fact, 64% of men and 76% of women appeared to crave greater flexibility to address the challenges of their personal lives.

### *In Their Own Words . . .*

The MCCA survey instrument offered multiple opportunities to submit comments and several of the respondents contributed their thoughts about the survey itself and the status of diversity efforts in law firms generally as it relates to attorneys with disabilities.

Some felt MCCA could have done a better job with the survey itself, and we admit with regret that it is true:

*“Should show more consideration of disability in your survey.”*

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<sup>6</sup> It's interesting that exactly 43% of the men and 43% of the women reported this concern about negative career impact.

<sup>7</sup> This was admittedly, less of a concern for the men with disabilities (only 64% replied affirmatively).

*“I have a disability and wish you would have inquired about that aspect of law firm life.”*

And other comments underscored the depth to which the diversity efforts of law firms and the profession in general are failing to address the challenges faced by attorneys with disabilities:

*“While the firm seems to be aware of and address to some degree gender, racial, and sexual orientation diversity, it does not appear to have any focus whatsoever on those with disabilities. It appears to be something the firm has not even considered.”*

*“I think law firms have barely begun to think about persons with disabilities as contributing to diversity goals, and have certainly not developed mechanisms for dealing with attorneys having mental/emotional disabilities. It’s a complex question, heavily tied in to the pressure for billable hours.”*

*“In advance of new hires arriving at the firm, the firm should actively seek information as to whether the hiree [sic] has any disabilities. If so, then the firm should have ADA accommodations ready to go when that person begins work – not several weeks or months thereafter.”*

*“Accepting diversity means accepting alternative manners, expressions, views, and appearances which many more senior members of the firm expressly do not accept in their actions.”*

But perhaps the quote that best captures what we all need to keep top-of-mind was also the most succinct:

*“Don’t forget to include disabled people in diversity inclusion efforts.”*

## **MCCA Checklist of Special Tips & Recommendations Based Upon Research Regarding Male and Female Attorneys with Disabilities Who Work in AmLaw 200 Law Firms**

- ✓ Audit current diversity programs and initiatives to closely examine whether the way they are designed, offered, or implemented could result in attorneys with disabilities being left out (even inadvertently) or overlooked.
- ✓ Communicate strongly, clearly, and frequently that the firm is as committed to its attorneys with disabilities (as it is to those of a diverse race/ethnicity or gender) to build a workplace free of tangible or intangible barriers to the professional development of attorneys with disabilities.
- ✓ A firm can assist its diverse attorneys to achieve equal treatment by their peers through better education that increases the level of understanding of the non-disabled lawyers at the firm regarding the challenges faced by their peers with disabilities. Through greater education, understanding, and opportunities for interaction, they will appreciate that they share many similarities with their peers with disabilities. Understanding and familiarity will contribute towards achieving equality.
- ✓ Be alert and vigilant to instances (intentional or not) where attorneys with disabilities are left out of business development efforts with important clients and take active steps to remedy it in favor of their inclusion.
- ✓ Think about whether the standard ways your firm approaches training its lawyers may need to be adapted to better meet the needs of any of your attorneys with disabilities. Be inquisitive and open to their suggestions for improvement.
- ✓ Be sure that your firm establishes a clear and widely known process whereby attorneys with disabilities who have workplace concerns know how and to whom to raise such concerns for resolution. It is recommended that an internal ombudsperson role be established so that attorneys who want to discuss their concerns have a well-trained, well-informed, and well-regarded person to whom they can turn for guidance.
- ✓ All attorneys who care about diversity should be willing to lend their active support in furtherance of the firm's diversity initiatives, including the recruitment and hiring of diverse

attorneys, participation in firm-sponsored diversity events, and standing up to voice disapproval of bigoted comments.

- ✓ Address Work/Life balance concerns. Strive for open, transparent application of policies to all employees. Take steps to reduce the stigma associated with taking advantage of these policies. Consider opportunities to offer greater flexibility in employees' work schedules to allow more leeway to address personal life concerns.
- ✓ Formal mentoring program - pay particular attention to mentor assignments for all women, especially for women with disabilities as mentees and train mentors to be better advocates for their women mentees by helping to seek out plum work assignments for women with disabilities in particular.
- ✓ Pay attention to work assignments to assure equal access to opportunities to work on matters involving key client relationships. Recognize that women with disabilities may experience a harder time obtaining the necessary work required for them to meet their billable hours target.
- ✓ Ensure timeliness of feedback provided to attorneys with disabilities to better enable their ability to timely adapt and address any concerns expressed regarding their work.
- ✓ Work to ensure that women with disabilities are not shut-out from understanding the "unwritten rules of the game" that are essential to their personal career advancement.



# A Pledge for Change

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**BY PATRICK  
FOLLIARD |**  
SEP/OCT  
2009

## **INSIDE THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES**

They arrived dressed mostly in conservative business attire, with briefcases in hand – exactly what one would expect from attorneys who have just left the office. But as more men and women entered the Thurgood Marshall Ballroom in Washington, DC’s, bustling Marriott Wardman Park Hotel on June 15, it became clear that this group was not only a unique gathering of legal minds, but also another vibrant slice of the diversity pie. Some members of the crowd used wheelchairs and crutches, while others relied on guide dogs and white canes with red tips to get where they needed to go.

As the large room filled, the attorneys greeted each other and broke off into small, animated groups. Through the friendly din, a more-casually dressed college-age woman could be heard asking an older female attorney if the LSAT makes accommodations for those with learning disabilities. She want to go to law school, but is uncertain about the test.

Alex J. Hurder, chair of the American Bar Association (ABA) Commission on Mental and Physical Disability Law (the Commission), welcomed the roomful of participants to the second ABA National Conference on the Employment of Lawyers with

Disabilities. He thanked the conference's cosponsors, the Association of Corporate Counsel (ACC) and the Minority Corporate Counsel Association (MCCA), and then introduced keynote speaker Isaac J. Lidsky, law clerk to Supreme Court Justices Sandra Day O'Connor (retired) and Ruth Bader Ginsburg. Lidsky spoke about the challenges he has overcome as an attorney who also is blind.

Designed to address the needs and interests of attorneys and law students who are mentally, physically, or sensory disabled, the conference—like the Commission's first conference held in 2006—was composed of discussions, speeches, and networking. Sessions scheduled throughout the second day featured disabled and non-disabled panelists engaging in topics ranging from best employment and accommodation practices to mentoring and retention.

The centerpiece of this year's conference was the Commission's new Pledge for Change, which is essentially a promise to include disabled attorneys in the profession. "We were inspired by early diversity pledges," explains Hurder, who, in addition to chairing the commission, is a clinical professor of law at Vanderbilt Law School and directs a clinic that represents clients in special education and Social Security disability cases. "We're asking legal employers to sign the pledge. We're keeping a list of those who've endorsed the pledge on our website. That way, we can keep track of the response, as well as give publicity to those who've signed on."<sup>1</sup>

"Our first disability conference three years ago centered on law firms and the role they play in legal employment," he continues. "It was very successful and generated lots of excitement, but naturally didn't fix the problem entirely. For this year's conference, we decided to focus on corporations. In addition to knowing that we could partner with corporate-oriented organizations like ACC and MCCA, we were also aware of the power inherent in corporate legal departments. Because corporations hire firms, they have a lot of leverage—especially when it comes to outlining what they expect from the people they're hiring. There may be a handful of corporate counsel in a corporation, but they have a lot of influence in the legal world."

**The centerpiece of this year's conference was the Commission's new Pledge for Change, a promise to include disabled attorneys in the profession.**

The commission learned at its first conference that its audience was not made up exclusively of hiring partners; in fact, most attendees were either associate and senior lawyers with



disabilities or law students with disabilities who wanted to learn how to use the system to get jobs, security, and equal treatment. This year's 170 conference participants reflected the same makeup. Hurder noted that "the disabilities are varied—there are blind people and those who use wheelchairs or pull an oxygen supply—and it's impossible to know them all. Not all the disabilities are visible—chronic fatigue syndrome, asthma, bipolar disorder, learning disabilities—and some

participants decline to disclose their disability. Among the panelists, both disabled and not, are attorneys who influence hiring in firms, corporations, and government."

The speeches and sessions making up the second day of the conference included MCCA executive director Veta T. Richardson's morning address to participants. Richardson emphasized the importance for legal employers to include the disabled in their broader diversity efforts, and to be more sensitive to the concerns of employees with disabilities in general. Referring to MCCA's recent study, *Sustaining Pathways to Diversity: The Next Steps in Understanding and Increasing Diversity & Inclusion in Large Law Firms*, she noted the need for firms to focus more intently on making sure they strongly communicate their diversity values and the work being done by the diversity committee, particularly where disabled women are concerned.

At lunch, Kareem A. Dale, associate director of the White House Office of Public Engagement and special assistant to the president for disability policy, delivered a speech detailing the White House's efforts to employ those with disabilities, and the challenges of being a lawyer who is blind. Later in the day, Baker Botts managing partner Walter J. Smith participated in a session on employment, in which he spoke about his personal experience as the father of a son with cognitive disabilities and his great success with employing staff and attorneys with disabilities at the firm's offices throughout the world.

In the morning, Carrie G. Basas, a commission member and assistant law professor at the University of Tulsa focusing on disability rights, moderated a discussion on reasonable accommodation at law school and work. Born with Larsen's syndrome, a congenital disease that affects the joints, Basas currently uses a cane. Throughout her life, she has undergone more than 40 operations, and experienced the full range of mobility from no cane to being in a wheelchair. Consequently, she has also experienced a full range of attitudes and reactions, depending upon where she is in that mobility cycle.

“Accommodations are critical. Without them, many disabled people can’t attend law school or enter the workforce,” says Basas, who is currently working on a book of letters from seasoned disabled attorneys to their younger counterparts, to be titled *Lawyers Lead On*. “During my years at Harvard Law School, I needed a parking space near the dorm, and I had to reschedule one class because it was in an inaccessible classroom. Those were my only accommodations.

“A study I did a year ago showed that disabled women were widely self accommodating because they were afraid to ask employers for accommodations; they feared such a request would change the dynamic of the workplace and they’d be rejected,” she continues. Basas also referenced additional work on the subject by the Job Accommodation Network, a free service provided by the U.S. Department of Labor’s Office of Disability Employment Policy, whose mission is to facilitate the employment and retention of workers with disabilities. Basas notes that “the majority of accommodations is free or may cost \$50 or less. There are exceptions, but for the most part, employers’ fears of burdensome expense are unfounded.”



When Basas was a law student at Harvard, no disabled mentors or disabled fellow law students were among her colleagues or resources at the school. “I had no one to talk to about the realities of disability,” she remembers. “I had no idea what the workplace was going to be like; I was clueless about employers’ attitudes and accommodations. So, in law school, I started a listserv for lawyers and law students with disabilities a place where they could go to for the information they wanted and needed.”

Currently, the National Association for Law Students with Disabilities (NALSWD) no connection to Basas’s listserv offers pertinent information, peer support, and networking opportunities. Basas is on the advisory board. Through its partnership with the ABA Section of Individual Rights and Responsibilities, the association is raising awareness and advocating for the rights of persons with disabilities within the legal profession. NALSWD’s national student organization’s impact on recruiting, training, and mentoring law students with disabilities strives to directly benefit the legal community.

ABA president H. Thomas Wells Jr. was on hand for much of the conference. “A year ago, the ABA restated its mission,” Wells recalls. “We used to have eleven goals; now we’ve winnowed down our priorities to just four. They are to serve our members; serve the profession; serve the public; and promote diversity. When the ABA talks about diversity, we’re referring not only to women and racial and ethnic diversity, but also sexual orientation gender identity [SOGI] diversity and mental and physical

disability diversity. This gives you an idea of just how committed the ABA is in bringing disabled attorneys into the workforce.

“The profession is definitely evolving – and I should know, because I’ve been a lawyer since the Stone Age,” continues the amiable Wells. “It’s a fact that we’ve done better in some areas of diversity than in others. When it comes to racial and ethnic minorities and women, we’ve done OK, but need to do better. We haven’t done as well in areas like SOGI and the disabled. That’s why this conference is so important: It’s a learning experience for all of us.” **DB**

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## Notes

<sup>1</sup> For more information on the pledge, see [www.abanet.org/disability/](http://www.abanet.org/disability/).

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# REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES

## INTRODUCTION

Diversity in the legal profession has been the subject of much discussion and study for a number of years. A 2003 report by the U.S. Equal Employment Opportunity Commission (EEOC), entitled [Diversity in Law Firms](#), notes the significant role that lawyers play in social, economic, and political life and the influence that minorities and women have been able to attain as their numbers in the legal profession increase.<sup>1</sup>

To date, individuals with disabilities generally have not been a part of the discussion about diversity in the legal profession. Yet, access to the profession is important for people with disabilities for the same reasons it is important to minorities and women. While there is little reliable data on the representation of individuals with disabilities in the legal profession, anecdotal evidence suggests that lawyers with disabilities face many of the same barriers to employment that people with disabilities face in other jobs.

Among the problems lawyers with disabilities have cited is lack of access to reasonable accommodations. Title I of the Americans with Disabilities Act of 1990 (ADA) requires private and state and local government employers with 15 or more employees to provide **reasonable accommodation** to qualified applicants and employees with disabilities, unless doing so would cause an undue hardship.<sup>2</sup> Section 501 of the Rehabilitation Act of 1973 imposes the same requirements on federal agencies, regardless of the number of employees they have.<sup>3</sup>

This fact sheet addresses the application of the reasonable accommodation obligation to attorneys and their employers.<sup>4</sup> Attorneys with disabilities, both as applicants and employees,<sup>5</sup> may need a range of accommodations in order to apply for and perform many types of legal jobs. Most of the accommodations that attorneys with disabilities may need are similar to those needed by other professionals with disabilities who work in an office setting. Thus, much of the discussion in this document will apply to a wide range of administrative and professional jobs.

This fact sheet reviews many of the most common types of reasonable accommodations that lawyers with disabilities may need.<sup>6</sup> Some of these accommodations, such as modified schedules and telecommuting, are often used by legal employers generally to attract and retain attorneys. Many legal employers have recognized the importance of flexibility to remain competitive in hiring the best attorneys. For these employers, providing reasonable accommodation will be an extension of this approach. In addition, providing reasonable accommodation for qualified attorneys with disabilities serves the larger goal of enabling legal employers to diversify their workforce.

## A. General Information About Reasonable Accommodation

Reasonable accommodation refers to any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

There are three categories of reasonable accommodation:

- modifications to the job application process
- modifications to the work environment or to the manner or circumstances under which the position held or desired is customarily performed
- modifications that enable an employee with a disability to enjoy equal benefits and privileges of employment (e.g., employer-sponsored training or social events).<sup>7</sup>

Reasonable accommodations remove workplace barriers that would otherwise impede qualified attorneys with disabilities from competing for jobs, performing jobs, or gaining access to the benefits of employment. As with so many ADA issues, reasonable accommodation decisions should be made on a case-by-case basis after

discussions that allow the employer to understand the nature of the accommodation(s) requested and the precise aspect of the application process, job, or benefit that poses a barrier. In some circumstances, an employer may also request documentation of the attorney's disability.

## B. Misconceptions Concerning Attorneys with Disabilities and Reasonable Accommodation

Some employers assume that all attorneys with disabilities will need reasonable accommodation or that accommodations will be too costly or difficult to provide. In fact, many attorneys with disabilities will never need reasonable accommodation and most accommodations can be provided at little or no cost.<sup>8</sup> Employers also may mistakenly assume that if a person needs an accommodation, she is likely to be unable to meet expected performance measures—for example, satisfying a minimum number of billable hours. Indeed, managers in professions that require long hours, specialized skills, and stressful working conditions sometimes assume that persons with disabilities, or certain types of disabilities, are not capable of performing such work, especially if they request reasonable accommodation.

Example 1: Juan, an associate with a medium-sized law firm, has a learning disorder (low processing speed). Juan has been working successfully at the firm for six months, but he is concerned that his disability is starting to create some difficulties in performing his job. Juan finds that his disability can cause him to become distracted but that he can fully compensate for this problem by dictating his thoughts into a tape recorder instead of writing or typing. Therefore, he requests that he be permitted to have a secretary transcribe his recordings. This accommodation enabled him to work successfully at his prior firm. Juan's supervisor, a partner, denies the request, telling Juan that, in a law firm these days, a competent lawyer has to be able to draft his own documents, not dictate them to someone else. Juan leaves the firm soon thereafter.

The firm may have violated the ADA. Even if the partner had questions about Juan's competence, he should have considered that Juan had used this accommodation to work successfully at his prior firm. This would be a strong indication that the accommodation enables Juan to perform his job effectively. The ADA permits employers to discuss how accommodations work and to ensure that an employee is qualified to perform the essential functions—the primary job duties. Here, the partner never discussed his concerns with Juan or gave Juan an opportunity to respond. If this accommodation would have permitted Juan to perform his job, without causing undue hardship to the firm, then the partner's denial is a violation of the ADA.

The need for reasonable accommodation does not signal an inability to do the job. The purpose of workplace accommodations is to enable attorneys with disabilities to perform their jobs and meet the employer's performance standards.

## C. Applicants and Reasonable Accommodation

Employers may need to provide reasonable accommodation for the application process. Common forms of reasonable accommodation needed may include using sign language interpreters and providing written materials in alternative formats, such as Braille or large print. Employers may find it helpful to note on applications that applicants may request reasonable accommodation for the hiring process and to specify a contact person.

Example 2: Using a relay service, Francesca, who is deaf, calls to schedule an interview with a law firm. She tells the secretary that she is deaf and will

need a sign language interpreter. The secretary consults with the Human Resources Department which makes the arrangements.

Example 3: A law firm is interviewing several third year law students, one of whom uses a wheelchair. The firm practice is to take the students to lunch at a restaurant next door, but that restaurant has steps at the entryway. The managing partner instructs his secretary to change the reservation to an accessible restaurant down the street.<sup>9</sup>

Employers should consider whether their on-line recruiting and application systems afford access to the application process to individuals with disabilities who use specialized computer software (e.g., applicants with vision impairments who use screen reading or magnification software).

During an interview, employers may not generally ask applicants if they need reasonable accommodation to perform a job. However, if an employer knows a particular applicant has a disability, either because it is obvious or because the person has voluntarily revealed it, and the employer reasonably believes the disability might require accommodation to perform the job, the employer is entitled to ask the following two questions:

- Do you need reasonable accommodation to perform the job?
- If the answer is yes, what accommodation do you believe you need? <sup>10</sup>

Employers can assist applicants in assessing whether they will need an accommodation by making clear the job requirements, the duties to be performed, and the expected level of performance.

The need for reasonable accommodation is not a valid reason to reject an applicant.

## D. Requesting Reasonable Accommodation

The ADA generally requires applicants and employees with disabilities to request reasonable accommodation, rather than requiring employers to ask if accommodation is needed.<sup>11</sup> A request is the beginning of the reasonable accommodation process, not the end. The employer may have questions about the nature of the impairment, whether it is a disability, and the requested accommodation. Those questions are addressed as part of the interactive process that follows the request. The interactive process is discussed in section F.

To request a reasonable accommodation, an attorney must let the employer know that because of a medical condition he needs a change to the application process, to the job, or to a benefit of employment. An attorney does not have to mention the ADA, the Rehabilitation Act, or reasonable accommodation and does not have to provide evidence that the condition is a disability at the time the request is made. The attorney just has to make a plain English request for a change due to a medical condition. In some instances, a request for reasonable accommodation may come from a third party, for example a doctor's note outlining work restrictions.

Some employers may not appear open to receiving requests for reasonable accommodation, and some lawyers with disabilities may be reluctant to ask for accommodation because they are concerned that the employer will perceive them as less competent even when the employer has done nothing to suggest that it has such a perception. However, as in other workplace settings, employees in the legal profession who need accommodation must request it and employers should be prepared to respond appropriately.

Example 4: Omar, who has cerebral palsy, has recently been hired by a law firm. He finds that his physical limitations in using a computer keyboard, combined with the heavy workload and constant deadlines, are causing him to fall behind in his assignments. Omar is concerned about what the firm will think if he asks for a reasonable accommodation, but he talks to his supervising partner about voice-recognition software that would make it much easier to use a computer and therefore perform his work. The partner consults with the firm's Information Technology department and the

software is ordered and installed. Omar also receives specialized training in how to use the software.

Example 5: Mary, a senior attorney with a federal agency, has bipolar disorder. Her agency is aware of her disability and has provided an accommodation. Mary's doctor has recently changed her medication, which is resulting in temporary problems with concentration. At the same time, Mary is trying to cope with a change in her workload, thus resulting in a significant increase in stress. Mary contemplates requesting a reasonable accommodation, such as temporarily altering her work hours or removing several marginal functions. But, because she is concerned that her employer will view her as unable to meet job requirements if she asks for too many accommodations, Mary decides not to ask for the additional accommodation.

Perhaps Mary can handle the change in medication, the changes in her workload, and the resulting increase in stress. However, if she cannot handle the stress and performance problems result, neither Mary nor her employer benefit. While it may be difficult for an attorney with a disability to ask for an accommodation, or multiple accommodations, it is better for both the attorney and the employer to deal with an accommodation request than to address performance problems that result from a failure to request a needed accommodation.

Employers can do a number of things to create a climate in which lawyers will request needed accommodation. For example:

- They can adopt policies and procedures on how requests for accommodation will be handled and ensure that these policies are well publicized and implemented.
- They can make sure that both employees and managers know that company policy supports full compliance with the ADA and the provision of reasonable accommodation.
- They can require adequate training of supervisors, managers, and human resources professionals on handling requests for accommodation and other requirements of the ADA.

## E. When to Request a Reasonable Accommodation

Individuals with disabilities may request reasonable accommodation at any time during the application process or during their employment.<sup>12</sup> Some attorneys may choose to wait until they have a job offer before requesting a reasonable accommodation. Others may voluntarily raise the issue during the hiring process.<sup>13</sup> And attorneys may develop disabilities during their employment, thus prompting a request for reasonable accommodation.

Example 6: Roger is General Counsel of a major corporation. He develops macular degeneration and, as a result, requests from the senior vice president the services of a reader as a reasonable accommodation. He explains that his eyesight no longer permits him to read and that he must review many documents and contracts. The senior vice president agrees to this request.

The ADA does not compel attorneys to ask for accommodations at a certain time. However, failure to request needed accommodation in a timely manner (or to accept a proffered accommodation) could affect job performance and result in discipline or termination based on poor performance or conduct.<sup>14</sup>

Example 7: An attorney at a nonprofit organization recognizes soon after she begins working that she is having difficulty following conversations at

meetings because of her deteriorating hearing. While the attorney uses a hearing aid, it only helps her when talking directly to one person and not in a large room where many people participate in a discussion. The attorney believes that she would be able to hear if the employer provided a portable assistive listening device. The attorney brings the situation to her supervisor's attention and explains that a simple assistive listening system would include an FM transmitter and microphone that could be placed at the center of a conference table and an FM receiver and headset that she would wear. The system would amplify speakers' voices over the headset without affecting the way in which other meeting participants would hear the conversation. The employer provides the reasonable accommodation and the attorney now performs all of her job duties successfully.

Example 8: A county government attorney chooses not to disclose her hidden disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels the attorney about her deficiencies, but the problems persist. The supervisor warns that if her work does not show improvement within the next two months, she will receive a written warning. At this point, the attorney discloses her disability and asks for reasonable accommodation. The supervisor should discuss the request and how the proposed accommodation will help improve the attorney's performance. The two-month period to evaluate the attorney's performance should be suspended pending a decision on her request for reasonable accommodation.

Example 9: Same facts as in Example 8, but the supervisor's response to the request for reasonable accommodation is to deny it immediately, explaining, "You should not have waited until problems developed to tell me about your disability." The attorney, however, did not realize that she had any serious performance problems until her supervisor brought them to her attention, thus prompting her to request accommodation. The supervisor should not have summarily dismissed the request but instead should have discussed it, gathered more information if necessary, and determined whether a reasonable accommodation for a disability was needed. Then, as in Example 8, the two-month period could commence to measure whether the attorney's performance improved.

Example 10: An attorney with a small firm has a learning disability and does not request accommodation during the application process or when he begins working. Because the attorney had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations. Performance problems soon arise, and the attorney's supervising partner brings them to the attorney's attention. He tries to solve the problems on his own, but they persist and he is counseled on improving his performance. The firm follows its policy on counseling and disciplining attorneys who are failing to meet minimum requirements, but these efforts are unsuccessful. During this entire period, when the attorney is receiving counseling and warnings, he does not ask for reasonable accommodation. However, when the partner meets with the attorney to fire him, then the attorney reveals a disability and requests accommodation.

The attorney's request for reasonable accommodation is too late. Reasonable accommodation is always prospective. Therefore, an employer is not required to excuse performance problems that occurred prior to the accommodation request. While it may be understandable that the attorney's prior experience made him reluctant to ask for accommodation, his failure to do so was a mistake. The firm correctly responded to the attorney's performance problems and gave him sufficient opportunity to make changes and request accommodation. Once an employer makes an employee aware of performance problems, it is the employee's responsibility to request any accommodations to address and rectify them.

## F. Discussing a Request for Reasonable Accommodation: The Interactive Process

The request for accommodation is the first step in an informal, interactive process between the attorney and the employer.<sup>15</sup> This process will generally focus on two issues: whether the attorney has a disability as defined by the ADA and why the requested accommodation is needed. In many instances, a simple conversation between the employer and the attorney will suffice to clarify and resolve these issues. However, when the disability and/or the need for accommodation are not obvious, the employer may ask the attorney for additional information. The employer may also seek, if necessary, reasonable documentation from an appropriate health care or vocational rehabilitation professional about the attorney's disability and functional limitations.<sup>16</sup> The employer is entitled to know that the attorney has a covered disability for which he needs a reasonable accommodation. But, the employer is not entitled to obtain all of an attorney's medical records, since they will contain far more information than is necessary to determine whether a disability exists and why there is a need for reasonable accommodation.

An employer that requests documentation should specify what types of information it needs regarding the disability, its functional limitations, and/or the need for reasonable accommodation. In some instances, the employer may obtain needed information by asking the attorney to sign a limited release allowing the employer to submit a list of specific questions to the health care or rehabilitation provider, or by requesting that the attorney submit the questions to the provider directly. These questions should avoid legal terminology and relate only to the condition for which the attorney is requesting accommodation and the job-related barriers she is experiencing. Asking the attorney or her health care provider vague questions increases the likelihood of receiving vague answers.

Unproductive approach: Does Jane Doe's condition substantially limit a major life activity?

Better approach: Please specify all activities that are limited by Jane Doe's asthma. For example, does Ms. Doe's asthma affect her ability to breathe? To walk? Any other activities? For all activities affected by Ms. Doe's asthma, please indicate: 1) the degree of limitation (e.g., under certain specified conditions she can have an asthma attack that will result in severe difficulty breathing and require that she go to the hospital; Ms. Doe experiences minor breathing difficulties during spring and fall allergy seasons) and 2) the frequency with which these limitations occur (e.g., constantly, every few weeks, every two months, only during certain seasons, when confronted with high levels of stress).

The employer should be clear about the purpose for asking such questions, i.e., a specific question should be designed to elicit information to enable the employer to determine if the attorney has an ADA disability, why a reasonable accommodation is needed, or other possible accommodations that would meet the attorney's needs. Clearly, the employer must understand the nature of the problem, how it is connected to the disability, and how a suggested accommodation would resolve the problem before she can assess what accommodation might be appropriate.<sup>17</sup>

Example 11: Rebecca, an in-house attorney, asks her supervisor to make several changes to accommodate her chronic fatigue syndrome. She requests that she be allowed to arrive at work at 10:00 a.m. (and correspondingly work later in the evening), that meetings not be scheduled before 10:00 a.m., if possible, and that she be given a reclining chair in her office. The general starting time is 8:30 a.m. and no attorneys have reclining chairs. The employer asks for a more specific explanation regarding the connection between the chronic fatigue syndrome and the accommodations requested. The attorney explains that she has a condition closely associated with chronic fatigue syndrome which results in low blood pressure. This, in turn, results in

lightheadedness, and she occasionally faints. After such episodes, she feels tired and groggy and experiences problems concentrating for at least a couple of hours. The low blood pressure is more likely to occur during the early morning hours and after prolonged periods of sitting. Rebecca explains that the accommodations she is requesting are designed to enable her to work a full day, uninterrupted by any symptoms, by starting work at 10:00 a.m. and by avoiding the need to sit or stand for prolonged periods. A reclining chair would enable her to avoid sitting upright, thus preventing the onset of the low blood pressure and enabling her to continue working. Since Rebecca's job involves numerous telephone conversations and significant amounts of reading, she can use the reclining chair when her symptoms prevent sitting at her desk. Her request to schedule meetings at a later hour, where possible, would enable her to avoid missing important work.

The employer requests documentation to substantiate Rebecca's medical condition, the symptoms she experiences, and the need for the accommodations she identifies. The doctor provides information that corroborates Rebecca's description of her chronic fatigue syndrome and low blood pressure, that explains how reclining, as opposed to sitting, can avoid the onset of low blood pressure, and that concludes that Rebecca should be able to work a full day with these accommodations. Assuming the lawyer has a disability, and absent any undue hardship, the employer must provide these accommodations or alternative ones that address her limitations and enable her to perform the essential functions of her position.

In some instances, it will immediately be clear whether a proposed accommodation will be effective. In other instances, an employer may have to consider more carefully whether an accommodation will work. The attorney should inform his employer whether he has used a proposed accommodation before for example, at a previous job or in school and if so, how well it worked.

Changes in the disability or changes to a job may require an accommodation that the attorney has never before used. When this is the case, an employer should not simply dismiss the possibility that an accommodation may work. Depending on the type of accommodation, an employer in this situation may wish to propose providing the accommodation on a trial basis to determine its effectiveness.

## G. Types of Reasonable Accommodations

Reasonable accommodations for attorneys may take many forms. Common examples<sup>18</sup> include:

- making existing workplaces accessible (e.g., installing a ramp, widening a doorway, or reconfiguring a workspace)
- job restructuring (e.g., removing a marginal function)<sup>19</sup>
- part-time or modified work schedules
- unpaid leave once an employee has exhausted all employer-provided leave (e.g., vacation leave, sick leave, personal days)
- acquiring or modifying equipment (e.g., a TTY that would enable a deaf attorney to use a telephone relay service, or an assistive listening device that an attorney who is hard of hearing can use at a meeting)
- modifying workplace policies
- providing tests or training materials in an alternative format, such as Braille or large print or on audiotape
- providing qualified readers or sign language interpreters
- permitting telework, even if the employer does not have an established telework program or the employee with a disability has not met all the prerequisites to qualify for an existing telework program (e.g., length of service)<sup>20</sup>

- changing the methods of supervision (e.g., supervising partner provides associate with critiques of his work through e-mail rather than face-to-face meetings)<sup>21</sup>
- reassignment to a vacant position.<sup>22</sup>

This list of accommodations is not exhaustive. For example, lawyers with disabilities affecting arm strength and the ability to pull and push might require automatic door openers. A lawyer with a vision impairment may need a screen reading program for a computer, and a lawyer whose disability prevents typing may need voice-recognition software.

Example 12: Deborah required extensive leave due to leukemia. While the firm granted the leave, her supervising partner wants to give her an unsatisfactory review because she did not bill the required number of hours due to her use of extended leave. Penalizing Deborah with a poor review would be a violation of the ADA because it would render the leave an ineffective accommodation and would constitute retaliation for her use of a reasonable accommodation.<sup>23</sup> The firm should evaluate Deborah's performance taking into account her productivity for the months she did work. It might also choose to delay her evaluation for several months or do an interim evaluation and allow Deborah to resume a normal workload, thus enabling the firm to do a more accurate review of her work.

Example 13: Jonathan, a trial attorney working for a federal agency, asks for a reassignment to a less-demanding position because he finds the long hours and constant deadlines increasingly difficult to handle due to Parkinson's disease. The agency has a vacancy for an attorney to draft agency policy directives and respond to legal inquiries from agency field offices and the public. The job does not require the same long hours as his current litigation position and he would have more control over the pace of work. Since Jonathan meets the qualifications for this position and the position is at the same grade level as his current job, the agency must reassign him unless it can show undue hardship.

Example 14: Emily has lymphedema which causes a buildup of lymphatic fluids in her right leg. The swelling is painful and makes it very difficult to walk more than very short distances, thus affecting Emily's ability to commute to work. She provides documentation from her doctor confirming that the lymphedema is a chronic condition that has worsened in the last few months. The doctor does not expect any improvement in the next several months. As a reasonable accommodation, Emily requests that she be allowed to work from home three days a week. Much of her work involves writing and reviewing documents which she can do using a computer. She also can communicate with clients and colleagues through use of the phone and e-mail. The doctor's letter explains that the three days working at home will ease the pain and make it tolerable for Emily to commute the other two days. Emily and her supervising partner work out an appropriate schedule and methods for ensuring that work is completed in a timely manner. Emily also agrees that, with notice, she can switch days working in the office if she needs to attend a meeting. The partner agrees to this schedule for four months as long as Emily's condition does not improve. After four months, the partner will request an update on Emily's condition to determine if she still requires telework as a reasonable accommodation or any modification to this arrangement due to any changes in her condition.

Sometimes employers are quick to provide items that they expect a person with a disability will need, while slow to grant requests for unexpected things. If employers are uncertain why something is needed, they should ask. Often, the unexpected items may be the easiest to provide (e.g., special office supplies may be necessary because of a disability, such as certain types of pens for attorneys with limited use of their hands).

In some situations reasonable accommodation is needed to make the working environment more accessible to attorneys with disabilities. For example, an employer might have to install flashing emergency lights or provide a personal digital assistant (PDA) to notify an attorney who is deaf of an emergency situation. Employers also might need to shift furniture to make it easier for an attorney who uses a wheelchair to navigate through the office.

While most forms of reasonable accommodation cost little or nothing to provide, some forms of accommodation may entail higher expenses. Before investing money for more expensive accommodations, the employer and the attorney may wish to explore whether a demonstration of the accommodation can be arranged. If an attorney has used an accommodation before, and can give a detailed explanation of how it will work, setting up a demonstration may not be necessary.

Employers that are concerned about an accommodation's cost may choose to explore the possibility that an accommodation can be provided through vocational rehabilitation agencies or other federal or state programs. However, an employer who can pay the cost of a reasonable accommodation without undue hardship cannot refuse to provide an accommodation because it cannot be obtained through some other source.<sup>24</sup>

## H. Actions Not Required as Reasonable Accommodation

Certain actions are not required as reasonable accommodations.

- Employers are never required to remove an essential function, i.e., a fundamental job duty. An attorney with a disability must be able to perform the essential functions of his position, with or without reasonable accommodation. Conducting legal research, writing motions and briefs, counseling clients, teaching a law course, drafting regulations and opinion letters, presenting an argument before an appellate court, drafting testimony for a legislative body, and conducting depositions and trials are examples of what may be essential functions for many legal positions.

Employers should be careful to distinguish essential functions from marginal functions -- duties that are tangential or secondary to the primary job duties. While essential functions never have to be removed from a position, marginal functions may have to be removed as a reasonable accommodation if a person cannot perform them because of a disability.

Example 15: A senior associate with multiple sclerosis practices trusts and estates law. The essential functions of her position include drafting wills, providing representation at probate hearings, and counseling clients on complex tax implications related to the transfer of property. In order to conserve the limited energy that results from her disability, the attorney requests that her employer no longer require that she serve on the firm's hiring committee. The attorney and firm determine that this is a marginal function and should be eliminated so that she can focus her limited energy on performing the essential functions.

- Employers are not required to lower or eliminate production standards for essential functions, either quantitative or qualitative, that are uniformly applied. For example, a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement.

Employers should make clear their expectations on production standards, the work that must be produced, and any timetables for producing it. If problems arise in any of these areas, supervisors should immediately discuss them with the attorney with a disability just as they would with any other attorney. On the other hand, if an attorney recognizes that a workplace problem is connected to a disability, the attorney should raise the issue of reasonable accommodation to correct the problem, thus enabling the attorney to meet the employer's expectations.<sup>25</sup>

- Employers are not required to change an attorney's supervisor as a reasonable accommodation.<sup>26</sup> However, nothing in the ADA would prevent an employer and attorney from agreeing to a supervisory change for reasons related to a disability.
- Employers are not required to withhold discipline warranted by poor performance or conduct.<sup>27</sup> (See Example 10.)
- Employers do not have to provide personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an attorney with a wheelchair, hearing aids, or similar devices if they are also needed outside of the workplace.

## I. Management Should Respond Quickly to Requests for Accommodation

After receiving a request for reasonable accommodation, an employer should move expeditiously to respond to it, seeking any additional information that is needed, and make a determination.<sup>28</sup> In some cases, there will be an urgent need to make a determination.

**Example 16:** A law firm's mergers and acquisitions department announces on Monday that all attorneys are expected to attend a staff meeting on Wednesday. A deaf attorney requests a sign language interpreter. The firm must move quickly to provide an interpreter for the meeting.

In other situations, time may not be as critical, but it is always best to make responding to a request a priority. This is especially true when there may be a need to obtain documentation on the disability and/or need for the accommodation or to consult with outside sources on possible accommodations. Employers should keep the attorney informed of developments and explain any delays in processing the request or providing the accommodation. Any unnecessary delay in responding to a request for reasonable accommodation could result in a violation of the ADA.

## J. Management May Choose Between Effective Accommodations

In many situations, more than one possible accommodation may meet the needs of the attorney with a disability. The ADA requires that any accommodation chosen be reasonable and effective in eliminating the workplace barrier.<sup>29</sup> While the employer should give serious consideration to a specific accommodation requested by an attorney, the employer is not required to provide that accommodation. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective in eliminating the workplace barrier.<sup>30</sup> This means an employer is free to choose a less expensive or less burdensome alternative if it will still be effective in meeting the attorney's needs. If an attorney has problems with an accommodation suggested by management, she should explain why it is ineffective, or less effective, in eliminating a workplace barrier, and not merely object to the alternative accommodation.<sup>31</sup>

**Example 17:** A deaf summer associate will accompany a litigator to an all-day deposition. He requests two sign language interpreters. The law firm suggests that one interpreter should be sufficient. The associate explains that a sign language interpreter cannot interpret for several consecutive hours. In order to avoid calling frequent breaks in the deposition, the associate believes that two interpreters are needed. The firm agrees and makes the arrangements.

**Example 18:** A law professor with a visual disability finds that the glare created from light coming through her office window makes it very difficult to read. She explains the problem to the head of her department and requests that she be moved to an office without a window. While such an office is available, the department head asks if curtains or shades would solve the problem. The professor agrees that they would and the department head makes arrangements for shades to be installed rather than moving the professor to a new office.

Sometimes the goal in the interactive process may be to identify several types of effective accommodations, to assess their relative merits, to get the attorney's input on what he prefers and why, and then to have the employer make a decision. While employees often have suggestions for possible accommodations, employers should be actively involved in proposing ideas based on a thorough understanding of the workplace barrier. The employer may seek assistance from a variety of sources on possible accommodations, including the Job Accommodation Network, Disability and Business Technical Assistance Centers, disability organizations, and the EEOC.<sup>32</sup>

## K. Employers May Need to Provide More Than One Accommodation

Sometimes an attorney may need only one accommodation, while in other cases she may need two or more accommodations.<sup>33</sup> The need for reasonable accommodation also can change over time, particularly for degenerative disabilities.<sup>34</sup> Attorneys with disabilities should not assume that since they asked for accommodation once, the employer knows when a different accommodation is needed. To the contrary, attorneys should make a new request if a current accommodation no longer works or if an additional accommodation is required. If it is unclear why a new accommodation is needed, an employer should again engage in the interactive process. Generally, an employer should not ask for additional information to establish that the attorney has an ADA disability unless previous information suggested that the disability or its limitations would be of limited duration.<sup>35</sup>

Example 19: A senior associate has multiple sclerosis. As a reasonable accommodation, he is allowed to work a flexible schedule as long as he coordinates his hours with other attorneys in his practice area. He also is allowed to work from home when his disability flares up and makes commuting to work more difficult. The attorney's eyesight is beginning to deteriorate severely as a result of the disability. He raises the issue of his failing eyesight with the firm's human resources department, which handles most accommodation requests, and asks if he might be assigned additional secretarial help. The human resources manager does some research and learns about equipment that he believes may enable the attorney to continue reviewing and drafting documents on a computer, including software that will read information on the screen and an optical scanner that can be used to convert printed material into an electronic format. The attorney agrees that this equipment should meet his needs. The firm purchases the equipment and provides the attorney with appropriate training on how to use it.

It is always a good idea for an employer to consult with the attorney after providing a reasonable accommodation to ensure that it is working as expected. Sometimes, despite everyone's best intentions, a reasonable accommodation does not work. In that case, the employer should consider whether there is another accommodation that would work and would not cause undue hardship.<sup>36</sup>

## L. Thinking Ahead Can Avoid Future Problems

Sometimes employers make major changes in the work environment that affect all employees but may have a particular impact on attorneys with disabilities, such as changes to information technology or relocation of physical facilities. Consulting with an attorney with a disability before making such changes can avoid problems and save money.

Example 20: A law firm intends to move into a building that is under construction. The firm has a mid-level associate who uses a wheelchair. The firm consults with the attorney about what questions it should ask the building owner and its architectural firm to ensure accessibility. The attorney provides a list of items addressing areas such as the entry to the building, the elevators, the restrooms, the parking lot, the stairwells (to ensure they are designed appropriately for emergency evacuation), and the firm's own

space. The firm discusses the attorney's concerns with the building owners and the architectural firm, and continues to consult with the associate throughout the building process to ensure the new space is accessible. Involving the employee with a disability helps ensure compliance with Title III of the ADA,<sup>37</sup> which requires that newly constructed buildings meet certain accessibility standards. Moreover, the employee may require additional adaptations not mandated by Title III, but nonetheless required as a reasonable accommodation (absent undue hardship) under Title I. Ensuring that accessibility features are built into the new structure avoids the difficult and potentially more expensive situation of considering retrofits after the building's completion.

Employers also should include employees with disabilities when reviewing or making changes to emergency protocols.<sup>38</sup> This includes ensuring that employees with certain disabilities are promptly made aware of emergency situations (e.g., installing flashing lights in addition to alarm bells) and that appropriate plans are in place for the evacuation of anyone with a mobility impairment.

## M. Reasonable Accommodation to Gain Equal Access to Benefits of Employment

The reasonable accommodation obligation extends to ensuring equal access to the benefits and privileges of employment.<sup>39</sup> Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training that can lead to employee advancement (whether provided by the employer or an outside entity);<sup>40</sup> (2) services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation); and (3) social and professional functions (e.g., parties to celebrate retirements and birthdays, company retreats, and outings to restaurants, sporting events, or other entertainment activities). Benefits and privileges of employment also include access to information communicated in the workplace, such as through e-mail, public address systems, or during meetings, whether or not that information relates directly to performance of an attorney's essential job functions.

**Example 21:** A corporation provides parking for its employees. Parking spaces are unassigned. An attorney has severe emphysema and asks for a parking space next to the door. His disability requires constant use of a portable oxygen tank which, in turn, restricts him from walking even relatively short distances. The attorney is seeking an accommodation to use the employer-provided benefit. Therefore, the employer should reserve a parking space next to the door for use by the attorney as a reasonable accommodation, if there is no undue hardship, in order to provide him equal access to the parking benefit.

An employer's obligation to make a benefit accessible with reasonable accommodation does not require the employer to provide an alternative benefit.<sup>41</sup>

**Example 22:** A corporation subsidizes paid parking for its employees. A lawyer with epilepsy does not drive because of her disability. She requests that the employer provide her with the cash equivalent of the parking subsidy as a reasonable accommodation so that she can use the money to pay for her transportation. The employer does not have to grant this request because the attorney is asking the employer to provide her with a different benefit – subsidized use of public transportation. The employer has the right to choose to provide paid parking while not providing subsidies for use of public transportation. The fact that the lawyer's disability does not allow her to make use of the paid parking does not require the employer to provide her with a different benefit.

## N. Limitation on Providing Reasonable Accommodation: Undue Hardship

An employer has no obligation to provide a specific form of reasonable accommodation if it will cause undue hardship, *i.e.*, significant difficulty or expense.<sup>42</sup> Employers should not assume that because one accommodation would result in undue hardship, there would be undue hardship in providing any accommodation. Undue hardship must be determined on a case-by-case basis, taking into consideration the following factors:

- the nature and cost of the accommodation needed
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation
- the impact of the accommodation on the operation of the facility.<sup>43</sup>

**Example 23:** A law firm based in New York has offices in four other cities. The firm has an executive committee comprised of partners from each office that sets salaries, establishes hiring policies, determines billing rates, and makes partnership decisions. The Atlanta office is considering hiring a blind attorney who has requested the following: a screen reader computer program that converts what is on the screen to speech; a computer program that scans written text and reads it aloud; a Braille printer; and a screen magnification program. In determining whether undue hardship exists, the Atlanta office must look at not only its resources but the resources of the entire firm. The Atlanta office is not an independent entity but maintains an integrated administrative and fiscal relationship with the head office in New York and the other offices; therefore, the resources of the entire firm must be taken into account in assessing undue hardship.

If the employer determines that the cost of a reasonable accommodation constitutes an undue hardship, it should consider whether some or all of the cost can be offset. In some instances, state rehabilitation agencies or disability organizations may provide certain accommodations at little or no cost.<sup>44</sup> An employer should also determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.<sup>45</sup> But, an employer cannot claim undue hardship solely because it cannot obtain a reasonable accommodation at little or no cost, or because it is ineligible for a tax credit or deduction.

An employer cannot claim undue hardship based on employees' fears or prejudices about the attorney's disability. Similarly, employers cannot base an undue hardship decision on the fears, prejudices, or preferences of clients or the public.<sup>46</sup> However, undue hardship may exist if a particular form of reasonable accommodation actually disrupts the ability of other attorneys and employees to do their jobs.

**Example 24:** Rachel, a city government attorney, seeks and is granted a modified work schedule because of her disability. Rachel's job requires that she work closely with department attorneys as well as other employees. Her new schedule means she often is not available when other attorneys and employees need her assistance, thus resulting in missed deadlines and incomplete work. Additionally, other attorneys are handling more requests for assistance because of Rachel's new schedule. Rachel's new schedule is causing an undue hardship on the agency because it adversely affects the

ability of other employees to perform their essential functions in a timely manner.

## O. Legal Enforcement

### Private Sector/State and Local Governments

An attorney who believes that his employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a charge of discrimination with the EEOC. The charge must be filed by mail or in person with a local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.<sup>47</sup>

The EEOC will notify the employer of the charge and may ask for a response and supporting information. Before a formal investigation, the EEOC may select the charge for its mediation program. Participation in mediation is free, voluntary, and confidential. Mediation may provide the parties with a quicker resolution of the case.

If mediation is not pursued or is unsuccessful, the EEOC investigates the charge to determine if there is reasonable cause to believe discrimination occurred. If reasonable cause is found, the EEOC will then try to resolve the charge. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a right to sue, which gives the charging party 90 days to file a lawsuit. A charging party also can request a notice of a right to sue from the EEOC 180 days after the charge first was filed with the EEOC.

For a detailed description of the process, please refer to the EEOC website at <http://www.eeoc.gov/employees/charge.cfm>.

### Federal Government

An applicant or employee who believes that her employment rights have been violated on the basis of a hearing disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual may choose to participate in either counseling or in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days and ADR within 90 days.

At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

In cases where a hearing is requested, the administrative judge issues a decision within 180 days and sends the decision to both parties. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency.

A complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at <http://www.eeoc.gov/facts/fs-fed.html>.

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### Endnotes

<sup>1</sup> See <http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/#intro>.

<sup>2</sup> See 42 U.S.C. §§ 12111(2) and (5), 12112(b)(5)(A); 29 C.F.R. §§ 1630.2(b), (d) and (e), 1630.9(a). Pursuant to Title II of the ADA, state and local government agencies with fewer than 15 employees must follow the same employment discrimination rules as found under Title I. 28 C.F.R. ♦ 35.140(b)(2).

<sup>3</sup> 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b). This document will use the term ♦ADA♦ to refer to both the Americans with Disabilities Act and the Rehabilitation Act.

<sup>4</sup> In 1999, the U.S. Equal Employment Opportunity Commission (EEOC) issued a comprehensive Enforcement Guidance addressing many legal, policy, and practical concerns involving the ♦reasonable accommodation♦ obligation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (rev. Oct. 17, 2002) at [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html) [hereinafter ♦Reasonable Accommodation♦]. Readers who want more specific information about the topics discussed in this Fact Sheet should consult the Guidance.

In addition to the Guidance, the EEOC has published documents on many other ADA-related subjects, including specific disabilities or types of disabilities (e.g., psychiatric disabilities, cancer, and diabetes) and the rules regarding when employers may require applicants and employees to answer disability-related questions and undergo medical examinations. The ADA, the implementing regulations and its appendix, and all of the EEOC♦s ADA-related documents cited in this fact sheet (as well as others) can be found at EEOC♦s website, [www.eeoc.gov](http://www.eeoc.gov).

<sup>5</sup> Under some circumstances, partners may be considered employees entitled to the protection of the employment anti-discrimination laws. The position title is not determinative. Rather, whether a partner is considered an employee depends on the level of control the organization has over the partner. See Clackamas v. Gastroenterology Assocs, P.C. v. Wells, 538 U.S. 440, 448-51 (2003).

<sup>6</sup> This fact sheet is not intended to be a basic primer on the legal requirements regarding reasonable accommodation; nor will it provide a full discussion of many important ADA terms and concepts, such as the definitions of ♦disability,♦ ♦qualified,♦ and ♦essential functions.♦ See 42 U.S.C. §§♦2102(2), 12111(8); 29 C.F.R. §1630.2(g)-(n); 29 C.F.R. pt. 1630 app. §§ 1630.2(g)-(n). More information on these terms and concepts can be found in the appendix to the ADA regulations and EEOC♦s ADA-related documents referred to in note 4, supra. See also Section H, infra, ♦Actions Not Required as Reasonable Accommodation,♦ for examples of possible essential functions of an attorney.

<sup>7</sup> 29 C.F.R. § 1630.2(o)(1)(i-iii) (emphasis added).

<sup>8</sup> The Job Accommodation Network (JAN) provides information about the costs of reasonable accommodation at <http://askjan.org/links/faqs.htm> and <http://askjan.org/media/LowCostHighImpact.doc>.

<sup>9</sup> See section M, infra, ♦Reasonable Accommodation To Gain Equal Access To Benefits of Employment.♦

<sup>10</sup> See pages 6-8 in the EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995) at [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html). While employers may ask a specific applicant with a disability about the need for reasonable accommodation, the employer may not ask questions about the disability (e.g., how long has the applicant had the disability, what treatment does he receive, what is the prognosis). Such questions are prohibited prior to making a job offer.

<sup>11</sup> See Questions 1-3 in ♦Reasonable Accommodation,♦ supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004); Estades-Negrone v. Associates Corp. of N. Am., 377 F.3d 58 (1st Cir. 2004); Russell v. TG Mo. Corp., 340 F.3d 735 (8th Cir. 2003); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999); and Taylor v. Principal Fin. Group, 93 F.3d 155 (1996 5th Cir.).

<sup>12</sup> See Question 4 in ♦Reasonable Accommodation,♦ supra note 4.

<sup>13</sup> See Questions 5 and 16 in the EEOC Fact Sheet on Job Applicants and the Americans with Disabilities Act (2003) at [www.eeoc.gov/facts/jobapplicant.html](http://www.eeoc.gov/facts/jobapplicant.html).

<sup>14</sup> See 29 C.F.R. § 1630.9(d). See, e.g., Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003); Conneen v. MBNA Am. Bank N.A., 334 F.3d 318 (3d Cir. 2003). But see Fenney v. Dakota Minn. & E.R.R. Co., 327 F.3d 707 (8th Cir. 2003) (employer♦s motion for summary judgment denied where plaintiff showed that

his repeated requests for reasonable accommodation were ignored, thus causing him to take a demotion to avoid termination).

<sup>15</sup> 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9. See also Question 5 in ♦Reasonable Accommodation, ♦ supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Bartee v. Michelin N. Am., Inc., 374 F.3d 906 (10th Cir. 2004); Brown v. Tucson, 336 F.3d 1181 (9th Cir. 2003); EEOC v. United Parcel Serv., Inc., 249 F.3d 557 (6th Cir. 2001); Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

<sup>16</sup> See Questions 6-8 in ♦Reasonable Accommodation, ♦ supra note 4. See e.g., Templeton v. Neodata Serv., Inc., 162 F.3d 617 (10th Cir. 1998).

<sup>17</sup> See Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

<sup>18</sup> 42 U.S.C. § 12111(9); 29 C.F.R. ♦ 1630.2(o)(2); 29 C.F.R. pt. 1630 app. § 1630.2(o). See also ♦Reasonable Accommodation, ♦ supra note 4, which provides detailed information on a number of forms of reasonable accommodation, including job restructuring, leave, part-time or modified work schedules, modifying workplace policies, and reassignment.

<sup>19</sup> See Section H, ♦Actions Not Required as Reasonable Accommodation, ♦ for information on the difference between essential and marginal functions.

<sup>20</sup> See Question 34 in ♦Reasonable Accommodation, ♦ supra note 4; see also EEOC Fact Sheet on Telework as a Reasonable Accommodation (2003) at [www.eeoc.gov/facts/telework.html](http://www.eeoc.gov/facts/telework.html). See, e.g., Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004); Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

<sup>21</sup> See Question 33 in ♦Reasonable Accommodation, ♦ supra note 4; see also Question 26 in EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997) at [www.eeoc.gov/policy/docs/psych.html](http://www.eeoc.gov/policy/docs/psych.html).

<sup>22</sup> See section on ♦Reassignment♦ in ♦Reasonable Accommodation, ♦ supra note 4. See, e.g., Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6 (1st Cir. 2004); Hedrick v. W. Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004); Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004); Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001).

<sup>23</sup> See Criado v. IBM, 145 F.3d 437, 444-45 (1st Cir. 1998); see also Question 19 in ♦Reasonable Accommodation, ♦ supra note 4.

<sup>24</sup> For more information on ♦undue hardship, ♦ see section N, infra, ♦Limitation on Providing Reasonable Accommodation: Undue Hardship.♦

<sup>25</sup> See section E, supra, ♦When to Request a Reasonable Accommodation.♦

<sup>26</sup> See Question 33 in ♦Reasonable Accommodation, ♦ supra note 4; but see Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999) (contrary to EEOC's Reasonable Accommodation Guidance, it is not *per se* unreasonable to change an employee's supervisor but there is a presumption that such an accommodation is unreasonable).

<sup>27</sup> See Questions 35-36 in ♦Reasonable Accommodation, ♦ supra note 4. Cf. Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000) (court upholds termination because plaintiff never requested reasonable accommodation despite repeated warnings about excessive absenteeism); Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

<sup>28</sup> See Question 10 in ♦Reasonable Accommodation, ♦ supra note 4.

<sup>29</sup> See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

<sup>30</sup> See Question 9 in ♦Reasonable Accommodation, ♦ supra note 4. See, e.g., Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003).

<sup>31</sup> See, e.g., Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Webster v. Methodist Occupational Health Ctrs., Inc., 141 F.3d 1236 (7th Cir. 1998); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997).

<sup>32</sup> Contact information for the Job Accommodation Network and the Disability and Business Technical Assistance Centers, as well as additional organizations that can assist in identifying accommodations, can be found in Reasonable Accommodation, supra note 4. Individuals also may find helpful information on disability organizations and other resources in the EEOC's Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act/Resource Directory (1992), available free of charge by calling 1-800-669-3362 (Voice) or 1-800-800-3302 (TDD) [hereinafter ADA Technical Assistance Manual]. To discuss possible forms of reasonable accommodation, individuals and employers may call the EEOC at 202-663-4691.

<sup>33</sup> See, e.g., Ralph v. Lucent Tech., Inc., 135 F.3d 166 (1st Cir. 1998).

<sup>34</sup> Cf. Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

<sup>35</sup> See Question 8, Example B in Reasonable Accommodation, supra note 4.

<sup>36</sup> See Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

<sup>37</sup> 42 U.S.C. § 12183.

<sup>38</sup> See EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (2001) at [www.eeoc.gov/facts/evacuation.html](http://www.eeoc.gov/facts/evacuation.html); Preparing the Workplace for Everyone: Accounting for the Needs of People with Disabilities at <http://www.dol.gov/odep/pubs/ep/preparing.htm> (although this is a blueprint for federal agencies on adopting and implementing emergency plans that address the needs of people with disabilities, most of the information is relevant to other types of employers). Employers also may find helpful information from the National Organization on Disability's Emergency Preparedness Initiative, [www.nod.org](http://www.nod.org).

<sup>39</sup> See footnotes 14 and 15 and accompanying text in Reasonable Accommodation, supra note 4.

<sup>40</sup> See id. at Question 15.

<sup>41</sup> Cf., Alexander v. Choate, 469 U.S. 287 (1985) (Tennessee's reduction in annual inpatient hospital coverage cannot be the basis of a disparate impact claim under §504 of the Rehabilitation Act because the statute does not require a state to alter its definition of a benefit to meet the medical reality confronting a disabled individual); see also section 7.12 in the ADA Technical Assistance Manual, supra note 32 (an employer does not have to eliminate a benefit because an employee with a disability cannot use it); section (B) (What is a Disability-Based Distinction) in EEOC Interim Enforcement Guidance on the application of the ADA to disability-based distinctions in employer provided health insurance (1993) at [www.eeoc.gov/policy/docs/health.html](http://www.eeoc.gov/policy/docs/health.html) (health insurance distinctions that are not based on disability and that apply to all insured employees do not violate the ADA even when the definition of a particular benefit may have an adverse impact on certain individuals with disabilities); Question 5 in EEOC Questions and Answers About the Association Provision of the ADA (2005) at [http://www.eeoc.gov/facts/association\\_ada.html](http://www.eeoc.gov/facts/association_ada.html) (same).

<sup>42</sup> 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. pt. 1630 app. § 1630.2(p); see also section on Undue Hardship Issues in Reasonable Accommodation, supra note 4.

<sup>43</sup> 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2); 29 C.F.R. pt. 1630 app. § 1630.2(p).

<sup>44</sup> The Job Accommodation Network (JAN) website, [www.jan.wvu.edu/links/funding.htm](http://www.jan.wvu.edu/links/funding.htm), provides information on possible funding sources or sources to obtain certain forms of accommodations. Employers may

wish to check if any of these sources might be helpful, although many are limited to certain locations and serving certain clientele (e.g., low income individuals).

<sup>45</sup> Two tax incentives may be available to certain businesses to help cover the cost of making access improvements for persons with disabilities. The first is a tax deduction that can be used for architectural and transportation adaptations. The second is a tax credit for small businesses that can be used for architectural adaptations, equipment acquisitions, and services such as sign language interpreters. More information can be obtained at <http://www.ada.gov/archive/taxpack.htm> and <http://www.irs.gov>.

<sup>46</sup> See 29 C.F.R. pt. 1630 app. § 1630.15(d).

<sup>47</sup> Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as ♦Fair Employment Practices Agencies (FEPAs).♦ Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will ♦dual file♦ the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will ♦dual file♦ the charge with the FEPA but usually will retain the charge for investigation.

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## FEATURES

# The biggest hurdle for lawyers with disabilities: preconceptions

BY TERRY CARTER ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/17/](http://www.abajournal.com/authors/17/))

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A few years ago, a young associate in the Chicago office of Schiff Hardin asked senior partner Max Brittain for advice. She was often late with assignments, especially the big ones, but didn't want the partner she worked with to know she had been diagnosed with attention deficit disorder and was taking medication for it.

"I finally convinced her that she was digging a hole she'd never get out of if she didn't come forward," Brittain says. "It was hurting her career."

*Photo by Wayne Slezak*

Brittain is a prominent management-side employment litigator in the 400-lawyer firm, but the slight irony ends there. After he had become established in his field, Brittain suffered serious problems related to the late onset of Type 1 diabetes. He underwent a radical surgical procedure in 1995 to stop hemorrhaging in his eyes, which left him with limited vision, he says, "like looking out an airplane window going through a cloud." Six years later, he lost his left leg below the knee and grew hard of hearing.

Years ago the firm began accommodating Brittain, 67, a rainmaker who among other things needs a driver and can read only large print. So the associate went to him with her problem.

“I was able to approach the powers that be and say the strikes against her work aren’t right,” he says. “I told them she’s a very bright lawyer and we need to deal with her ADD differently than we do with other lawyers.”

The solution: Break assignments into pieces so as not to overwhelm her. Rather than task her with drafting a brief in two weeks, ask for a statement of facts in three days; then a research memo; and finally a statement of law. It worked.

“There is a stigma attached to something when people really don’t know much about it—in this instance, mental disabilities,” says Brittain, who recently lost his other leg. “Getting them to come forward is the biggest issue.”

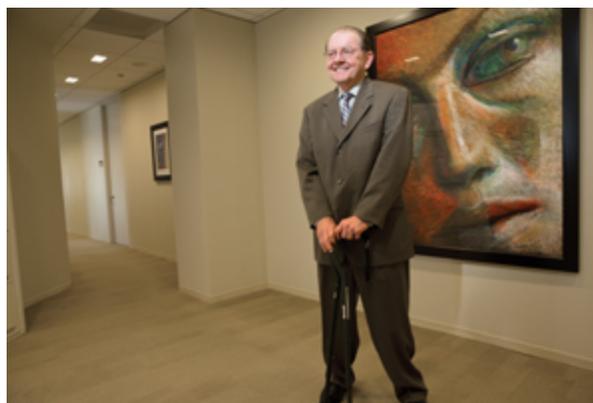
## A RARE PRESENCE

Brittain’s own disabilities, particularly in combination, are still a rare presence at big law firms, or any firm for that matter—and obviously Schiff Hardin’s willingness to increase accommodations for him stems at least in part from his proven ability, before and after his disabilities, to bring in work and get it done.

Many lawyers with disabilities still end up where they always were: channeled toward government work, advocacy organizations or solo and small-firm employment, often with disability-related practices.

Over the past couple of decades, technological and medical advances have made it much easier (or in some instances, possible) for lawyers with disabilities to perform ordinary tasks in legal work. There are devices and software that read digital documents to the blind, refreshable Braille machines that can provide real-time communication, and instant transcripts on computer screens for the deaf—even in court hearings with direct feeds from stenographers.

But at the same time, old attitudes and perceptions have been slow to lose their grasp.



*Max Brittain is a senior partner and litigator at Schiff Hardin. Photo by Wayne Slezak.*

“We’re still often looked at as a delicate flower or damaged, and that makes it hard to be part of the diverse fabric of the workforce,” says Stuart Pixley, a senior attorney at Microsoft Corp. in Redmond, Washington, specializing in patent licensing transactions.

Pixley formerly worked in three big law firms, including a partnership at the megafirm Baker & McKenzie. He has cerebral palsy and uses an electric wheelchair and hearing aids.

Though he succeeded in law practice, Pixley felt isolated and discouraged in the firms. “I don’t remember seeing anyone who looked like me.” Pixley adds that Microsoft is so systematically intensive about building “an understanding of disabilities through cultural competence” rather than through gestures of political correctness, that “I have an idyllic world here.”

The unintended marginalization in big firms was as simple as a social function. As a summer associate in New York City at Milbank, Tweed, Hadley & McCloy in the mid-1990s, for example, Pixley wasn’t asked how he might negotiate the 2 miles from the office to a cocktail party at a Mexican restaurant in SoHo. The firm, where he later would work full time for two years as an associate, rented a yellow school bus to pick him up and drop him off.

“It came late and eventually I showed up when a few people were still there,” Pixley says of the transportation spectacle. “But there I was in a suit and getting off a school bus at a law firm function. They didn’t know exactly how to get me there and were reluctant to say ‘take a public bus,’ which they probably should have done.”

Other, more problematic misunderstandings hurt his acceptance as a team member, even as a partner. Pixley once was asked at a large gathering by a partner—a friend—how well the hearing aids helped him. Not great in such a setting, but not bad when using the telephone, he replied, which is how a lot of communication with clients is done.

“I told him I ask them to repeat things now and then, and that my theory is to be light-handed and comfortable with that,” Pixley recalls. “But then [some in the firm] became afraid that if I let folks know I have a hearing impairment and asked them to repeat themselves too many times, that they might literally fear being double-billed.”

## **UNKNOWN NUMBERS**



*A senior attorney at Microsoft, Stuart Pixley specializes in patent licensing transactions. Photo by Chris Joseph Kalinko.*

reporting zero disabilities) encompassing 73,081 lawyers.

Whatever the totals, they are increasing, as is the number of law students seeking accommodations for disabilities. Many of them have been coming together in a disability rights movement, including solo practitioners who represent others in accessibility cases under the ADA, law firms and advocacy groups specializing in disability law, and law firm lawyers who work pro bono.

The networking in those efforts has led to an increase in organized bar groups, such as the Disability Rights Bar Association, launched in 2006 by abled and disabled lawyers, academics, and nonprofit law and disability advocacy groups; the recently formed National Association of Attorneys with Disabilities; and the National Association of Law Students with Disabilities, started in 2007 with help from the ABA's Individual Rights and Responsibilities Section.

The number of lawyers with disabilities is hard to determine. Unlike race, gender, ethnicity and, more recently, sexual orientation, there is little reporting on them. Only two state bars—those in Oregon and Washington—have done tallies, and still that is self-reporting. Some lawyers won't do so; some others don't see themselves as disabled. And the definition of disability under the Americans with Disabilities Act is fast expanding, largely via the hottest area: mental health impairments.

In an ABA membership survey in 2013, 8 percent of the lawyers answered in the affirmative when asked whether they have disabilities. A 2012 survey by the Washington State Bar Association found that 21 percent of its members said so. The National Association for Law Placement found that just one-third of 1 percent of law firm partners reported having disabilities in its 2014 survey, which was slightly higher than a few years earlier. Associates with disabilities composed just 0.28 percent, also slightly higher than before. The figures were based on data from 740 law offices and firms (including some

## 'WE'RE FIGHTING BACK'

"The ADA has been in effect since 1990, and people with disabilities are fed up with so much failure to follow it," says William Goren, who is passionately outspoken and whose solo practice based in Decatur, Georgia, is built around advising companies and litigants on the ADA and other disability law topics. "So we're not as willing to get rolled as we used to be. We're fighting back."

Goren, 54, is deaf, but uses powerful hearing aids that lessen his hearing loss to only 40 percent; thus, functionally, he is considered hard of hearing. In his 30s, Goren developed debilitating joint problems and is unable to use a computer keyboard or mouse.

"I can't use a computer without voice dictation," he says. "And I can't tell you how many software programs I've bought that turned out not to be accessible with voice-dictation technology."

Goren is a prolific writer of books and scholarly articles, as well as on his blog *Understanding the Americans with Disabilities Act*

([http://www.abajournal.com/blawg/Understanding\\_the\\_Americans\\_with\\_Disabilities\\_Act](http://www.abajournal.com/blawg/Understanding_the_Americans_with_Disabilities_Act)), which made the *ABA Journal's* Blawg 100 for 2014. His authoritative book of the same name, published by the ABA, is in its fourth edition.

Goren founded the National Association of Attorneys with Disabilities in 2013 along with seven other executive board members, including Pixley of Microsoft. (Pixley also is one of 15 appointed members of the ABA Commission on Disability Rights, which collaborates with many organizations.) The NAAD, just finishing its organizational and structural stage, is a cross-disability group for developing a national voice in matters of accessibility and other civil rights, as well as pushing for inclusion in diversity efforts in the judiciary and elsewhere.

Something of a critical mass has formed to press for disability rights in general. In recent years there has been a cascade of incremental progress, such as rulings or agreements concerning the likes of Netflix (closed-captioning for the deaf), eBay and Target (website access for the blind), and Scribd (see "Sites for Sore Eyes," February, page 15).

"I'm primarily dealing with the digital version of no wheelchair ramp," says Tim Elder, a Fremont, California, lawyer who is blind and has a solo practice focused on the intersection of technology and disability rights law, especially concerning startup companies and innovative technology.

“We’re moving toward a more virtual workspace, and rather than focus on reasonable accommodations, we need to take the same approach as with physical buildings and think about how we’re designing this virtual space.”

It is much easier to build accessibility into software when it is developed than later, much like putting an elevator in a 20-story building during its construction rather than afterward.

Elder, 35, is involved in litigation nationwide, with cases including Marriott hotels’ use of enterprise software inaccessible to the blind and Uber car service, whose drivers sometimes refuse to take service animals.

He is one of an increasing number of lawyers with disabilities who are active in leadership positions in the organized bar. Elder came up through the ABA’s Young Lawyers Division and—in a significant gain for the disability rights movement—is a member of the ABA’s Standing Committee on Technology and Information Systems, which deals with accessibility, among other issues.

More than once, Elder says, he has been recruited to work ADA cases on the defense side. “I have no problem working with management if they’re trying to do the right thing, but this is more fulfilling and frankly more interesting substantively for me. And I have more work to do than bandwidth to do it.”

The practice area is white-hot.

Since he began teaching disability law a dozen years ago, Michael Waterstone has seen a huge increase in numbers of students—abled and disabled—who come to him interested in such a practice.

“This is a growing area with a lot of legal work for both sides, plaintiff and defendant,” says Waterstone, now at the Loyola School of Law in Los Angeles. “It’s reached the point where I increasingly tell law students with disabilities that if they want to make it their life’s work, fine, but don’t feel like you need to do it.”

In fact, Waterstone sees an even greater need for lawyers with disabilities to enter and rise to the top levels of major law firms.

Waterstone’s mentor when he was an associate at the Los Angeles-based litigation powerhouse Munger, Tolles & Olson was the late Charles Siegal, who wore leg braces as a result of polio and did pro bono work on disability rights matters.

“I was able to see how he could do more in some ways for the movement than a lawyer similarly situated doing strictly public interest work,” Waterstone says. “Because of who he was, he could call people in positions of power and get them interested in disability issues.”

## EARLY LOSSES

For many years ADA cases did not fare well in the courts, with the tone set at the top of the federal judiciary: Four appeals made it to the U.S. Supreme Court, which saw none that it liked. In fact, Congress passed the Americans with Disabilities Amendments Act in 2008 expressly to overturn two of those cases that had narrowed the scope of what qualifies as a disability under the ADA.

Hundreds of cases brought after the amendments went into effect in 2009 are now working their ways through the courts. Many fewer plaintiffs are losing summary judgment motions on the definitions of disability and whether they are disabled; more substantive issues are now being thrashed out. Judges are delving into such issues as whether plaintiffs are capable of doing the job with accommodation or whether such accommodation puts undue hardship on the employer, according to Stephen Befort, a University of Minnesota Law School professor who did an empirical study of ADA cases between January 2010 and April 2013.

“Over the next few years we’re going to see some pivotal decisions,” says Waterstone, the Loyola law professor.

Some critics have complained that disability rights litigation is too diffuse, that there is need for greater coordination and focus so as to produce an equivalent of the very carefully orchestrated *Brown v. Board of Education* case, the 1954 Supreme Court ruling that ended racial segregation in public schools.

“But I have a hard time counting to five for a pro-disability rights decision,” says Daniel Goldstein of Baltimore’s Brown, Goldstein & Levy, alluding to the current makeup of the high court. “So why not design something with the intent to get results at the federal circuit court level?”



*The Washington, D.C., municipal government now includes closed-captioning in videos posted on its website, thanks to the pro bono efforts of deaf law partner Melissa Felder Zappala. Photo by David Fonda.*

Goldstein, a member of the ABA's Commission on Disability Rights and founder in 2006 of what now is the Disability Rights Bar Association, argued such a case at the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, in February. In *Reyazuddin v. Montgomery County*, he challenged a Maryland county government's purchase of an enterprise software system that is inaccessible to the blind and thus makes them unemployable.

A lot of cases are brought simply because a problem exists and someone takes an interest. Melissa Felder Zappala, a deaf partner in the Washington, D.C., office of the talent-magnet litigation and corporate firm Boies, Schiller & Flexner, recently worked pro bono on a lawsuit against the D.C. government for posting videos that lacked closed-captioning on its website. She brought in her father, Barry Felder, a litigation partner at Foley & Lardner in New York City, to join forces with the Washington Lawyers' Committee for Civil Rights and Urban Affairs. The city settled, agreeing to use captioning going forward.

After her first year at Georgetown University Law Center, Zappala interned at the National Association of the Deaf's Law and Advocacy Center and became interested in a career in disability law. The following year, as a summer associate at Boies Schiller, she grew fond of analyzing complex commercial litigation matters well enough to box in the other side.

"I prefer to do disability rights pro bono," says Zappala, who speaks on phone calls and can read the other person's responses immediately, via a third-party service, on her office computer screen. She can usually also hear the other person thanks to a cochlear implant and residual hearing. Zappala gets similar readouts on a computer screen at depositions and court hearings, though it is largely backup because she also reads lips.

The implant, done on her worst ear, was a gamble Zappala took between law school and coming to the firm. Had it failed, she might have lost all hearing in that ear.

Waterstone welcomes efforts such as Zappala's but believes a long-term, big-case strategy still is needed. He says states like Connecticut have constitutional equal-protection clauses that go beyond what is available in the federal system, providing heightened scrutiny in disability matters.

"I would like to see more aggressive activity pushing the bounds of favorable state law," says Waterstone, "and over time set precedent that a more rigorous review of state laws that draw lines on the basis of disability is not such a terrible thing."

Even if there were such a forward-looking approach, as the ADA hits its 25th anniversary this year, the old brick-and-mortar battles continue. While Elder says he's dealing now with the digital version of curb ramps, problems remain real where wheelchair rubber meets those curbs.

"We could go to almost any city and I guarantee I could find, within 1 square mile, 15 corners in violation," says Tim Fox, a Denver lawyer who in 1986 was paralyzed from the shoulders down while playing rugby in college. "The cities still weren't paying attention after the ADA was passed."

Fox was in his second year at Stanford Law School when the legislation went into effect in 1990. Later he and his wife, Amy Robertson, whom he met when they were associates at what now is Wilmer Cutler Pickering Hale & Dorr in D.C., opened a litigation firm in Denver specializing in disability rights cases. In 2013 they folded Fox & Robertson and launched the Civil Rights Education and Enforcement Center. Still litigating, they added flexibility for efforts such as educational presentations for advocacy groups.

CREEC is now in negotiations with three cities, all with populations greater than 1 million, to make curbs accessible.

## **A NEW ISSUE: THE BRAIN**

The fastest-expanding and sharpest-edged issue for diversity in the legal profession concerns mental disabilities, such as ADD, bipolar disorder and depression. Lawyers are 3.6 times more likely than others to suffer depression, according to a 1990 Johns Hopkins University study.

Even as more employers recruit lawyers with sight, hearing and mobility problems, they still recoil at dealing with what they see as unknowable possibilities of a disabled mind. The fact that these impairments are often treatable and manageable is overshadowed by social stigma and lack of understanding.

The U.S. Department of Justice recently has drawn some bright lines to sort fact from surmise.

Last August the DOJ announced a settlement with the Louisiana Supreme Court, which agreed to stop asking bar applicants, in violation of the ADA, about mental health diagnosis and treatment. Now the court will seek such information only when there is evidence of a problem that affects the applicant's competency, ethics or professional manner. The court also agreed to pay \$200,000 to some bar applicants and lawyers. Justice has its eye on similar issues in Connecticut and Vermont.

A few months earlier, the Law School Admission Council settled with the DOJ, which had intervened in a class action alleging that LSAC accommodations for the disabled were denied routinely for the Law School Admission Test, and that the council flagged the test scores of those who were accommodated so law schools would know they had been given extra time.

Under the settlement, the LSAC agreed to streamline and professionalize review of accommodation requests and cease flagging of scores. Without admitting liability, the council agreed to pay \$7.73 million.

“The interesting paradox is that there are lots of high-incidence conditions protected by the ADA that are not visible or obvious,” says Andrew Imparato, who is up front about his periodic depression and has done high-level policy work on mental health issues, including three years as senior counsel and disability policy director for U.S. Sen. Tom Harkin, D.-Iowa, when Harkin chaired the Committee on Health, Education, Labor and Pensions. “Depression, anxiety and obsessive compulsive disorder are three common characteristics that exist in every law firm.”

But when a lawyer with one or more of those difficulties comes out about it, many firms are quick to worry about client perceptions.

“The reality is that firms are dealing with this whether it’s in the open or not,” says Imparato, now executive director of the Association of University Centers on Disabilities. “If high-level people start talking openly about depression or whatever, it changes the culture.”

Imparato suffered his first serious episode of depression in his final semester at Stanford Law School, and he entered the profession adjusting to a new diagnosis of being bipolar. He immediately went into public-interest work in disability law, which made it easier to be open from the start.

His impairment is predictable. Imparato’s energy and self-confidence diminish for about five or six months each year, and his method for dealing with it might bring a smile to a hiring partner: “I try to stay busy. My worst days are when I don’t have enough to do.”

## **FUNDAMENTAL SHIFT**

Attitudes and perceptions have long been the fly in most ointments. And a fundamental shift is underway as some law firms, such as Schiff Hardin, take the lead in considering lawyers with disabilities as a minority group—not as people

deserving pity or charity. As with other groups, individuals range from the mediocre to the superstar in a profession whose core requirements are knowledge, analytical skill and judgment.

At Britain's request a few years ago, his firm (as do a handful of others) has a so-called affinity group for lawyers with disabilities among its various diversity efforts, along with those for race, gender and ethnicity.

The dearth of individuals with disabilities in the legal profession prompted the ABA Commission on Disability Rights in 2009 to proffer a pledge for committing to support disability rights. It is titled *Disability Diversity in the Legal Profession: A Pledge for Change*

([https://www.americanbar.org/content/dam/aba/administrative/mental\\_physical\\_disability/pledge\\_for\\_change.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/pledge_for_change.authcheckdam.pdf)) (PDF). It is a commitment to help ensure that lawyers with disabilities are given a fair chance at work in the profession, and to better reflect the diversity of communities, clients and customers. The more than 175 signatories thus far include law firms, law schools, corporations, organized bar groups and others.

When a lawyer with a disability applies for a job, too often the first question concerns what he or she can't do, rather than what they can.

"I don't think we talk enough about enabling excellence, enabling people to bring their A game," Pixley says. "I want to bring my A game."

*This article originally appeared in the June 2015 issue of the ABA Journal with this headline: "Able: The biggest hurdle for lawyers with disabilities: preconceptions."*

## Sidebar

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### A PDF Battle Won

In late 2002, then-61-year-old Tom Ross had minor abdominal surgery that was botched and left him blind from sepsis. It was four months before he regained consciousness and three years before he could resume his commercial real estate transactions practice at the 600-lawyer firm Akerman.

After retiring in 2009, Ross, who had only occasionally ventured into courtrooms over four decades, represented a friend, also a real estate lawyer, in a suit against Windermere, Florida, a small town in suburban Orlando, over drainage problems.

Ross was incensed that documents produced by the judge and the town's lawyers often were static-form PDFs—scanned visual images of documents—rather than dynamic PDFs with searchable text. When he ran the digital files through the screen reader on his computer, which can turn text into speech, it told him

nothing was there.

His repeated complaints to the judge and clerk of the Orange County circuit court were unavailing. Opposing counsel gave him no quarter.

"At the end of my career and trying to help someone, not making any money on it, and dealing with a bunch of Neanderthals who haven't got the professional courtesy to be decent, it just pissed me off," says Ross, speaking of opposing counsel.

Well-known in his field, resourceful and persistent, Ross complained to the U.S. Department of Justice. Against the odds, it acted: Last July the DOJ announced a settlement with the Orange County clerk of courts for ADA violations. The court now will provide any document of record in an accessible format and ensure the court's website is accessible to those with disabilities.

Ross got \$10,000 for his trouble. The underlying suit had settled: \$200,000 in legal fees for Ross; \$185,000 in damages for his client. And, Ross estimates, close to \$1 million was paid by Windermere and its insurer for their own lawyers. The original request had been for a mere \$25,000 fix on the drainage problem.

"My point is that even though I can afford \$900 software that could crack those PDFs, it's not fair because not every young lawyer can afford it, and some law firms can't," Ross says.

While the feds came to his rescue in Florida state court, Ross would have no luck if he were to go after the federal judiciary. Federal judges might preside over ADA cases, but they're not subject to the law because it pertains only to state and local employers. But most federal courts present the same problem: The notoriously dull-edge PACER system often provides static PDFs that are inaccessible to the blind.

Creating PDFs that have searchable text is not difficult, not expensive and not too much to ask, says Scott LaBarre, a Denver lawyer who is blind and is a former chair of the ABA Commission on Disability Rights.

"The expectation is that everything now is born digital; and if it is, we ought to have a way to get at it through screen readers or other devices," LaBarre says. "I have some tools to deploy and can ask my secretary to run it through software to make it accessible, but that takes time, and time is money."

The Administrative Office of the U.S. Courts has no standards for PDFs, but is working to improve accessibility for blind users as it develops NextGen, the next generation version of case management/electronic case files software, a spokesman says.



***Scott LaBarre says that creating searchable PDF text is not difficult, expensive or too much to ask. Photo courtesy of Scott LaBarre.***

Early adopters of NextGen, the 2nd and 9th U.S. circuit courts of appeal at New York City and San Francisco, respectively, now require text-searchable PDFs, except for attached exhibits.



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# The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession - An Empirical Study of the Disabled Lawyers

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# The Disabled Lawyers Have Arrived; Have They Been Welcomed With Open Arms Into The Profession? An Empirical Study of The Disabled Lawyer

Donald H. Stone†

## Introduction

The Individuals with Disabilities Education Act<sup>1</sup> (IDEA) opened doors for disabled children to receive a free elementary and secondary education appropriate to their needs.<sup>2</sup> As a result, education is being provided to most disabled children in an integrated and mainstream setting.<sup>3</sup> Many of these disabled children have grown up, earned a college degree, entered law school, and perhaps received academic modifications in the law school classroom.<sup>4</sup> Upon their successful completion of law school, disabled law graduates have sought and received reasonable accommodation of their disabilities, but they have also encountered road blocks as they proceed through the bar exam and admissions process.<sup>5</sup> If able to surmount the hurdle of admission, these disabled lawyers are knocking on the doors of law firms, seeking employment. Is there a welcome mat or a “do not enter” sign awaiting them?

Lawyers with hidden disabilities—whether mental illness, learning disability, alcohol, or drug addiction—present unique challenges for law firms as employers. Can the disabled lawyers

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1. The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2000). Congress enacted this statute to provide special education service and to ensure additional school funding to states. *Id.* § 1400(d). The law was first enacted as the Education for All Handicapped Children Act of 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975).

2. *See* 20 U.S.C. § 1400(d).

3. *See id.* § 1400(c)(2).

4. *See generally* Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Disabilities*, 42 S. TEX. L. REV. 19 (2000) (offering insight into accommodating disabled law students).

5. *See generally* Donald H. Stone, *The Bar Admissions Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331 (1995) (explaining the bar admission process for the disabled law graduate).

who seek employment perform the essential functions required of an attorney? Should law firms be required to make modifications in the workplace in order to permit a disabled lawyer to be gainfully employed? If so, what reasonable accommodations are required by law?

The Americans with Disabilities Act<sup>6</sup> (ADA) is a landmark civil rights bill designed to open all aspects of American life to individuals with disabilities.<sup>7</sup> The articulated purpose of the federal law is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>8</sup> The primary focus of the ADA is to furnish “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>9</sup>

According to federal census data, there were approximately 51.2 million disabled Americans in 2002.<sup>10</sup> Over eighteen million people over the age of twenty-one reported that they experienced employment problems related to their disability.<sup>11</sup> A recent report published by the American Bar Association (ABA) recognized the need for up-to-date statistics on the number of attorneys with disabilities in the field.<sup>12</sup> It noted that:

[A]n important step in devising strategies to promote the full and equal participation of people with disabilities in the legal profession is to gather comprehensive data—not just on the numbers of lawyers with disabilities, but also on the number of law students and college students with disabilities—in order to gain a better understanding of the pool of potential lawyers and how to expand and respond to the needs of that pool.<sup>13</sup>

In 2007, as part of its census, the ABA found that out of the 11,784 lawyers who answered the question “[d]o you have a

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6. Americans with Disabilities Act, Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12 213 (2000)).

7. *See id.* § 12101(b).

8. *Id.* § 12101(b)(1).

9. *Id.* § 12101(b)(2).

10. ERIKA STEINMETZ, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, AMERICANS WITH DISABILITIES: 2002 (2006) 1, <http://www.census.gov/prod/2006pubs/p70-107.pdf>.

11. *Id.* at 27.

12. AMERICAN BAR ASSOCIATION COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW, THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION (2006), [http://www.abanet.org/disability/docs/conf\\_report\\_final.pdf](http://www.abanet.org/disability/docs/conf_report_final.pdf) [hereinafter ABA REPORT].

13. *Id.* at 8.

disability?" 833 respondents answered "yes."<sup>14</sup> This accounts for about seven percent of ABA membership; however, the ABA Commission on Mental and Physical Disability Law believes that there are significantly more lawyers with disabilities than these numbers reflect.<sup>15</sup> Another study conducted by the National Association of Law Placement (NALP) found that about eighty-one percent of law graduates with disabilities were employed while eighty-seven to ninety percent of non-disabled law graduates were employed.<sup>16</sup> An even greater disparity exists in the salaries of disabled lawyers when compared with non-disabled lawyers. The NALP study revealed that the mean salary for an attorney with a disability was \$66,049.00 as compared to the mean for all law graduates, which was \$77,939.00.<sup>17</sup> These figures suggest that many lawyers with disabilities will experience pay inequity upon entering the profession.

The ABA, as one of its major goals, promotes full and equal participation in the legal profession by minorities, women, and lawyers with disabilities.<sup>18</sup> In an ABA report, the association acknowledged that significant steps must be taken to make the legal profession more accessible to lawyers with disabilities.<sup>19</sup>

Disabled attorneys and firms face serious disability-related questions from the beginning of the hiring process throughout employment. At the initial interview stage at a law firm, should a disabled applicant be encouraged to disclose his disability to the hiring partner of the law firm? Would the disabled attorney be wise to wait until after the offer of employment is extended, or even after employment commences, before disclosure of the disability and discussion of reasonable accommodations in the workplace? At what point do hiring partners in law firms expect disclosure of a learning disability or a history of substance abuse? Once a disabled lawyer is hired, how should a firm provide him or her with reasonable accommodations in the workplace in a fair and equitable manner as required by law?<sup>20</sup>

Disabled lawyers are seeking architectural accessibility, job

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14. THE COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW, AMERICAN BAR ASSOCIATION, GOAL IX REPORT 2 (2008), <http://abanet.org/disability/docs/2008GoalIX.pdf>.

15. *See id.*

16. *Id.* at 3.

17. *Id.*

18. *See* American Bar Association, ABA Mission and Goals, <http://www.abanet.org/about/goals.html> (last visited Jan. 21, 2008).

19. *See* ABA REPORT, *supra* note 12, at v.

20. *See* 42 U.S.C. § 12111(9) (2000).

restructuring, leave time for counseling sessions, accessible technology, and modifications of their work schedule among other accommodations.<sup>21</sup> Law firms are also beginning to see requests for additional administrative support, scheduling adjustments, and assignment of less stressful and less time sensitive work.<sup>22</sup> How should law firms best accommodate disabled attorneys?

This Article proceeds in seven parts. Part I briefly outlines the ADA's position on reasonable accommodations. Part II addresses how law firms are reacting and responding to the fact that they employ lawyers with mood disorders, such as depression or bipolar disorder,<sup>23</sup> attorneys with learning disabilities, and individuals with alcohol or drug addiction. What disabilities are most often represented? Are lawyers with disabilities apt to receive work modifications to accommodate their disability? Are attorneys with mental illness provided with less stressful case assignments? Are lawyers with substance use disorders<sup>24</sup> and alcohol or drug addiction assigned co-counsel to monitor or offer support to the disabled individual?

Part III of this Article outlines the annual ABA report on lawyers with disabilities, which includes recommendations as to how employers should accommodate disabled persons from the hiring process through employment. A fundamental concern underlying the provision of reasonable accommodations within the law firm is the potentially negative impact on client representation. Part IV of this Article analyzes the balancing act of providing reasonable accommodations to the disabled lawyer and the importance of providing competent representation to the client. Part V examines attorney disciplinary proceedings pursuant to the Model Rules of Professional Conduct in order to shed light on the issues related to the disabled lawyer. Part VI discusses and analyzes court decisions in the area of reasonable accommodations in the workplace to note the impact of the ADA and the direction in which courts are heading as they tackle this challenging and significant area of law.

Empirical data contained in this Article serves as a backdrop for purposes of elaboration and comparison of these and other

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21. ABA REPORT, *supra* note 12, at 50.

22. *Id.*

23. For a full description of these and other disorders, see AMERICAN PSYCHIATRIC ASSOCIATION, DESK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-IV 167-83 (1994).

24. *Id.* at 12.

questions.<sup>25</sup> Attorneys from fifty law firms in nine states were surveyed to obtain data and their opinions on questions relating to employment accommodations by law firms.<sup>26</sup> Because of the significant number of disabled lawyers entering the workforce and seeking modifications and accommodations, such an inquiry is well warranted. Law firms are beginning to grapple with the disabled lawyer's claim for fair and equitable treatment, while still serving their clients to the best of their ability. Part VII presents and analyzes this empirical data. In conclusion, this Article offers recommendations regarding fair and equitable reasonable accommodations for disabled lawyers in the workplace.

## I. The ADA and Reasonable Accommodation

According to the ADA:

The term "reasonable accommodation" may include—

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>27</sup>

The ADA encourages an informal, interactive process between an employer and a qualified individual with a disability in order to determine the appropriateness of a given accommodation.<sup>28</sup> The ADA lists factors that should be considered in order to determine whether an accommodation is reasonable or would impose an undue hardship on the employer.<sup>29</sup> Factors to be considered include the nature and costs of the accommodation, the overall financial resources of the employer, the type of operation of the employer, and the impact of the accommodation upon the

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25. See Donald H. Stone, *Attorneys with Disabilities Survey (2007)* [hereinafter Stone, Survey] (unpublished online survey conducted by author, original survey on file with author, survey questions and answer choices reproduced *infra* at Appendix A).

26. See Donald H. Stone, *Results of Attorneys with Disabilities Survey, Question 1 (2007)* [hereinafter Stone, Results] (unpublished data, on file with author). Survey respondents indicated that they practiced law in California, the District of Columbia, Illinois, Louisiana, Maryland, Missouri, New York, Texas, and Virginia. *Id.*

27. 42 U.S.C. § 12111(9) (2000).

28. See 29 C.F.R. § 1630.2(o)(3) (2007).

29. *Id.* § 1630.2(p)(2).

employer.<sup>30</sup>

## II. The California Bar Committee on Legal Professionals with Disabilities

In 2004, the California Bar Committee on Legal Professionals with Disabilities conducted a survey and issued a report, which included recommendations on how to confront the challenges to employment and how to structure the practice of law for attorneys with disabilities.<sup>31</sup> This poll of California attorneys highlighted the challenges that lawyers with disabilities continue to face, including “unemployment, refusal and resistance to reasonable accommodation requests, a shortage of services, and a surplus of skepticism.”<sup>32</sup> The poll found that the attorneys’ disabilities included mobility impairments, manual dexterity, and psychological disabilities.<sup>33</sup> Almost half of the respondents believed that they were denied employment opportunities because of their disability.<sup>34</sup> The problem was reportedly more severe among attorneys whose disabilities were visible.<sup>35</sup>

The poll also revealed that attorneys with non-apparent disabilities were more willing to reveal their disability to co-workers than to the court or to opposing counsel.<sup>36</sup> It may be the case that bias is perceived to be lessened as an attorney becomes more comfortable around co-workers and when an attorney’s ability rather than his or her disability is the focus of the

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30. *See id.*

31. STATE BAR OF CALIFORNIA COMMITTEE ON LEGAL PROFESSIONALS WITH DISABILITIES, CHALLENGES TO EMPLOYMENT AND THE PRACTICE OF LAW CONTINUE TO FACE ATTORNEYS WITH DISABILITIES, RESULTS OF A 2003 ONLINE POLL OF CALIFORNIA ATTORNEYS WITH DISABILITIES (Dec. 4, 2004), [http://hum.wa.gov/documents/disability%20documents/2004\\_Attorneys-with-Disabilities-Report-Exec-Sum.pdf](http://hum.wa.gov/documents/disability%20documents/2004_Attorneys-with-Disabilities-Report-Exec-Sum.pdf) [hereinafter POLL OF CALIFORNIA ATTORNEYS].

32. *Id.* at 1. One hundred fifty attorneys responded to the online survey, which included inquiries on the nature and impact of disability, barriers to practice, and demographics of respondents. *Id.* at 3. It is noted that twenty-eight percent of respondents were in solo practice, twenty percent in government, fifteen percent in small firms, ten percent in public interest, five percent in medium firms, three percent in large firms, and twelve percent unemployed. *Id.* at 13.

33. *See id.* at 4. Examples of psychological disabilities include major depression, bipolar disorder, anxiety disorder, schizophrenia, and personality disorders. *Id.*

34. *Id.* at 5 (noting that forty-five percent of the respondents claimed that they had been denied employment opportunities).

35. *See id.* at 28 (reporting that sixty-eight percent of attorneys with visible disabilities were denied employment-related opportunities due to their disability).

36. *See id.* at 5 (finding that disabilities were revealed to co-workers, supervisors, and clients more often than to opposing counsel, bar exam administrators, and the court).

discussion. The stigma of a disability is reduced as the attorney becomes more comfortable with those around him or her.<sup>37</sup> An attorney with a disability may believe, rightly or wrongly, that disclosing the disability to opposing counsel, often during an adversarial relationship, will be used to the advantage of the opposing counsel. The stigma and discrimination that exists is even more likely felt during the heat of battle of contested litigation, when the adversarial relationship is most heightened.

Lawyers with disabilities who sought reasonable accommodations from their employer reported experiencing refusal or resistance to such accommodations at work, in the courtroom, and while meeting with opposing counsel.<sup>38</sup> Examples of the ways in which attorneys with disabilities were not reasonably accommodated included a lack of patience for disabled attorneys, lack of accessible court facilities, lack of technology in the courthouse, derogatory comments made by judges in open court, and refusal of opposing counsel to provide accommodations during depositions.<sup>39</sup>

The California poll revealed a variety of barriers encountered by disabled attorneys, ranging from physical barriers in court and in their law offices to vision-related and hearing-related communications barriers.<sup>40</sup> As a result of this ambitious report, the State Bar of California made several recommendations that were approved by the State Bar Board of Governors.<sup>41</sup> One of the recommendations included that "law firms need to be educated about the advantage of hiring attorneys with disabilities and about the value of building successful partnerships between law firms and legal professionals with disabilities."<sup>42</sup>

As more lawyers with disabilities enter the workforce, judges, opposing counsel, and adverse parties to litigation will see the benefits of working with and hiring disabled individuals and will hopefully participate in providing the necessary reasonable accommodations that these attorneys require. Opening the doors to allow attorneys with disabilities equal opportunity to participate in the legal profession, thereby benefiting society, will

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37. *See id.* at 9.

38. *Id.* (finding the highest incidence of refusal or resistance to providing reasonable accommodation in a legal employment setting (twenty-four percent) and in court hearings (twenty-one percent)).

39. *Id.*

40. *See id.* at 10–13 (noting that other examples include barriers due to unaccommodating opposing counsel and inaccessible bar examination venues).

41. *See id.* at 15–17.

42. *Id.* at 38.

break barriers and eliminate the stigma attached to persons with disabilities.

Increasing numbers of students with physical and mental disabilities are attending and graduating from colleges and universities.<sup>43</sup> The poll of California attorneys encourages the California State Bar to partner with law schools in order to recruit individuals with disabilities to attend law school.<sup>44</sup> In addition to making improvements to the recruitment process, the partnership should provide support to law students with disabilities in law school and throughout the bar examination process, which will result in more people with disabilities entering the legal profession.<sup>45</sup> The time is now for the legal profession to recognize its unique opportunity to be at the forefront in opening doors to persons with disabilities. The legal profession and the clients it serves will be forever benefited by the willingness of legal employers to expand opportunities and reasonable accommodations to lawyers with disabilities.

### III. ABA National Conference on the Employment of Lawyers with Disabilities

The American Bar Association recently announced in its annual report that one of its major goals is to promote full and equal participation in the legal profession by lawyers with disabilities.<sup>46</sup> This report states "[w]e have taken significant steps in making our profession more open to women, to persons of color and to those who come from racially and ethnically diverse backgrounds. We must now take similar first steps on behalf of lawyers with disabilities."<sup>47</sup> Some of the disabilities that were discussed include mental illness, learning impairments, and substance abuse problems.<sup>48</sup> This report found that the most pressing needs of lawyers with disabilities were twofold: reasonable accommodations assistance and job creation for lawyers with disabilities.<sup>49</sup> The report also recognized a significant hurdle in this complex issue: while there are as many

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43. See Stone, *supra* note 4, at 20 (discussing law schools' provisions concerning reasonable accommodations for students with learning disabilities).

44. See POLL OF CALIFORNIA ATTORNEYS, *supra* note 31, at 17.

45. See *generally id.* (finding that only four percent of the California bar membership is composed of attorneys with disabilities, while 17.4 percent of the state's population has a disability).

46. ABA REPORT, *supra* note 12, at 1.

47. *Id.* at v.

48. See *id.* at 2.

49. See *id.* at 3.

as fifty million persons with disabilities within the general population, "there is a paucity of lawyers with disabilities in the profession."<sup>50</sup> The report explains that because reasonable accommodations are either unavailable or inadequate in higher education, law offices, and courthouses, individuals with disabilities are not provided with adequate opportunities to participate in the legal profession.<sup>51</sup> As the report indicates, the combination of a dearth of employment opportunities in the legal profession and the lack of available and effective reasonable accommodations is of significant concern for the ABA. Another weighty issue is that discrimination is still present against lawyers with disabilities, as it is experienced by persons with disabilities in other areas of the community, including housing, transportation, and access to public places.<sup>52</sup>

An interesting and rather controversial observation of the report is that people with disabilities typically face the greatest levels of discrimination from private law firms—precisely those employers who are most capable of funding reasonable accommodations.<sup>53</sup> The ABA report postulates that the discrimination seen from private law firms that possess the financial resources to make reasonable accommodations is due to a lack of "commitment, priorities, and basic understanding."<sup>54</sup> The more that individual law firms provide accommodations to their lawyers with disabilities, the greater the likelihood that other law firms will see the benefits and possibilities, and do the same. The incremental change in the culture of law firms, leading to real improvement in the lives of lawyers with disabilities, should be the hope and goal of the profession upon entering the twenty-first century.

The report provides examples of reasonable accommodations for attorneys, including: architecturally accessible workplaces; job restructuring; part-time or modified work schedules; unpaid leave; modified equipment (e.g., telecommunications devices for the deaf); modified workplace policies; alternative format training materials (Braille or large print); qualified readers or sign language interpreters; telework; changed methods of supervision;

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50. *Id.* at 4.

51. *See id.*

52. *See* 42 U.S.C. § 12101(a)(9) (2000) (finding that discrimination is an ongoing problem for people with disabilities).

53. *See* ABA REPORT, *supra* note 12, at 12.

54. *Id.*

and reassignment to a vacant position.<sup>55</sup>

The ABA report recommends that for law firms, the necessary starting point for change is the senior and managing partners' commitment to the goal of hiring and retaining lawyers with disabilities.<sup>56</sup> Hiring decisions by respected attorneys send a message of inclusiveness that is best demonstrated by welcoming lawyers with disabilities inside the front door.

The report made recommendations for legal employers during the application and hiring process, and in the workplace. They include: appointing a diversity representative on the firm's management committee; including people with disabilities as part of the equal opportunity language in the job announcements; asking questions in the interview process that bring out the candidate's strengths first and focus on the essential functions of the position; developing a work environment that is supportive and productive for all lawyers; incorporating flexible work arrangements and flexible hours; prorating billable hours; establishing a policy that allows lawyers to work from home; providing diversity training, creating an active mentor program; and, creating a centralized fund to pay for all reasonable accommodations.<sup>57</sup>

The report contains many examples of embracing diversity in a way that includes lawyers with disabilities within the legal profession. The report speaks not only to law firms and disabled lawyers, but also to law students,<sup>58</sup> law schools,<sup>59</sup> and the legal profession at large.<sup>60</sup>

#### **IV. The United States Equal Employment Opportunity Commission's Reasonable Accommodations for Attorneys with Disabilities**

##### *A. The EEOC Fact Sheet*

With disabled lawyers becoming more and more visible in the field of law, the Equal Employment Opportunity Commission (EEOC) issued a fact sheet to dispel the myth that attorneys with

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55. *Id.* at 50.

56. *See id.* at 56.

57. *Id.* at 61-62.

58. *Id.* at 65 (encouraging mentor programs).

59. *Id.* at 66 (encouraging employment opportunities for law students with disabilities).

60. *Id.* at 65 (suggesting that a study should be conducted that investigates how many lawyers with disabilities are in the legal profession).

disabilities who require reasonable accommodations are less competent or less productive than attorneys without disabilities.<sup>61</sup> Yet lawyers with disabilities still identify the lack of access to reasonable accommodations as a barrier to employment.<sup>62</sup> Providing reasonable accommodations for qualified attorneys with disabilities also serves the larger goal of enabling legal employers to diversify their workplace.<sup>63</sup> The EEOC fact sheet recognizes that “most accommodations can be provided at little or no cost.”<sup>64</sup> It is noted that the disabled lawyer should request the reasonable accommodations, thereby taking the first step in the process by having a conversation with his or her employer.<sup>65</sup> Such a request should be made in a timely manner to avoid an adverse impact on job performance, discipline, or termination based on poor performance or conduct.<sup>66</sup> The interactive conversations between disabled attorneys and employers should center on the nature of the disability and why a reasonable accommodation is needed.<sup>67</sup> The EEOC fact sheet provides common examples of reasonable accommodations for attorneys.<sup>68</sup>

The EEOC fact sheet acknowledges that employers are not required to remove an essential function of a job, noting that an attorney with a disability must be able to perform the essential functions of the position, with or without reasonable accommodation.<sup>69</sup> Employers are not required to lower or eliminate production standards for essential functions, change an attorney’s supervisor, or withhold discipline warranted by poor performance or conduct.<sup>70</sup>

The EEOC fact sheet encourages a quick response from

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61. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REASONABLE ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES (2006), <http://www.eeoc.gov/facts/accommodations-attorneys.html> [hereinafter EEOC, REASONABLE ACCOMMODATIONS] (addressing the application of reasonable accommodations under the ADA to disabled lawyers and their employers).

62. *See id.*

63. *See id.*

64. *Id.*

65. *See id.*

66. *Id.*

67. *See id.*

68. *Id.* (listing examples of reasonable accommodations); *see also* 42 U.S.C. § 12111(9) (1991) (same); 29 C.F.R. § 1630.2(o)(2) (2008) (same).

69. EEOC, REASONABLE ACCOMMODATIONS, *supra* note 61 (listing examples of essential functions of an attorney, including conducting legal research, writing motions and briefs, counseling clients, presenting an argument before an appellate court, and conducting depositions and trials).

70. *See id.* (noting that the employer also is not required to provide personal use items, such as wheelchairs or hearing aids).

management to a request for a reasonable accommodation and permits management to choose between reasonable accommodations, as long as the chosen accommodation is effective in eliminating the workplace barrier.<sup>71</sup> The employer may be required to provide more than one accommodation if necessary to remove the barrier.<sup>72</sup> The EEOC permits an employer not to provide a specific form of accommodation "if it will cause 'undue hardship', i.e. significant difficulty or expense."<sup>73</sup> However, "employers cannot base an undue hardship decision on the fears, prejudices, or preferences of clients or the public."<sup>74</sup>

The EEOC publication is a significant and positive step towards including the disabled lawyer in the legal profession and expanding diversity by opening doors to lawyers with disabilities.

### B. A Reasonable Accommodations Case

In the case of *Lyons v. Legal Aid Society*,<sup>75</sup> a lawyer with a physical disability requested that her employer accommodate her by providing a parking space near her place of employment.<sup>76</sup> Beth Lyons sought this accommodation from the Criminal Defense Division of Legal Aid (Legal Aid), whose office was located in lower Manhattan.<sup>77</sup> The Legal Aid Society raised the claim that the requested accommodation was unreasonable as a matter of law.<sup>78</sup> The court noted that the question of whether it is a reasonable accommodation to provide parking to a disabled employee would depend on factors such as employer's geographic location and

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71. See *id.*

72. See *id.*

73. *Id.* (citations omitted) (explaining that whether an employer would suffer undue hardship is determined on a case by case basis, considering factors such as: the nature and cost of the accommodation needed; the overall financial resources of the facility making the reasonable accommodation; the number of employees at the facility; the size, type and location of the facility; the type of operation of the employer; and the impact of the accommodation on the operation of the facility); see also 42 U.S.C. § 12111(10) (detailing factors in the undue hardship determination); 29 C.F.R. § 1630.2(p) (discussing undue hardship).

74. EEOC, REASONABLE ACCOMMODATIONS, *supra* note 61.

75. *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512 (2d Cir. 1995).

76. *Id.* at 1512. For a comprehensive discussion on parking for the disabled, see Donald H. Stone, *You Take My Space, I Take Your Air: An Empirical Study of Disabled Parking and Motor Vehicle Laws For Persons With Disabilities*, 33 OHIO N. U. L. REV. 665 (2007).

77. *Lyons*, 68 F.3d at 1516 (noting that Lyons could not fulfill her responsibilities as a staff attorney at Legal Aid without being able to park her car adjacent to her office).

78. See *id.* (noting that the Legal Aid Society claimed that the parking was unwarranted preferential treatment, amounting to a matter of personal convenience).

financial resources.<sup>79</sup> The determination of reasonableness, noted the court, depends on a common sense balancing of the costs and benefits to both the employer and the employee.<sup>80</sup> The obligations to provide a disabled lawyer with accommodations at work will likely be more expansive for private law firms with significant resources than for organizations with fewer resources such as legal aid societies or public defenders' offices.<sup>81</sup>

The *Lyons* court acknowledged that there is nothing inherently unreasonable in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work.<sup>82</sup> The court found that the district court erred in dismissing Lyons' complaint.<sup>83</sup> It is unlikely, however, that Legal Aid would be required to provide the parking space because of the organization's financial limitations.<sup>84</sup> If Lyons had demanded the same from a large private law firm with significantly greater resources, the court would most likely have required the firm to provide the requested accommodation.

### C. Challenges of Billable Hours

The financial implication of billable hours for the attorney with a disability is of profound importance. The disabled lawyer may require the reasonable accommodation of additional time to complete a task. Will the law firm absorb the additional hours, will the resulting increased costs be passed on to the client, or will the disabled attorney be compensated at a lower hourly rate when additional time is provided?

This situation presents a challenge that many law firms may not be willing to face. If the firm hires an individual with a learning disability who received accommodations in law school, such as additional time to complete an exam, is it reasonable for the firm to similarly accommodate that person by granting additional time to complete assignments? In a field where

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79. *Id.*

80. *Id.* at 1516–17.

81. See 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2 (p)(2) (noting that the ADA permits different outcomes on requests for reasonable accommodations, depending on the financial cost to and financial resources of the employer).

82. *Lyons*, 68 F.3d at 1517.

83. *Id.*

84. See 29 C.F.R. § 1630.9(a) (noting that providing a reasonable accommodation is not required if an employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business, and defining undue hardship as "significant difficulty or expense incurred by a covered entity").

efficient use of one's time is essential, the less than efficient lawyer may confront this unfortunate barrier to the firm's willingness to hire a lawyer with a learning disability.

The immediate past president of the ABA, Michael S. Greco, hosted the inaugural National Conference on the Employment of Lawyers with Disabilities, from which the ABA report discussed earlier was derived.<sup>85</sup> His suggestion when it comes to this volatile area is that billable hours should be prorated or billed directly to the firm.<sup>86</sup> An employer, however, is not required to lower its billable hours standard nor is an employer required to grant the attorney additional time to complete tasks.<sup>87</sup> If the firm is committed to diversifying, however, there are alternative accommodations that are being considered, such as less demanding or less time-sensitive cases.<sup>88</sup> A firm should view a disabled attorney as it might view a junior associate who is a recent law school graduate. Both probably require more time than a senior partner does to complete tasks, but the junior associate likely does not face the same discrimination as the associate with the learning disability. If law firms reframe the way they view disabilities, they may be more willing to hire a disabled lawyer.

In fact, the disabled lawyer who requires additional time to complete certain tasks may demonstrate other talents and provide skills that a non-disabled lawyer does not possess. For example, a disabled attorney may possess superior judgment and an ability to work well in a team, characteristics which should be acknowledged for leading to a cooperative atmosphere at work. An attorney's ability to cultivate and bring in new clients, which benefits the firm, also may not relate to a lawyer's disability. If a disabled lawyer lacks the capacity to complete a task in a timely manner, this should be balanced against the lawyer's skill in bringing in new clients and his or her intellect and interpersonal skills. A firm may require less billable hours to be produced by a disabled lawyer if he or she brings other skills and talents to the firm.

If a firm chooses to value the skills mentioned above, then the firm should give credit to lawyers who possess those skills. Additionally, high intellect as well as talents such as bringing out

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85. See Michael S. Greco, *Forgotten Colleagues*, 17 *Experience* 31 (2007); see also ABA REPORT, *supra* note 12.

86. Greco, *supra* note 85, at 32.

87. See EEOC, REASONABLE ACCOMMODATIONS, *supra* note 61; Symposium, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks*, 15 *AM. U. J. GENDER SOC. POL'Y & L.* 881, 895-96 (2007).

88. See *infra* Part IX tbl. 2 (summarizing accommodations that law firms provide).

the best in co-counsel should not be underestimated. Furthermore, a firm may consider other options, such as paying the disabled lawyer a salary based on the lower number hours he or she bills, while permitting the disabled lawyer additional time to complete a task, thus lowering the expected number of billable hours but compensating at the same rate as a non-disabled lawyer. These accommodations, despite their financial implications to the firm, may be reasonable, especially for the larger firms with sufficient financial resources and a sufficient number of employees to compensate for the accommodation provided.

To diversify the profession and encourage and welcome disabled lawyers, law firms can do three things. First, and most importantly, they can simply absorb the cost of reasonable accommodations. Second, they can reward lawyers in ways other than meeting certain billable hour requirements. Third, and less desirably, they can grant the disabled attorney additional time to complete tasks but compensate him or her at a lower salary. This last option should only be available if other accommodations have been explored and deemed either unreasonable or financially burdensome.

## V. A Lawyer's Professional Responsibilities

A lawyer is an advocate of clients, an officer of the court, as well as a citizen with a special responsibility to uphold a high quality of justice.<sup>89</sup> This special responsibility demands that a lawyer be "competent, prompt, and diligent" in his or her practice.<sup>90</sup> This higher standard should be considered and evaluated in situations where a lawyer with a disability seeks entry into the legal profession.

A lawyer's duty to provide competent representation to a client "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."<sup>91</sup> "A newly admitted lawyer can be as competent as a practitioner with long experience. . . . Competent representation can also be provided through the association of a lawyer of established competence in the field in question."<sup>92</sup> For both the new lawyer and the disabled lawyer, interaction with other capable lawyers is often what is needed to provide competent representation. Acknowledging when an attorney needs assistance in legal

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89. MODEL RULES OF PROF'L CONDUCT pmb1. (2002).

90. *Id.*

91. *Id.* at R. 1.1.

92. *Id.* at R. 1.1 cmt. 2.

representation is important to reach the goal of including more disabled lawyers in the profession.

The lawyer with a disability may require reasonable accommodations such as additional time to complete an assigned task. The Model Rules of Professional Conduct state that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>93</sup> A delay in time may adversely affect a client’s interest. For example, “when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.”<sup>94</sup> Unreasonable delay by an attorney can “undermine confidence in the lawyer’s trustworthiness.”<sup>95</sup> Therefore, a lawyer with a disability should be particularly careful to not take on more cases than he can reasonably handle, or alternatively ensure that he associates himself with co-counsel who can provide assistance.

A lawyer with a disability should also be mindful of either declining or terminating representation when the disability causes him or her to be unable to represent a client competently.<sup>96</sup> The Model Rules of Professional Conduct require that a lawyer must not represent a client or withdraw from representation “if the representation will result in violation of the rules of professional conduct.”<sup>97</sup> When a “lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client,” the lawyer must withdraw from representation.<sup>98</sup>

#### A. *Misconduct*

There are several instances when a lawyer’s disability may be a factor leading to misconduct and possible disciplinary proceedings. The Model Rules of Professional Conduct define professional misconduct to include “conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>99</sup> There are many examples of illegal conduct that suggest that an individual is unfit to practice law, such as violent criminal behavior or involvement with illegal drugs.<sup>100</sup>

In one court case, an attorney’s drug and alcohol addiction

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93. *Id.* at R. 1.3.

94. *Id.* at R. 1.3 cmt. 3.

95. *Id.*

96. *See id.* at R. 1.16.

97. *Id.* at R. 1.16(a)(1).

98. *Id.* at R. 1.16(a)(2).

99. *Id.* at R. 8.4.

100. *Id.* at R. 8.4 cmt. 2 (addressing the distinction between illegal conduct reflecting adversely on an attorney’s fitness to practice law and other offenses carrying no such implications).

caused him to misappropriate his client's funds.<sup>101</sup> The court acknowledged that the misconduct was attributed to alcohol addiction, which presented circumstances sufficient to warrant sanctions less severe than disbarment.<sup>102</sup> The court was willing to view this misconduct in a different light, as the addiction was, to a substantial extent, responsible for the conduct of the attorney.<sup>103</sup> Although not excusing the lawyer's dishonesty, the court recognized that the mitigating factor of substance abuse was causally connected to the misdeed and sufficiently exculpatory to warrant a less severe sanction.<sup>104</sup>

Courts are willing to permit attorneys with substance abuse addiction who commit misconduct to seek reinstatement upon showing rehabilitation.<sup>105</sup> In one such case, the court viewed an attorney's misconduct of misappropriating funds differently because of his alcoholism.<sup>106</sup> The court suspended the attorney for thirty days, imposed counseling and active membership in Alcoholics Anonymous, and required him to associate with a practicing attorney who monitored his activities as an attorney.<sup>107</sup> The mentor or co-counsel model for attorneys with substance abuse addiction is a fair and equitable solution to situations such as this.

In another instance, Gary Mandel, an attorney who was addicted to pain killers and forged prescriptions, was not disbarred because his criminal conduct was induced by his addiction to the medication.<sup>108</sup> The court was persuaded that the misconduct was a result of the lawyer's addiction to pain medication rather than an intent to harm others.<sup>109</sup> Hence, the court held that disbarment was not warranted, and a lesser sanction of supervision was imposed.<sup>110</sup> Courts appear to have been persuaded by the compelling argument that the disability of substance abuse is a mitigating circumstance.

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101. *Att'y Grievance Comm'n of Md. v. Miller*, 483 A.2d 1281, 1283 (Md. 1984).

102. *Id.* at 1290.

103. *See id.*

104. *See id.*

105. *See Att'y Grievance Comm'n of Md. v. Aler*, 483 A.2d 56 (Md. 1984) (noting that when alcoholism is the cause of attorney misconduct, the misconduct must be viewed with respect to the attorney's chemical dependency).

106. *See id.* at 61.

107. *Id.*

108. *Att'y Grievance Comm'n of Md. v. Mandel*, 557 A.2d 1329, 1331 (Md. 1989).

109. *Id.* at 1330 (explaining that because the attorney forged the pain medication prescriptions to avoid the pain of withdrawal, the court was persuaded that the addiction to pain medicine led to the criminal action).

110. *Id.* at 1331.

Another Maryland court demonstrated a judicial willingness to not disbar an attorney with alcohol or drug addiction if he received rehabilitative counseling and agreed to be monitored by another practicing lawyer.<sup>111</sup> Zach Nichols was found to have committed misconduct as a result of his alcoholism, and therefore incompetent to practice law.<sup>112</sup> He was suspended, but permitted to be reinstated pending proof of successful completion of counseling and a willingness to be associated with another member of the bar who monitored his activities as a practicing lawyer.<sup>113</sup>

The idea that courts view a lawyer's misconduct in a different light, if alcoholism is the cause of a lawyer's misconduct, was seen again in another case in Maryland.<sup>114</sup> Although Arthur Joseph Reid's license was suspended indefinitely, the court noted in his case that the focus shifts to questions of rehabilitation and the imposition of conditions to protect the public, if the lawyer is allowed to resume practice and if the cause of the misconduct is, to a substantial extent, alcoholism.<sup>115</sup> The court noted that when a lawyer's misconduct is caused by alcoholism, drug addiction, or a mental disorder, the usual sanction is indefinite suspension rather than disbarment.<sup>116</sup>

In certain cases, however, courts have been unwilling to make the connection between an attorney's disability and his misconduct.<sup>117</sup> The District of Columbia Court of Appeals came to this conclusion in the case of Matthew Marshall, an attorney addicted to cocaine.<sup>118</sup> The court, referencing the ADA, found that in order for the attorney to avail himself of the protections of the ADA, he needed to show he is a qualified individual with a disability.<sup>119</sup> The court found that Marshall was not qualified to

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111. See *Att'y Grievance Comm'n of Md. v. Nichols*, 482 A.2d 499 (Md. 1984); see also *In re Hogan*, 490 N.E.2d 1280 (Ill. 1986) (declining to disbar an attorney who filed incomprehensible pleadings, and instead ordering the preparation of a plan designed to remedy the attorney's disability).

112. *Nichols*, 482 A.2d at 500.

113. *Id.*

114. See *Att'y Grievance Comm'n of Md. v. Reid*, 521 A.2d 743 (Md. 1987).

115. *Id.* at 745-46.

116. *Id.* at 746; see also *Att'y Grievance Comm'n of Md. v. Cappell*, 886 A.2d 112, 113-14 (Md. 2005) (discussing a conditional diversion program).

117. See, e.g., *In re Marshall*, 762 A.2d 530 (D.C. 2000) (holding that Marshall, an attorney with a cocaine addiction, was disbarred due to his misconduct).

118. *Id.* at 540.

119. *Id.* at 539 (noting that a qualified individual is an individual with a disability who, with or without reasonable modifications, meets the essential requirements of being a lawyer).

be a member of the bar because he committed serious misconduct, and no reasonable modifications were possible.<sup>120</sup> The court was not persuaded that the lawyer's wrongdoing was mitigated under the ADA, despite the fact that the individual had been diagnosed as a person with drug addiction and had claimed that his misconduct was caused by this disability.<sup>121</sup> A more flexible approach to drug addiction, with sanctions other than disbarment, was suggested by the court's dissenting judge.<sup>122</sup> Chief Judge Wagner proposed requiring rehabilitative treatment and monitoring, a more enlightened approach to addressing this complex issue.<sup>123</sup>

### *B. Responsibilities of Managing Partners*

Partners in a law firm and managing attorneys may be held responsible for the actions of the lawyers within their firm.<sup>124</sup> The Model Rules of Professional Conduct state that it is the responsibility of partners, managers, and supervising lawyers to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform" to these rules.<sup>125</sup> Lawyers with knowledge of specific misconduct who have direct supervisory authority are required to take reasonable remedial action to prevent violations of the Model Rules of Professional Conduct.<sup>126</sup> A supervising attorney is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.<sup>127</sup> This responsibility is significant in situations in which lawyers with disabilities, such as substance abuse, commit misconduct. There is a safety net in place to protect the interests of clients, but at the same time there is an added burden of responsibility placed on the supervising or managing attorney. Whether the result is a greater willingness to hire lawyers with disabilities may depend on the amount of risk that a law firm is

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120. *Id.*

121. *Id.* at 540.

122. *Id.* at 541 (Wagner, C.J., dissenting).

123. *See id.*

124. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1.

125. *Id.* (noting that such responsibilities include establishing internal policies and procedures designed to promote compliance with the Model Rules of Professional Conduct).

126. *See id.* (stating that the rule applies to lawyers who have managerial authority over the professional work of the firm).

127. *See id.* (noting that whether a lawyer has supervisory authority in particular circumstances is a question of fact).

willing to take in any given situation.

### C. *Conditional Admission to the Bar*

The ABA recently adopted a model rule that will grant conditional admission to people who apply to the bar who have experienced chemical dependency or other mental illness that would have otherwise rendered them unfit to practice law.<sup>128</sup> Based on rules already in place in nineteen states and Puerto Rico, the new model rule allows conditional admission to people who can demonstrate recent successful rehabilitation or treatment.<sup>129</sup> According to the Honorable Robert Childers, Chair of the Commission on Lawyer Assistance Programs, the rule is only to be used when there is a “concern about the ability [of an applicant] to sustain their recovery, given the stress of practice.”<sup>130</sup> State bar authorities are given the discretion of whether to adopt the rule,<sup>131</sup> and also of whether or not the lawyer’s conditional admittance should be available as public knowledge.<sup>132</sup> Supporters believe that the rule will encourage people to seek help who previously would not have, for fear that their mental illness or substance abuse issues would preclude them from being admitted to the bar.<sup>133</sup>

A disabled lawyer admitted on a conditional basis may have a variety of requirements imposed by the state bar authorities, including “meet[ing] monthly with a trained monitor, attend[ing] weekly support meetings, and undergo[ing] randomized testing.”<sup>134</sup> Although such a license requirement may pose a hardship on the disabled lawyer, such barriers may outweigh the alternative of license denial. The ABA rule allowing conditional admission to the bar promotes the meritorious goal of encouraging diversity within the legal profession by including more lawyers with disabilities. The conditional license should be in place for a fixed period of time when a disabled lawyer is less capable of

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128. Edward A. Adams, *ABA OKs Conditional Admission to Bar for Would-Be Lawyers with Addiction, Mental Problems*, A.B.A.J., Feb. 11, 2008, available at [http://www.abajournal.com/news/aba\\_oks\\_conditional\\_admission\\_to\\_bar/](http://www.abajournal.com/news/aba_oks_conditional_admission_to_bar/).

129. *Id.*

130. *Id.* (alteration in original).

131. *Id.* (noting that the ABA “measure is advisory only; bar admission authorities in individual states must adopt it for it to take effect”).

132. *Id.*

133. *Id.*

134. ABAnet.org, Model Rule on Conditional Admission to the Bar: What It Means, Next Steps (Apr. 2008), <http://www.abanet.org/media/youraba/200804/article08.html>.

fulfilling the responsibilities of the legal profession, and such conditions should be removed upon a demonstration that the disabled lawyer is fit to practice law alone. Although the potential for conditional admission to the bar is a step in the right direction for lawyers with these types of disabilities, there are additional strategies that law firms can promote that may benefit the conditionally admitted lawyer. These strategies include requiring the conditionally admitted attorney to attend Alcoholics Anonymous or Narcotics Anonymous, practice with other attorneys, represent clients with the assistance of co-counsel, attend mental health counseling, and be compliant in taking necessary medications.

## VI. Select Court Decisions Discussing Reasonable Accommodations

Lawyers with learning disabilities, entering the profession often face obstacles in the bar examination process. In *Bartlett v. New York State Board of Law Examiners*,<sup>135</sup> Marilyn Bartlett won a nine-year battle to obtain reasonable accommodations in taking the New York State Bar Examination.<sup>136</sup> By requesting accommodations in order to effectively compete on the bar examination, lawyers like Bartlett are testing the legal profession's response to disabilities in the workplace.

Bartlett, a woman with dyslexia, fought to take the New York Bar Exam with extended time and a computer to accommodate her learning disability.<sup>137</sup> The court analyzed the essential functions of a lawyer in order to determine the reasonable accommodations to provide on the bar exam.<sup>138</sup> The court determined that if Bartlett's learning "disability prevents her from competing on a level playing field with other bar examination applicants, then her disability has implicated the major life activity of working . . ."<sup>139</sup>

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135. *Bartlett v. New York State Bd. Of Law Exam'rs*, No. 93 Civ. 4986, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001).

136. *Id.* at \*148 (finding that the plaintiff was entitled to "injunctive relief in the form of reasonable accommodations on the bar examination" because she demonstrated that she was disabled under the ADA); *see also* Docket, *Bartlett v. N.Y. State Bd. Of Law Exam'rs*, No. 93 Civ. 4986, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. Aug. 15, 2001) (No. 1:93cv04986) (showing that Bartlett first brought her case to the United States District Court of the Southern District of New York in 1993, though the final decision was not made until 2001).

137. *Bartlett*, 2001 U.S. Dist. LEXIS 11926, at \*3 & n.4.

138. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1126-28 (S.D.N.Y. 1997), *aff'd in part, vacated in part*, 156 F.3d 321 (2nd Cir. 1998), *vacated*, 527 U.S. 1031 (1999).

139. *Bartlett*, 2001 U.S. Dist. LEXIS 11926 at \*143 (citing *Bartlett*, 970 F. Supp.

The court was convinced that her dyslexia substantially limited her ability to work, and that she was an individual with a disability protected under the ADA.<sup>140</sup> The *Bartlett* court concluded that Marilyn Bartlett was “substantially limited in the major life activity of reading when compared to most people,” and “substantially limited in the major life activity of working because . . . her reading impairment [was] a substantial factor in her failing the bar examination.”<sup>141</sup> The court awarded injunctive relief and ordered the following reasonable accommodations on the New York State Bar Exam: “(1) double the normally allotted time, spread over four days; (2) use of a computer; (3) permission to circle multiple choice answers in the examination book; and (4) large print on both the New York State and Multistate Bar Examinations.”<sup>142</sup> The clear and comprehensive requirements spelled out by the *Bartlett* court move the discussion into the workplace arena. How law firms respond to the requests and demands of lawyers with disabilities will determine to what extent diversity in the workplace will include individuals with disabilities.

In *Spinella v. Town of Paris Zoning Board of Appeals*,<sup>143</sup> a disabled lawyer with a visual impairment received reasonable accommodations, in the form of twice the usual time for motion responses, orders, and other documents with time requirements.<sup>144</sup> In this extraordinary case, Spinella demonstrated that as a result of his disability, it took him “twice as long to write and read and absorb material as a non-disabled attorney.”<sup>145</sup> The court recognized that with accommodations he could perform the essential functions of a lawyer, extending the workplace to the courtroom and court system.<sup>146</sup> The lawyer’s “visual impairment

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at 1121) (explaining that because the court viewed the bar examination as an employment test, without the opportunity to compete fairly on the exam, Bartlett would be precluded from potential employment in the field); see generally Stone, *supra* note 5 (providing a comprehensive discussion of the bar exam).

140. *Bartlett*, 2001 U.S. Dist. LEXIS 11926 at \*147-48.

141. *Id.* at \*165.

142. *Id.* at \*148 (citing *Bartlett*, 970 F. Supp. at 1146-47, 1153).

143. *Spinella v. Town of Paris Zoning Bd. of Appeals*, 752 N.Y.S.2d 795 (N.Y. Sup. Ct. 2002).

144. *Id.* at 797-99 (explaining that the disabled lawyer received reasonable accommodations in law school and on the bar examination).

145. *Id.* at 797; cf. *United States v. Jones*, 102 F. Supp. 2d 1083 (E.D. Ark. 2000) (granting an attorney recovering from ear surgery a five-week continuance rather than the requested three-month continuance as a reasonable accommodation from court).

146. *Spinella*, 752 N.Y.S.2d at 798 (finding that with accommodations, the disabled lawyer, a qualified individual with a disability, could perform the essential

is good cause for the failure to meet the time requirements” of the court rules.<sup>147</sup> Extending this viewpoint further to employers of disabled lawyers has seen mixed results.

In *Riley v. Fry*,<sup>148</sup> an Illinois court heard the claim of an attorney who worked as an assistant public defender and was terminated for failure to perform the essential functions of the job.<sup>149</sup> The pain from her physical disability interfered with her ability to walk, talk, and concentrate.<sup>150</sup> In this rather extreme case, in which the disabled lawyer’s physical disability caused her to be unable to work, the court refused to “protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.”<sup>151</sup> The court correctly acknowledged that she could not be permitted to remain employed in the job yet not be required to regularly perform the job.<sup>152</sup>

The causal connection between a lawyer’s disability and subsequent misconduct is necessary to persuade an attorney disciplinary board to not suspend or disbar the attorney.<sup>153</sup> Proving this causal link for mental disabilities is a particular challenge for lawyers appearing before disciplinary boards. In the case of *In re Eckberg*,<sup>154</sup> the attorney’s anxiety disorder brought him before the state hearing board, which issued conditions on the attorney’s continued practice of law.<sup>155</sup> The board imposed conditions that included continuous counseling, despite the finding that David Eckberg was not incapable of competently practicing law.<sup>156</sup> The court, however, found it unnecessary to impose burdensome conditions on a disabled lawyer who established regular attendance at a treatment program and practiced law

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functions of the job).

147. *Id.* at 799.

148. *Riley v. Fry*, No. 98 C 7584, 2000 U.S. Dist. LEXIS 14541 (N.D. Ill. Oct. 3, 2000).

149. *Id.* at \*1, \*17–20.

150. *Id.* at \*2.

151. *Id.* at \*18 (citing *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999)) (noting that regular attendance in court was an essential function of an assistant public defender); *cf. Doe v. Att’y Discipline Bd.*, No. 95-1259, 1996 U.S. App. LEXIS 5727 (6th Cir. Feb. 22, 1996) (finding that no reasonable accommodations could permit a lawyer with a heart condition and Attention Deficit Disorder to practice law).

152. *Riley*, 2000 U.S. Dist. LEXIS 14541, at \*21.

153. *See, e.g., People v. Reynolds*, 933 P.2d 1295, 1304–05 (Colo. 1997).

154. *In re Eckberg*, 733 N.E.2d 1244 (Ill. 2000).

155. *Id.* at 1246.

156. *Id.* at 1251 (noting that the attorney regularly attended counseling, pledged to continue treatment, and had continued to practice law since 1996 without complaint).

without incident for several years.<sup>157</sup>

In *People v. Goldstein*,<sup>158</sup> the Colorado Supreme Court heard the appeal of a Colorado attorney with a mental illness who had unsuccessfully argued before the attorney disciplinary hearing board that disciplining an attorney for conduct caused by a mental disability was discriminatory and prohibited by the ADA.<sup>159</sup> The court rejected Goldstein's claim, finding that his mental disability did not cause the misconduct of failing to file court papers on behalf of a client nor of falsifying a judge's signature.<sup>160</sup>

In another Colorado case, a lawyer with depression faced discipline due to chronic neglect of his clients.<sup>161</sup> The court found that the ADA did not prevent the court from disciplining an attorney who suffered from depression if such mental illness had not directly caused that attorney's misconduct.<sup>162</sup>

Likewise, in *Doe v. Attorney Discipline Board*,<sup>163</sup> a lawyer with Adult Attention Deficit Disorder was suspended from practicing law.<sup>164</sup> The court concluded that the attorney was not suspended as a result of his disability, but because he continuously "breached the most basic duties of an attorney . . ."<sup>165</sup> The court found no reasonable accommodation that could allow him to perform the essential requirements of practicing law, noting that the ADA does not require that a lawyer be held "to a lesser standard of conduct than any other attorney."<sup>166</sup>

Those attorneys who commit misconduct, for example by mishandling client funds or by failing to complete work on a client's case, usually face disbarment or suspension.<sup>167</sup> In light of

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157. *See id.* at 1254.

158. *People v. Goldstein*, 887 P.2d 634 (Colo. 1994).

159. *Id.* at 638 n.2; *see also id.* at 638 n.1 (explaining that the lawyer was treated for success neurosis, a condition whereby a patient unwillingly and unconsciously repeats patterns jeopardizing success in a patient's life).

160. *Id.* The Supreme Court of Colorado affirmed the decision of the disciplinary hearing board, but on other grounds, as the issue did not properly come before the court on appeal. *Id.* at 638 n. 2.

161. *People v. Reynolds*, 933 P.2d 1295, 1305 (Colo. 1997).

162. *Id.* at 1304-05.

163. *Doe v. Att'y Discipline Bd.*, No. 95-1259, 1996 U.S. App. LEXIS 5727 (6th Cir. Feb. 22, 1996).

164. *Id.* at \*3-4.

165. *Id.* at \*8.

166. *Id.*

167. *See, e.g., In re Sullivan*, 530 A.2d 1115 (Del. 1987) (holding that an attorney should be disbarred for misappropriating funds, and other violations); *Attorney Grievance Comm'n of Md. v. Draper*, 514 A.2d 1212 (Md. 1986) (holding that an incompetent attorney should be put on inactive status); *In re Disability of Diamondstone*, 105 P.3d 1 (Wash. 2005) (holding that an attorney who had

some courts' overwhelming priority to protect the public, those courts may be reluctant to punish attorneys with mental illnesses with sanctions less than disbarment if they are unable or unfit to practice law.<sup>168</sup>

## VII. Attorneys With Disabilities Survey: Data Analysis

### A. General Findings

The Attorneys with Disabilities Survey<sup>169</sup> (Stone Survey) questioned the hiring and managing partners of fifty law firms across the nation in order to solicit their opinions on disabled lawyers entering the legal profession.<sup>170</sup> Additional comments were also requested from survey participants, with the goal of providing a better understanding of the hiring decisions and challenges in accommodating lawyers with physical or mental disabilities.

Over half the firms surveyed employed a disabled attorney.<sup>171</sup> The lawyers possessed a variety of physical or mental disabilities, including diabetes, mental illness, substance abuse, hearing loss, mobility impairment, and learning disabilities.<sup>172</sup> The most common disabilities identified by respondents included diabetes, mobility, psychological/mental illness, and substance abuse.<sup>173</sup>

The Stone Survey reported that firms provided numerous

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committed various acts of misconduct should be put in disability inactive status); *In re Campbell*, 21 P.3d 1147 (Wash. 2001) (holding that an attorney found to be mentally incompetent should be placed on disability inactive status); *In re Meade*, 693 P.2d 713 (Wash. 1985) (holding that an attorney found to be mentally incompetent should be placed on inactive status).

168. See *Slaten v. State Bar of Cal.*, 757 P.2d 1, 11 (Cal. 1988).

169. Stone, Survey, *supra* note 25.

170. See Stone, Results, *supra* note 26, at Question 2 (indicating that the law firms ranged in size from as small as two attorneys to as large as over one thousand attorneys and that the surveyed firms collectively employed approximately 3,156 lawyers); *id.* at Question 1 (noting that the law firms were located in California, the District of Columbia, Illinois, Louisiana, Maryland, Missouri, Texas, New York, and Virginia).

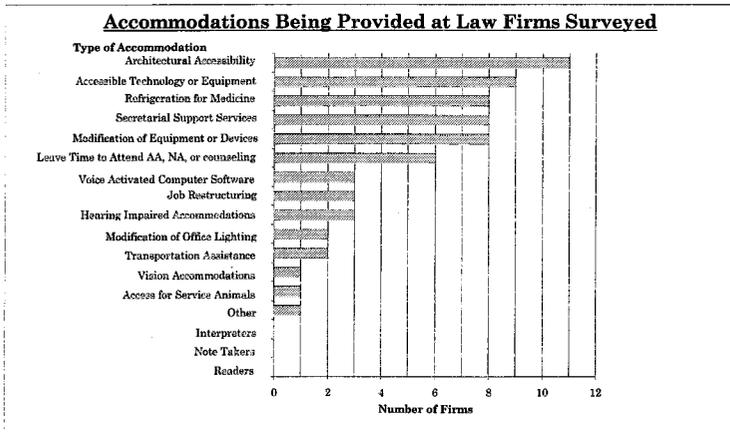
171. See *id.* at Question 3 (indicating that twenty-eight out of fifty firms surveyed reported employing attorneys with disabilities, accounting for approximately sixty-two to eighty-nine individuals).

172. *Id.* The results also indicate that lawyers had other disabilities, such as cancer, lupus, vision loss, and epilepsy. *Id.*

173. See *id.* at Question 3. The survey used ranges for hiring partners to identify how many attorneys with each category of disability they employed. *Id.* The total number of attorneys identified in the survey as having each type of disability were as follows: diabetes, 15–24; epilepsy, 1; hearing, 5; HIV/AIDS, 2–5; learning disability, 3; manual dexterity, 3; mobility, 7–10; psychological/mental illness, 10–16; respiratory, 1; speech, none; substance abuse, 7–10; vision, 4–7; other, 4. *Id.*

reasonable accommodations to disabled lawyers in order to permit them to perform the essential functions of their job,<sup>174</sup> as required by the ADA.<sup>175</sup> The most common forms of accommodation reported included modification of work schedule, architectural accessibility, accessible technology, accessible technology, additional secretarial support, and modification of equipment.<sup>176</sup>

As is evidenced by the results of the Stone Survey, as illustrated in Table 1, law firms are providing significant accommodations that allow disabled lawyers to perform the essential functions of their jobs. Employers demonstrate flexibility by modifying work schedules and providing additional secretarial support. Financial outlay and flexibility are often necessary elements in order to welcome disabled lawyers and afford them an opportunity to succeed.



**Table 1: Results from Question 4 from the Stone Survey<sup>177</sup>**

*B. Lawyers with Learning Disabilities*

The Stone Survey further inquired into the provision of reasonable accommodations specific to a lawyer with learning

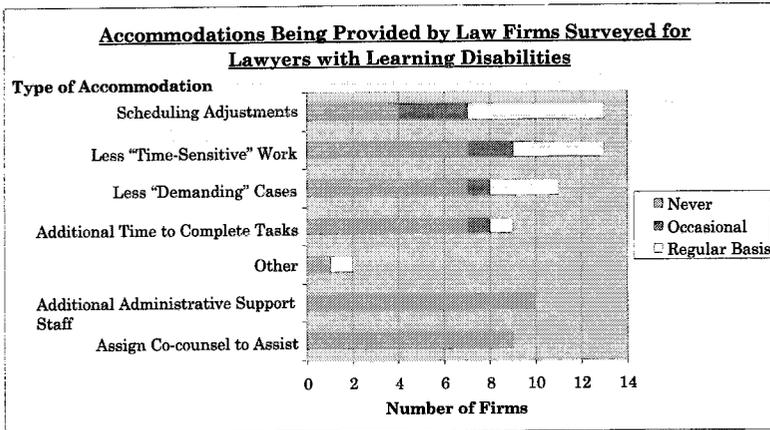
174. See *id.* at Question 4.

175. See 29 C.F.R. § 1630.2 (2008) (“Qualified individual with a disability means an individual with a disability who[,] . . . with or without reasonable accommodation, can perform the essential functions of such position.”).

176. See Stone, Results, *supra* note 26, at Question 4. The results also indicate that firms provided other accommodations, such as leave time and job restructuring. *Id.*

177. *Id.*

disabilities.<sup>178</sup> An individual with a learning disability<sup>179</sup> employed as a lawyer presents unique challenges in the high pressure and often time sensitive arena of a private law firm. Examples of reasonable accommodations provided on a regular basis to lawyers with learning disabilities, as summarized in Table 2, include: allowing additional time to complete tasks; assigning less demanding cases; assigning less time sensitive work; and providing scheduling adjustments.<sup>180</sup>



**Table 2: Results from Question 5 from the Stone Survey<sup>181</sup>**

One respondent to the Stone Survey commented, “[w]e had one attorney [sic], who has since left the firm, who needed reading and other special accommodations. We had an expert assess her needs and provided for them. She agreed with the accommodations.”<sup>182</sup> An honest relationship between employer and employee can greatly aid in providing accommodations that are satisfactory to both parties.

One of the challenges for law firms in providing meaningful accommodations to lawyers with learning disabilities is to avoid the perception of special treatment or lowered expectations. When a firm provides additional time or less demanding cases, other

178. Stone, Survey, *supra* note 25, at Question 5.

179. See 20 U.S.C. §1401(30)(a) (Supp. 2005) (defining “[S]pecific learning disability” as a disorder involving understanding or using language, which “may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations”).

180. Stone, Results, *supra* note 26, at Question 5.

181. *Id.*

182. *Id.*

attorneys may complain of unfair treatment. However, lawyers with learning disabilities may contribute other strengths and skills that compensate for their need to be given additional time to complete a task. For example, lawyers with disabilities might bring strong interpersonal skills, high intellect, extremely high motivation, and tenacity to the workforce. The disabled lawyer's strengths could be recognized by the firm to avoid the perception of favoritism. In order to fully recognize the strengths and skills of a disabled lawyer, law firms first need to level the playing field by providing reasonable accommodations to that lawyer as well.

In an era when lawyers with disabilities continue to experience discrimination and prejudice,<sup>183</sup> the moral dilemma of when to disclose a learning disability to a hiring partner in a law firm is highlighted in the Stone Survey.<sup>184</sup> Employers at law firms were asked when they expect disclosure: at the initial job interview; at the time the job has been offered; or after employment commences.<sup>185</sup> The ADA clearly prohibits "inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."<sup>186</sup> The ADA does permit "preemployment inquiries into the ability of an applicant to perform job-related functions."<sup>187</sup>

According to the results of the Stone Survey, as seen in Table 3, a majority of those surveyed indicated that lawyers with learning disabilities in need of reasonable accommodations should self-identify their disability at the initial job interview.<sup>188</sup> All of the respondents indicated that a learning disability should be disclosed at some point.<sup>189</sup> The comments of survey respondents indicated a range of opinions on when the disability should be disclosed, from "[s]ometime during the interview process," to "[w]henever they think they will not be able to perform the essential functions of their job," to "when it becomes an issue."<sup>190</sup> One respondent to the survey commented that each request should be "evaluated on a case by case basis, however, it is important to be sure reasonable accommodations are feasible and in place before an employee commences work."<sup>191</sup> The interview process

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183. See *supra* Part VI.

184. See Stone, Results, *supra* note 26, at Question 6.

185. *Id.*

186. 42 U.S.C. § 12112(d)(2)(A) (2000).

187. *Id.* § 12112(d)(2)(B).

188. See Stone, Results, *supra* note 26, at Question 6.

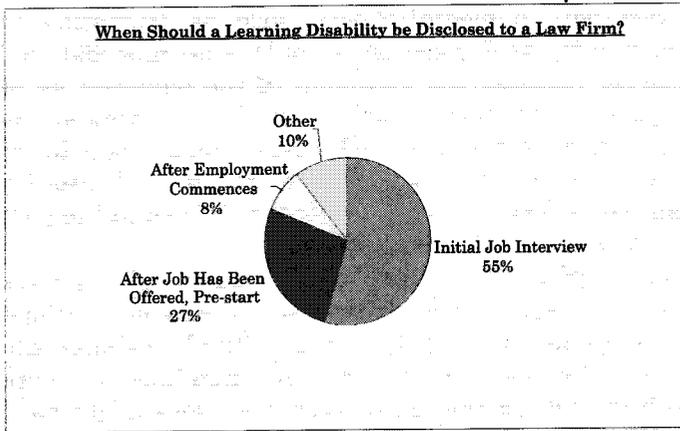
189. See *id.*

190. *Id.*

191. *Id.*

may be viewed as an opportunity for a lawyer with a learning disability to explain how he was successful in law school or other settings after receiving reasonable accommodations.

Placing the discussion of reasonable accommodations after a job offer is extended, but before employment commences, is a fair way to protect against discrimination. Doing so also ensures that a lawyer with a learning disability will have reasonable accommodations in place to level the playing field and promote an atmosphere of success.



**Table 3: Results from Question 6 from the Stone Survey<sup>192</sup>**

In *Doe v. Judicial Nominating Commission*,<sup>193</sup> an attorney sued the Commission alleging that some of the questions on the job application for judicial appointment required the applicant to disclose information on his or her physical and mental health in violation of the ADA.<sup>194</sup> Examples of questions on the application included:

Have you ever been treated for or suffered from any form of mental illness? . . . Have you been treated for or suffered from any form of emotional disorder or disturbance or otherwise been treated by psychologists, psychiatrists or other mental health care professionals, in the last five years? . . . Have you ever been addicted to or dependent upon alcoholic beverages or

<sup>192.</sup> *Id.*

<sup>193.</sup> *Doe v. Judicial Nominating Comm'n for the Fifteenth Judicial Circuit of Fla.*, 906 F. Supp. 1534 (S.D. Fla. 1995).

<sup>194.</sup> *Id.* at 1536.

any other drug?<sup>195</sup>

The court found that questions such as these in the initial application were overinclusive, lacking reasonable time restrictions, and forced the disclosure of information which was not necessary to protect the public.<sup>196</sup>

Employment inquiries related to a person's disability should be severely limited to questions that relate to one's ability to perform the job. Inquiries as to one's disability status, however, should be strictly prohibited.

### C. *Lawyers with a Mental Illness*

The lawyer with a mental illness, such as depression or bipolar disorder, may be in need of reasonable accommodations. The Stone Survey revealed the viewpoint of the employer as to whether a particular accommodation would be viewed as reasonable, as seen in Table 4.<sup>197</sup> The most common examples of reasonable accommodations for a lawyer with a mental disorder include: permit short-term leave, reduce schedule from full to part time status, and assign less stressful work.<sup>198</sup>

Employers differ in their understanding of whether accommodations for mental disabilities are reasonable.<sup>199</sup> While some survey respondents said that they would evaluate the situation on a case-by-case basis, many commented that they were concerned with the impact that such accommodations might have on the client.<sup>200</sup> Respondents were unwilling to compromise the quality of the services that they provide in order to accommodate a disabled attorney.<sup>201</sup> One attorney commented:

Practicing law is itself very stressful. It's difficult to conceptualize who [sic] you could make this more accommodating. Some practices are more than others (E.g., litigation vs. real estate); but in all areas, there is NO room for errors, which might subject the individual or the firm to the ever increasing malpractice claims. I do think that once an issue with an attorney is identified, the firm has a responsibility to accommodate both as a requirement of law under the ADA and equally as important, to avoid malpractice claims. The real question for lawyers with mental disabilities is whether they can perform the job with or without

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195. *Id.* at 1537 (citation omitted).

196. *Id.* at 1544-45.

197. Stone, Results, *supra* note 26, at Question 7.

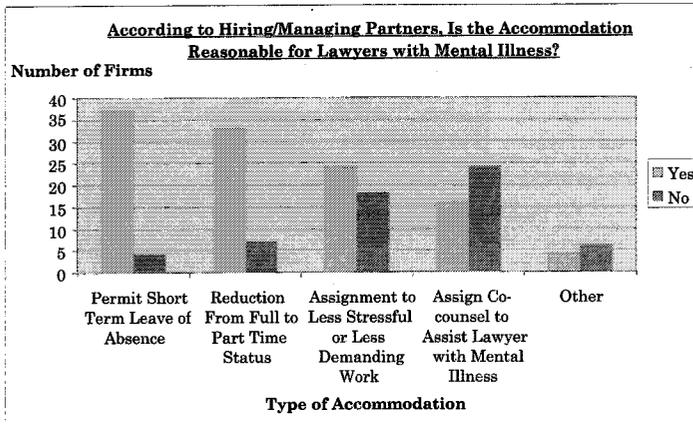
198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

acomodation [sic]. If the answer to that is that they must always be “supervised” by another attorney, I think the short answer there is no.<sup>202</sup>



**Table 4: Results from Question 7 from the Stone Survey<sup>203</sup>**

Based on the survey respondents' comments, it appears that some firms that have employed lawyers with mental illness in the past have managed to find a working solution. One firm indicated that “[o]n a short-term basis (eg [sic] for about a year period) we have provided a reduced case load and paid time off to an attorney with psychological disorder.”<sup>204</sup> That same respondent, however, added, “[o]n a long-term basis, however, a lawyer with a severe psychological disorder would unlikely be able to meet the requisite standard of care and thus not be ‘fit’ under our ethical guidelines.”<sup>205</sup> Although many lawyers with mental disorders can function in the employment arena without any reasonable accommodations provided, when a situation arises whereby a leave of absence or reduction in work schedule becomes necessary, it is encouraging to see that some law firms appear willing to be flexible and open-minded, as summarized in Table 5.<sup>206</sup>

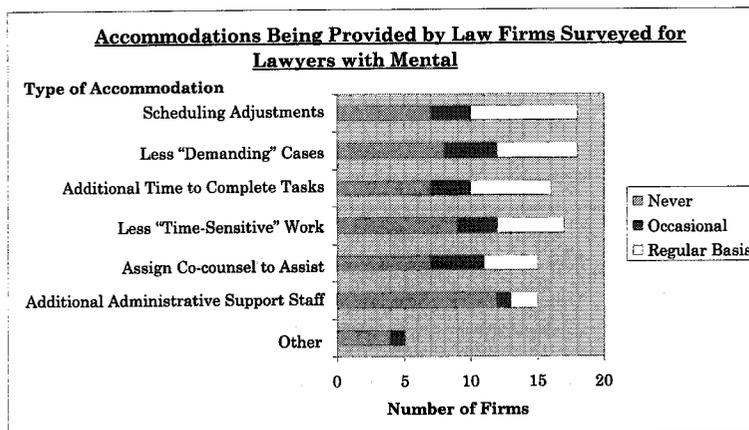
202. *Id.*

203. *Id.*

204. *Id.* at Question 8.

205. *Id.*

206. *See id.*



**Table 5: Results from Question 8 from the Stone Survey<sup>207</sup>**

In *Shaver v. Wolske & Blue*,<sup>208</sup> the court faced the issue of what reasonable accommodations a law firm must provide to a lawyer with major depression.<sup>209</sup> Shaver was provided with three weeks of vacation, but was still unable to return to work after an episode of depression.<sup>210</sup> When he attempted to contact his office, Shaver was told that the managing partners refused to talk to him.<sup>211</sup> Shaver made several more attempts to meet with the firm's partners but was never given the opportunity.<sup>212</sup> After Shaver's wife explained his condition and his need for additional time off to the partners, they told Shaver to take the time he needed to get well.<sup>213</sup> Despite this comment, Shaver was eventually terminated.<sup>214</sup> Shaver brought suit alleging handicap discrimination, failure to make reasonable accommodations, and wrongful discharge.<sup>215</sup> The court stated that his wife's explanation of the condition could be equivalent to an accommodation request and that "once an employee requests an accommodation, an employer is obligated to participate in the interactive process of seeking an accommodation."<sup>216</sup>

207. *Id.*

208. *Shaver v. Wolske & Blue*, 742 N.E.2d 164 (Ohio Ct. App. 2000).

209. *Id.* at 168.

210. *Id.* at 177.

211. *Id.* at 169.

212. *Id.* at 169-70.

213. *Id.*

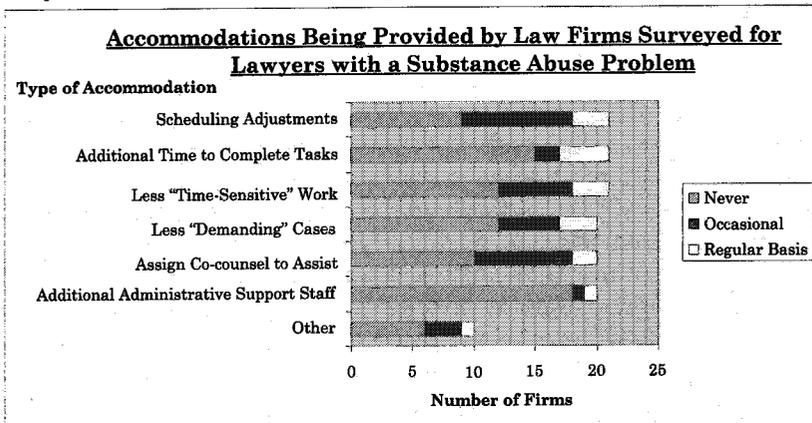
214. *Id.* at 170.

215. *Id.* at 167.

216. *Id.* at 175 (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 314 (3d Cir. 1999)).

#### D. Lawyers with a Substance Abuse Problem

Although alcohol and drug addiction are considered disabilities, law firms appear less willing to provide the reasonable accommodations of additional administrative support, additional time to complete tasks, scheduling adjustments, assigning co-counsel, or assigning less demanding cases to attorneys suffering from substance abuse, as seen in Tables 6 and 7.<sup>217</sup> Many employers responded that they had never had to face the issue of an attorney with substance abuse, but those that have dealt with this issue mentioned supporting treatment and giving the attorney time off.<sup>218</sup> An analysis of the results of the Stone Survey, as seen in Table 7, indicates a stronger preference for providing accommodations to the lawyer with a mental illness than to a lawyer with a substance abuse problem.<sup>219</sup>



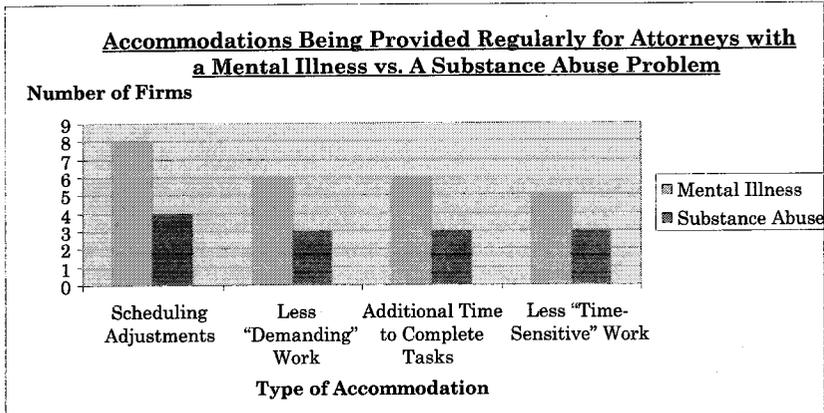
**Table 6: Results from Question 9 from the Stone Survey<sup>220</sup>**

217. Compare Stone, Results, *supra* note 26, at Question 9 with *id.* at Question 8.

218. See *id.* at Question 9.

219. Compare *id.* at Question 8, with *id.* at Question 9.

220. *Id.* at Question 9.



**Table 7: Comparison of Results from Questions 8 & 9 from the Stone Survey<sup>221</sup>**

The survey respondents' comments, as summarized in Table 8, reveal that for the attorney with an alcohol or drug problem, the course of action in addressing the situation is more likely to be a temporary leave of absence, as reported by sixty-three percent of the respondents, than a reduction to part-time status, as reported by only fourteen percent of respondents.<sup>222</sup> The reaction of the employer to the attorney with a substance abuse problem reveals that employers are more willing to accommodate and permit continued employment for the mentally ill lawyer than the lawyer with an addiction.<sup>223</sup> This might be attributed to the fact that society may be more understanding of mental illness than it is of alcohol and drug addiction. It may be that an attorney with a mental illness can still handle the essential functions of the job with reasonable accommodations, while an attorney with a substance abuse problem may be unable to do so. At least, that is the perception of the survey respondents.<sup>224</sup>

When asked what action a firm would take upon learning that an attorney had a substance abuse problem, the most frequent response was to encourage that attorney to enter counseling or a treatment program.<sup>225</sup> This response reflects the point often expressed in court decisions that the disabled lawyer

221. Compare *id.* at Question 8, with *id.* at Question 9.

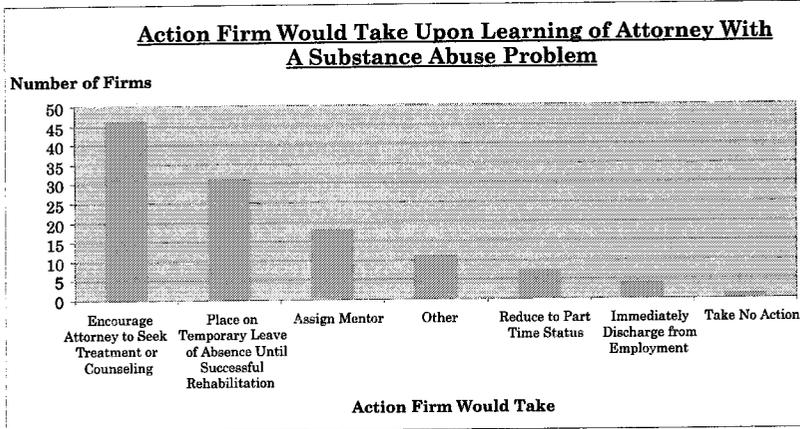
222. See *id.* at Question 10.

223. Compare *id.* at Question 8, with *id.* at Question 9.

224. Compare *id.* at Question 8, with *id.* at Question 9.

225. *Id.* at Question 10; see *infra* tbl.8.

should take action to address the disability.<sup>226</sup> It is promising that only four of the law firms responding to the survey would immediately discharge a lawyer diagnosed with a substance abuse problem.<sup>227</sup>



**Table 8: Results from Question 10 from the Stone Survey<sup>228</sup>**

Almost half of the respondents commented on Question 10 of the Stone Survey,<sup>229</sup> which asked participants about the actions that their firm might take upon learning of an attorney with a substance abuse problem.<sup>230</sup> Many of the comments said that this question is heavily dependent upon the circumstances.<sup>231</sup> One attorney responded, “[m]y firm would likely support that lawyer in his/her efforts to eliminate the problem, but only so long as the lawyer was likewise using his/her own best, and successful, efforts to end the problem.”<sup>232</sup>

## Conclusion

The purpose of the ADA is to eliminate discrimination against persons with physical and mental disabilities.<sup>233</sup> A

226. See, e.g., *In re Eckberg*, 733 N.E.2d 1244, 1254 (Ill. 2000) (noting that it was unnecessary to impose burdensome conditions on a disabled lawyer who established regular attendance at treatment).

227. Stone, Results, *supra* note 26, at Question 10.

228. See *id.*

229. See *id.*

230. Stone, Survey, *supra* note 25, at Question 10.

231. See Stone, Results, *supra* note 26, at Question 10.

232. *Id.*

233. 42 U.S.C. § 12101(b)(1) (2000).

primary way to accomplish this goal is to encourage the inclusion of disabled individuals in mainstream American society. Integration should start in elementary and secondary schools. Disabled students who successfully navigate the educational system and pursue a legal education often receive reasonable accommodations in their educational programs that level the playing field and permit opportunities for success.

Disabled law graduates who have passed the bar examination and bar application process are knocking on the door of law firms seeking employment. Encouraging law firms to hire and offer reasonable accommodations to disabled lawyers should be the cornerstone of the disability movement within the legal profession. Disabled lawyers have a wide spectrum of skills and abilities, and will flourish if, and only if, law firms are willing to provide a welcome mat for disabled attorneys, by exhibiting flexibility and open-mindedness to these attorneys. The success that disabled students have shown will expand with an increase in the hiring by law firms of individuals with disabilities. The goals of the ADA in fulfilling the American dream will be a reality. All of us will be watching our nation's law firms take the lead.

**Recommendations:**

- 1) Encourage law schools to accept and provide reasonable accommodations to disabled students.
- 2) Encourage bar admission and licensing boards to be flexible in accommodating disabled lawyers.
- 3) Encourage legal employers to offer reasonable accommodations to disabled lawyers.
- 4) Demonstrate to the court system that disabled lawyers can perform essential functions of the job.
- 5) Encourage flexibility among employers, asking them to provide scheduling adjustments, time off for counseling, mentor systems, supportive aids or secretaries and job restructuring.
- 6) Encourage employers to make all reasonable efforts to compensate the disabled lawyer who requires additional time to complete certain tasks at the same rate as a non-disabled lawyer, by either providing additional support services or co-counsel, or by recognizing other skills and talents of the disabled lawyer that are not readily seen in the billable hour system.
- 7) Support the ABA's recent recommendation of granting conditional admission to lawyers who experience

substance abuse issues or mental illnesses and are in the process of demonstrating successful rehabilitation or treatment.

**APPENDIX A****ATTORNEYS WITH DISABILITIES SURVEY**

Donald Stone

1. In what state do you practice law?
  
2. How many lawyers are currently employed in your firm?
  - \_\_\_ 1
  - \_\_\_ 2-9
  - \_\_\_ 10-24
  - \_\_\_ 25-49
  - \_\_\_ 50-99
  - \_\_\_ 100-149
  - \_\_\_ 150-249
  - \_\_\_ 250-999
  - \_\_\_ 1000 or more

3. Are you aware of any attorneys currently employed in your firm with the following disabilities? (Please indicate the number of attorneys with the following disabilities)

	0	1	2-5	6-10	11 or more
Diabetes					
Epilepsy					
Hearing					
HIV/AIDS					
Learning Disability					
Manual Dexterity					
Mobility					
Psychological/Mental Illness					
Respiratory					
Speech					
Substance Abuse (Alcohol or Drug Addiction)					
Vision					
Other					
Other (Please Specify)					

4. Are you aware of any of the following reasonable accommodations (modifications or adjustments) being provided to a disabled lawyer at your law firm? (Check all that apply)

- Access for service animals
- Accessible technology or equipment
- Accommodations for hearing impaired
- Accommodations for visually impaired
- Architectural accessibility to access the law firm (physical barrier)
- Interpreters
- Job restructuring
- Leave time to attend AA, NA, or counseling sessions
- Modification of equipment or devices
- Modification of office lighting
- Modification of work schedule
- Note takers
- Readers
- Secretarial support services
- Transportation assistance
- Voice activated computer software
- Working refrigeration for people on medicine
- Other

Comments:

5. For lawyers with learning disabilities, several challenges may be presented to provide reasonable accommodations. Which of the following have been provided by your law firm?

Never	Occasional	Regular Basis	N/A
	(once/year)	(weekly)	

Additional admin.  
support staff

Additional time  
to complete tasks

Assign co-counsel to assist

Less "demanding" cases

Less "time sensitive" work

Scheduling adjustments

Other

Comments:

6. Some lawyers with learning disabilities feel uncomfortable disclosing their disability due to confidentiality and privacy concerns. At which point do you believe a lawyer with a learning disability in need of reasonable accommodations should self-identify their disability[?] (check one)

- Initial job interview
  - After job has been offered, pre-start
  - After employment commences
  - Never
  - Other
- Comments:

7. For lawyers with mental illness or psychological disorders (such as major depression or bipolar disorder), do you believe the following would be considered reasonable accommodations by your law firm? (Check Yes or No)

- |  | Yes | No |
|--|-----|----|
| Assign co-counsel to assist lawyer with mental illness |     |    |
| Assignment to less stressful or less demanding work    |     |    |
| Permit short term leave of absence                     |     |    |
| Reduction from full to part time status                |     |    |
| Other  |     |    |
- Comments:

8. For lawyers with mental illness or psychological disorders, several challenges may be presented to provide reasonable accommodations. Which of the following have been provided by your law firm?

- |                                   | Never | Occasional<br>(once/year) | Regular Basis<br>(weekly) | N/A |
|-----------------------------------|-------|---------------------------|---------------------------|-----|
| Additional Admin. support staff   |       |                           |                           |     |
| Additional time to complete tasks |       |                           |                           |     |
| Assign co-counsel to assist       |       |                           |                           |     |
| Less "demanding" cases            |       |                           |                           |     |

Less "time sensitive" work  
 Scheduling adjustments  
 Other  
 Comments:

9. For lawyers with substance abuse (alcohol or drug addiction), several challenges may be presented to provide reasonable accommodations. Which of the following have been provided by your law firm?

	Never	Occasional (once/year)	Regular Basis (weekly)	N/A
Additional Admin. support staff				
Additional time to complete tasks				
Assign co-counsel to assist				
Less "demanding" cases				
Less "time sensitive" work				
Scheduling adjustments				
Other				
Comments:				

10. If you were informed that a lawyer in your law firm was diagnosed with alcoholism or substance abuse, what would you (your firm) do? (Choose all that apply)

- Assign mentor
  - Encourage attorney to seek treatment or counseling
  - Immediately discharge from employment
  - Place on temporary leave of absence until successful rehabilitation
  - Reduce to part time status
  - Take no action
  - Other
- Comments: