EMBRACING INVISIBLE DISABILITIES – ENDING THE SILENCE OF SHAME

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Embracing Invisible Disabilities – Ending the Silence of Shame

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Speakers:

Julie Ann Giamonna, Ferber Law, APC | Patanisha E. Davis, Key Counsel, P.C.
Michelle R. Ferber, Ferber Law, APC | Sally Noma, Noma Law Firm APC
Alexandra P. Saddik, Ferber Law, APC

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Elect to learn

Contra Costa County Bar Association

Sally Noma

A self-professed "Subro Nerd," Ms. Noma is both passionate about, and deeply experienced in property insurance subrogation matters. Ms. Noma leads strategy alignment, depositions, and communications at the highest levels of subrogation litigation.

Prior to the PG&E bankruptcy of 2018, she led discovery for the Subrogation Plaintiffs in key aspects of the landmark 2017 North Bay Fires litigation, which totaled more than $10 billion in insured losses.

Since 2016, she has been rated as AV Preeminent by Martindale-Hubbell, the highest rating for an attorney for both ethical standards and legal ability. Ms. Noma has been an insurance professional since before she was an attorney. She served as a claims adjuster, and then as an Education Consultant, where she trained employees in Department of Insurance policies, procedures, and coverage provisions.

Patanisha Davis

Patanisha E. Davis, Esq. is an attorney and author of Barren, But Not Broken: A Guide from Infertility to Adoption. She is a native of Oakland, California. Patanisha's name means reconciler of differences and that is exactly what she does in her career. Patanisha is currently employed as a Partner with Key Counsel, P.C. Her primary practice areas are in Probate, Guardianships, Conservatorships, Civil Litigation and Adoption. Patanisha has a Bachelor of Arts Degree in Psychology from Historic Tuskegee University, Master of Arts in Organizational Psychology/Change Leadership from California School of Professional Psychology. She was a professor at her Law School Alma Matter, John F. Kennedy University, where she taught Legal Methods. Patanisha also teaches high school students trial skills in a summer program with the California Youth Development League (CYDL).

Patanisha is known to manifest the impossible and works diligently to raise money for scholarship for students attending law school and undergraduate school. Patanisha is very involved with in her community. She currently serves on the board for the California Women Lawyers (CWL) as an Affiliate Governor and Chair of the Diversity Committee; Contra Costa Bar Association Women Section as the Past President, Program Coordinator of the East County Section, and a member of the Bar Associations Diversity Committee. Patanisha's publications include: Book "Barren, but Not Broken: A Guide from Infertility to Adoption" and an Article/MCLE Self Study in the Contra Costa Lawyer, July – August 2020 Edition title "Diversity Considerations in the Appointment of Counsel for Conservatees: Unintentional Implicit Bias". Her partner in the firm and in life is Attorney Michael S. Pierson. She is the mother of four wonderful children – Sean, age 16.5; Justice, age 11; Kayla, age 7.5 and Aiden, age 7.5. She enjoys traveling, singing, puzzling, and spending time with her family.

Michelle Ferber

Michelle is an employment and business lawyer, defending employers in actions involving harassment, discrimination, retaliation, wrongful termination, wage and hour violations and business torts. Michelle is a highly skilled trial attorney and regularly appears before various state and federal governmental agencies. Michelle's experience includes jury and bench trials, arbitrations, appellate arguments in both state and federal court and the defense of wage and hour class action lawsuits.

In addition to her litigation practice, Michelle regularly advises clients on employment law issues in the workplace, including the proper handling of termination and discipline decisions, workplace accommodation issues, and leaves of absence. Michelle provides her clients with all the advice and litigation expertise they need to stay current and compliant in the ever-changing landscape of employment laws and regulations, while recognizing the balance of business realities and economics.

Michelle's practice includes representation of clients throughout the state. In February 2016, she joined the firm of Nemecek & Cole as an Of Counsel attorney. Nemecek & Cole is recognized as a preeminent business litigation Southern California law firm. This relationship allows Michelle the flexibility to effectively represent her clients, regardless of geographic location.

Michelle has been recognized as a Northern California Super Lawyer and is AV rated by Martindale-Hubbell, the highest rating possible for both her legal skills and ethical standards. Michelle's client base includes retailers, restaurants, medical and dental providers, trucking and moving companies, contractors, architects, attorneys, and non-profit organizations.

Originally from Southern California, Michelle moved to Danville in 1997. Since that time, she has become involved in both the legal and local community. Michelle is a past officer and member of the Executive Committee of the Board of Directors of the Contra Costa County Bar Association. She was previously recognized as the 2015 "Board Member Extraordinaire." She is a past President of the Contra Costa County Bar Association Employment Section and former Secretary of the Contra Costa County Bar Association's Women's Section. She is a former Vice-President of Beth Chaim Congregation, and was an integral part of the process of building its first permanent home in Danville. Michelle also served at Dougherty Valley High School as its founding attorney mock trial coach and as founding member of its Athletic Boosters Association.

Michelle is a 1987 graduate of California State University, Northridge, where she majored in Journalism and wrote for the college newspaper. She received her J.D. in 1990 from Southwestern University School of Law, receiving various awards for excellence in academics and writing. In law school, Michelle served as an extern for the Honorable Arthur Alarcon of the Ninth Circuit Court of Appeals.

Alexandra Saddik

Alexandra has experience working in both litigation and transactional matters. She is a member of the Contra Costa County Bar Association and active in the Barristers section. She also co-founded and volunteers at The Glass Ball Foundation, a nonprofit dedicated to providing aid for people with chronic illnesses. Alexandra is an active member of the equestrian community, competing in both English dressage and cowboy dressage.

Alexandra graduated summa cum laude from Santa Clara University's Leavey School of Business with a BSc in Economics in 2015. She received her MBA focusing on finance from Santa Clara University's Leavey School of Business in 2018. Alexandra also received her JD with the high technology law certificate from Santa Clara University's School of Law in 2019. While at Santa Clara Law Alexandra served for three years on the High Technology Law Journal, spending two years as an Articles Editor and Managing Editor respectively. She also co-founded and served on the board of the JD/MBA Connection.

Julie Ann Giammona

With almost 30 years of experience representing employers in labor and employment matters, Julie Ann Giammona is a passionate and zealot advocate for business owners. Julie Ann defends employers against wrongful termination, harassment, discrimination and wage and hour issues in state and federal courts, at administrative hearings, and at arbitrations and mediations. Her analytic and strategic mind allows Julie Ann to immediately spot issues and build a comprehensive plan to affect resolution. In addition to defending litigation cases on behalf of employers, Julie Ann also provides advice and counsel to employers regarding leaves of absence, compliance with wage and hour issues, discipline and termination process, drug testing, and workplace violence issues. Because of her compassion and personal investment in her client's experience, Julie Ann quickly establishes trust with clients. Julie Ann believes treating others with dignity, respect, and honesty is the key to a lasting relationship.

Joining Ferber Law as Of Counsel, Julie Ann brings with her years of experience from one of the largest multi-national, global law firms that exclusively represents employers. After leaving the "big firm" atmosphere, Julie Ann opened her own office, continuing in her representation of employers. Julie Ann recently relocated back to the East Bay, her childhood home. She is excited to be a part of the ever-changing landscape of California employment law.

Julie Ann is a member of the Contra Costa County Bar Association and serves as a director for the East County Section. She is also a member of the Brentwood and Antioch Chambers of Commerce. Julie Ann serves as a director on the Northern California Employment Roundtable Board. She is actively involved in health advocacy in her community, often assisting others in obtaining access to critical health care and medication. Education is another love of Julie Ann, and she has spent countless hours assisting families in home schooling their children due to medical illness or crisis.

Julie Ann graduated from California State University, Northridge, Summa cum Laude, in 1984, with a major in Sociology. She received her J.D. from Loyola Law School, Order of the Coif, in 1990.

WHAT IS AN INVISIBLE DISABILITY?

- "Non-visible" "hidden" or "non-apparent" disability that usually goes unnoticed
- Includes: chronic illnesses like Myalgic Encephalomyelitis/Chronic Fatigue Syndrome, multiple sclerosis, autoimmune conditions, fibromyalgia, lung conditions like chronic obstructive pulmonary disease, learning disabilities, anxiety, depression, bipolar disorder, post traumatic stress disorder, and addiction
- Usually presents with remitting and relapsing periods throughout one's life

WHAT IS ABLEISM?

- Discrimination against those whose disability prevents them from behaving in conformance with the expected norm
- Stigmatizes and isolates the person living with the invisible disability
- Ableism is no different than other forms of discrimination, just less acknowledged

HOW CAN WE REMOVE THE BARRIERS?

Educate through conversation - words are important

Remove the culture of silence and shame

Encourage self-advocacy

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Service Animals

The Department of Justice published revised final regulations implementing the Americans with Disabilities Act (ADA) for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010, in the Federal Register. These requirements, or rules, contain updated requirements, including the 2010 Standards for Accessible Design (2010 Standards).

Overview

This publication provides guidance on the term "service animal" and the service animal provisions in the Department's regulations.

- Beginning on March 15, 2011, only dogs are recognized as service animals under titles II and III of the ADA.
- A service animal is a dog that is individually trained to do work or perform tasks for a person with a disability.
- Generally, title II and title III entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go.

How "Service Animal" Is Defined

Service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. Examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack, or performing other duties. Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person's disability. Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.

This definition does not affect or limit the broader definition of "assistance animal" under the Fair Housing Act or the broader definition of "service animal" under the Air Carrier Access Act.

Some State and local laws also define service animal more broadly than the ADA does. Information about such laws can be obtained from the relevant State attorney general's office.

Where Service Animals Are Allowed

Under the ADA, State and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is allowed to go. For example, in a hospital it usually would be inappropriate to exclude a service animal from areas such as patient rooms, clinics, cafeterias, or examination rooms. However, it may be appropriate to exclude a service animal from operating rooms or burn units where the animal's presence may compromise a sterile environment.

Service Animals Must Be Under Control

A service animal must be under the control of its handler. Under the ADA, service animals must be harnessed, leashed, or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe, effective performance of tasks. In that case, the individual must maintain control of the animal through voice, signal, or other effective controls.

Inquiries, Exclusions, Charges, and Other Specific Rules Related to Service Animals

- When it is not obvious what service an animal provides, only limited inquiries are allowed. Staff may ask two questions: (1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.
- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.
- A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the dog is out of control and the handler does not take effective action to control it or (2) the dog is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.
- Establishments that sell or prepare food must generally allow service animals in public areas even if state or local health codes prohibit animals on the premises.
- People with disabilities who use service animals cannot be isolated from other patrons, treated less favorably than other patrons, or charged fees that are not charged to other patrons without animals. In addition, if a business requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals.
- If a business such as a hotel normally charges guests for damage that they cause, a customer with a disability may also be charged for damage caused by himself or his service animal.
- Staff are not required to provide care for or supervision of a service animal.

Miniature Horses

In addition to the provisions about service dogs, the Department's ADA regulations have a separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities. (Miniature horses generally range in height from 24 inches to 34 inches measured to the shoulders and generally weigh between 70 and 100 pounds.) Entities covered by the ADA must modify their policies to permit miniature horses where reasonable. The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility. The assessment factors are (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

For more information about the ADA, please visit our website or call our toll-free number.

ADA Website

www.ADA.gov

To receive e-mail notifications when new ADA information is available,

visit the ADA Website's home page to sign up for email updates.

ADA Information Line

800-514-0301 (Voice) and 800-514-0383 (TTY)

24 hours a day to order publications by mail.

M-W, F 9:30 a.m. – 5:30 p.m., Th 12:30 p.m. – 5:30 p.m. (Eastern Time)

to speak with an ADA Specialist. All calls are confidential.

For persons with disabilities, this publication is available in alternate formats.

Duplication of this document is encouraged.

The Americans with Disabilities Act authorizes the Department of Justice (the Department) to provide technical assistance to individuals and entities that have rights or responsibilities under the Act. This document provides informal guidance to assist you in understanding the ADA and the Department's regulations.

This guidance document is not intended to be a final agency action, has no legally binding effect, and may be rescinded or modified in the Department's complete discretion, in accordance with applicable laws. The Department's guidance documents, including this guidance, do not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent.

Originally issued: July 12, 2011

Last updated: February 24, 2020

Demotion Can Be Reasonable Accommodation Under ADA

By C. Grainger Pierce Jr.
February 10, 2020

An employer properly offered a demotion to an employee with a disability as a reasonable accommodation under the Americans with Disabilities Act (ADA), according to the 7th U.S. Circuit Court of Appeals.

The Marion County, Ind., Sheriff's Department employed the plaintiff as a sworn deputy sheriff. In 2012, the plaintiff severely injured her hand in a car accident while on duty. As a result of the injury, the plaintiff never regained full use of her injured hand.

The sheriff's department assigned the plaintiff light-duty tasks while she underwent treatment. This continued for approximately a year until her doctors indicated that she would never be able to resume her duties as a deputy sheriff.

The sheriff's department then offered the plaintiff three choices: resign, be fired or move to a civilian clerk position. The third option was essentially a demotion and involved a decrease in pay. Given the plaintiff's injury, there were no available vacant positions equivalent to her prior role a deputy.

The plaintiff stated that she wanted to continue working at the sheriff's department and requested some accommodations related to her d period of weeks, the parties discussed accommodations to determine the plaintiff's new role. After observing other workers in various civil the plaintiff accepted employment as a clerk in the jail visitation office.

Following her reassignment, she sued the sheriff's department. The plaintiff claimed that the sheriff's department violated the ADA by dem civilian clerk role when there were better jobs available. The district court dismissed the claim, and the plaintiff appealed.

[SHRM members-only toolkit: Accommodating Employees' Disabilities (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/accommodatingdisabilities.aspx)*]*

The 7th Circuit agreed with the district court and held that a demotion was acceptable when an employee with a disability could not be ac his or her prior job or an equivalent role. The court specifically referenced the U.S. Equal Employment Opportunity Commission's interpreti the issue, stating that "[a]n employer may reassign an individual to a lower graded position if ... there are no vacant equivalent positions fo individual is qualified with or without reasonable accommodation."

Noting that the plaintiff failed to present any evidence that any vacant equivalent positions were available, the court reaffirmed that the AD employer only "to provide a qualified individual with a reasonable accommodation, not the accommodation he would prefer."

Ford v. Marion County Sheriff's Office, 7th Cir., No. 18-3217 (Nov. 15, 2019).

Professional Pointer: This case highlights the importance of carefully documenting discussions about reasonable accommodation. An employer should be able to provide evidence of its analysis of a requested accommodation and possible alternatives, such as other available positions, and the employee's written acceptance of the accommodation.

C. Grainger Pierce Jr. is an attorney with Van Hoy, Reutlinger, Adams & Pierce PLLC, the Worklaw® Network member firm in Charlotte, N.C.

[Visit SHRM's resource page on the Americans with Disabilities Act (www.shrm.org/ResourcesAndTools/Pages/Americans-with-Disabilities-Act.aspx)*.]*

Email Address

CONTACT US (WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX) | 800.283.SHRM (7476)

U.S. Equal Employment Opportunity Commission

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

This guidance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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EEOC-NVTA-2016-11

Concise Display Name:

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

Issue Date:

12-12-2016

General Topics:

ADA/GINA

Summary:

This document provides information on the ADA rights of people with depression, PTSD, and other Mental Health Conditions.

Citation:

ADA, Rehabilitation Act, 29 CFR Part 1630

Document Applicant:

Employees, Applicants, Employers

Previous Revision:

No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

If you have depression, post-traumatic stress disorder (PTSD), or another mental health condition, you are protected against **discrimination** and **harassment** at work because of your condition, you have workplace **privacy** rights, and you may have a legal right to get reasonable **accommodations** that can help you perform and keep your job. The following questions and answers briefly explain these rights, which are provided by the Americans with Disabilities Act (ADA). You may also have additional rights under other laws not discussed here, such as the Family and Medical Leave Act (FMLA) and various medical insurance laws.

1. Is my employer allowed to fire me because I have a mental health condition?

No. It is illegal for an employer to **discriminate** against you simply because you have a mental health condition. This includes firing you, rejecting you for a job or promotion, or forcing you to take leave.

An employer doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a "direct threat" to safety (a significant risk of substantial harm to self or others). But an employer cannot rely on myths or stereotypes about your mental health condition when deciding whether you can perform a job or whether you pose a safety risk. Before an employer can reject you for a job based on your condition, it must have objective evidence that you can't perform your job duties, or that you would create a significant safety risk, even with a reasonable accommodation (see Question 3).

2. Am I allowed to keep my condition private?

In most situations, you can keep your condition private. An employer is only allowed to ask medical questions (including questions about mental health) in four situations:

- When you ask for a reasonable accommodation (see Question 3).
- After it has made you a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions.
- When it is engaging in affirmative action for people with disabilities (such as an employer tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts, or a public sector employer considering whether special hiring rules may apply), in which case you may choose whether to respond.
- On the job, when there is objective evidence that you may be unable to do your job or that you may pose a safety risk because of your condition.

You also may need to discuss your condition to establish eligibility for benefits under other laws, such as the FMLA. If you do talk about your condition, the employer cannot discriminate against you (see Question 5), and it must keep the information confidential, even from co-workers. (If you wish to discuss your condition with coworkers, you may choose to do so.)

3. What if my mental health condition could affect my job performance?

You may have a legal right to a reasonable accommodation that would help you do your job. A reasonable accommodation is some type of change in the way things are normally done at work. Just a few examples of possible accommodations include altered break and work schedules (e.g., scheduling work around therapy appointments), quiet office space or devices that create a quiet work environment, changes in supervisory methods (e.g., written instructions from a supervisor who usually does not provide them), specific shift assignments, and permission to work from home.

You can get a reasonable accommodation for any mental health condition that would, if left untreated, "substantially limit" your ability to concentrate, interact with others, communicate, eat, sleep, care for yourself, regulate your thoughts or emotions, or do any other "major life activity." (You don't need to actually stop treatment to get the accommodation.)

Your condition does not need to be permanent or severe to be "substantially limiting." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. If your symptoms come and go, what matters is how limiting they would be when the symptoms are present. Mental health conditions like major depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify, and many others will qualify as well.

4. How can I get a reasonable accommodation?

Ask for one. Tell a supervisor, HR manager, or other appropriate person that you need a change at work because of a medical condition. You may ask for an accommodation at any time. Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition

or the side effects of medication, it is generally better to get a reasonable accommodation **before** any problems occur or become worse. (Many people choose to wait to ask for accommodation until after they receive a job offer, however, because it's very hard to prove illegal discrimination that takes place before a job offer.) You don't need to have a particular accommodation in mind, but you can ask for something specific.

5. What will happen after I ask for a reasonable accommodation?

Your employer may ask you to put your request in writing, and to generally describe your condition and how it affects your work. The employer also may ask you to submit a letter from your health care provider documenting that you have a mental health condition, and that you need an accommodation because of it. If you do not want the employer to know your specific diagnosis, it may be enough to provide documentation that describes your condition more generally (by stating, for example, that you have an "anxiety disorder"). Your employer also might ask your health care provider whether particular accommodations would meet your needs. You can help your health care provider understand the law of reasonable accommodation by bringing a copy of the EEOC publication The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work to your appointment.

If a reasonable accommodation would help you to do your job, your employer must give you one unless the accommodation involves significant difficulty or expense. If more than one accommodation would work, the employer can choose which one to give you. Your employer can't legally fire you, or refuse to hire or promote you, because you asked for a reasonable accommodation or because you need one. It also cannot charge you for the cost of the accommodation.

6. What if there's no way I can do my regular job, even with an accommodation?

If you can't perform all the essential functions of your job to normal standards and have no paid leave available, you still may be entitled to unpaid leave as a reasonable accommodation if that leave will help you get to a point where you can perform those functions. You may also qualify for leave under the Family and Medical Leave Act, which is enforced by the United States Department of Labor. More information about this law can be found at www.dol.gov/whd/fmla.

If you are permanently unable to do your regular job, you may ask your employer to reassign you to a job that you can do as a reasonable accommodation, if one is available. More information on reasonable accommodations in employment, including reassignment, is available here.

7. What if I am being harassed because of my condition?

Harassment based on a disability is not allowed under the ADA. You should tell your employer about any harassment if you want the employer to stop the problem. Follow your employer's reporting

procedures if there are any. If you report the harassment, your employer is legally required to take action to prevent it from occurring in the future.

8. What should I do if I think that my rights have been violated?

The Equal Employment Opportunity Commission (EEOC) can help you decide what to do next, and conduct an investigation if you decide to file a charge of discrimination. Because you must file a charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. **It is illegal for your employer to retaliate against you for contacting the EEOC or filing a charge**. For more information, visit http://www.eeoc.gov, call 800-669-4000 (voice) or 800-669-6820 (TTY), or visit your local EEOC office (*see* https://www.eeoc.gov/field for contact information).

ETHICS BOARD OPINION

08-01

CAVEAT: THE FOLLOWING OPINION OF THE ETHICS BOARD OF THE NATIONAL FEDERATION OF PARALEGAL ASSOCIATIONS, INC. (NFPA) IS ADVISORY ONLY AND SHOULD NOT BE CONSTRUED AS BINDING ON ANY REVIEWING AUTHORITY AND MUST BE INTERPRETED IN CONJUNCTION WITH THE APPLICABLE STATE'S SUPREME COURT RULES AND OPINIONS GOVERNING THE PROFESSIONAL CONDUCT OF MEMBERS OF THE LEGAL COMMUNITY. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOSE TO GIVE IT.

QUESTION: What are a paralegal's obligations and responsibilities when an attorney becomes impaired due to age or disability?

FACTS: A paralegal works for an attorney who is advanced in years. It becomes increasingly clear that the lawyer has begun to show the effects of that age, forgetting items on the calendar, becoming disoriented when traveling what should be known routes, recalling having performed work when it isn't complete.

OPINION: Under the published NFPA ethical considerations as they exist, a paralegal has no special responsibility or obligation in the situation as presented. However, general tenets of ethics in combination with the ABA Model Rules and NFPA's Model Code of Ethics and Professional Responsibility may provide guidance as to whether the behavior should be reported to an appropriate authority. Depending on the degree of impairment demonstrated by the particular actions of the attorney, the paralegal may be under an ethical obligation to report the behavior of the attorney to the appropriate authority.

DISCUSSION: The inquiry starts with a determination of the degree to which the attorney may be unable to provide competent, diligent legal representation. The facts as presented indicate behavior that, while they may be signs of diminishing capacity, could not be called 'misconduct' or even incompetence. If, however, the behavior came to include acts such as failing to appear at scheduled court hearings, missing deadlines, and forgetting to meet with clients, such would clearly draw into question the attorney's fitness to practice law. A closer examination may very well reveal that the attorney's behavior has prejudiced a client's case. Consequently, the attorney would have breached the ethical duty to provide competent, diligent representation, as required by the ABA Model Rules of Professional Conduct. The rules relevant here provide as follows:

> ABA Model Rule 1.1 Competence.
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> ABA Model Rule 1.3 Diligence.
> A lawyer shall act with reasonable diligence and promptness in representing a client.

The ethical duties imposed by those rules do not, of course, apply to paralegals. The ethical obligations imposed by NFPA upon their members similarly demand competency. See, NFPA EC-1.1. At the same time, the code also requires members to report ethical violations and other misconduct to proper authority. In NFPA's code, Ethical Consideration (EC) 1.3(d) states,

> A paralegal shall advise the proper authority of non-confidential knowledge of any action of another legal professional that clearly demonstrates fraud, deceit, dishonesty, or misrepresentation. The authority to whom the report is made shall depend on the nature and circumstances of the possible misconduct, (e.g., ethics committees of law firms, corporations and/or paralegal associations, local or state bar associations, local prosecutors, administrative agencies, etc.). Failure to report such knowledge is in itself misconduct and shall be treated as such under these rules.

The duty to report in 1.3(d) is limited to the four categories of fraud, deceit, dishonesty, or misrepresentation, and would not apply to a situation in which there was an absence of intent to commit dishonest behavior. The fact that the NFPA may have defined "misconduct" more broadly elsewhere in the code does not allow us to broaden the scope of 1.3(d). Further, EC 1.3(c) provides that if a paralegal's fitness to practice is compromised by physical or mental illness, resulting in an act of misconduct, then the paralegal may avoid sanction if the circumstances so merit. NFPA's ethical codes, therefore would require reporting only serious breaches of ethical behavior. They also favor consideration of mental or physical impairment in determining if sanctions are appropriate.

The present situation does not involve a paralegal's behavior, however. Here, the concern surrounds the lack of competence or diligence of an attorney. The ABA's rules create an obligation for an attorney to report breaches of professional conduct that may include behavior brought about by an impairment due to age. The ABA rule relevant here states,

> Rule 8.3 Reporting Professional Misconduct.
> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer‘s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

If the impairment means that competent representation is not being given, then Rule 8.3 would require an attorney to report the situation to "the appropriate professional authority." It is true that a paralegal is not held to the same obligation under the rules set forth in NFPA's published ethical considerations. Under those considerations, a paralegal has no duty to report the behavior, even should it become worse, to the point of raising "a substantial question" as to the lawyer's fitness to practice law. Moreover, the facts presented here have not reached that point. That could be the end of our inquiry.

However, the writer seeks an answer to a more general question: what should a paralegal do if an attorney exhibits signs of advancing age that call into question their ability to competently practice law and represent clients? General tenets of ethics would say that if a client is being subjected to incompetent representation because of the mental or physical condition of the lawyer, then it should be brought to the attention of someone, or some organization, that can correct the situation.

The paralegal often occupies the best position to observe the lawyer's behavior. They may find that although not required or obligated to do so under the rules, the behavior they have witnessed demonstrates an unacceptable degree of incompetence. The next question would be to whom should the paralegal report?

Considerations of loyalty and respect would place a priority on speaking with the attorney directly about the concerns. If possible, frank and open discussion with the attorney could go a long way. We recognize however, that in some situations, the paralegal is not the best person to approach the attorney directly.

In cases of fraud, deceit, dishonesty, or misrepresentation, the NFPA code leaves it up to the individual paralegal to decide. EC-1.3 states, "The authority to whom the report is made shall depend on the nature and circumstances of the possible misconduct, (e.g., ethics committees of law firms, corporations and/or paralegal associations, local or state bar associations, local prosecutors, administrative agencies, etc.)."

Absent anyone with in the office, an "appropriate professional authority" to some would mean the disciplinary committees of the state bar authorities. To others, resorting to disciplinary authorities is too harsh for an unintentional and most likely unpleasant condition for the attorney. Unlike cases of theft, misappropriation or dishonesty, an attorney's impairment should give cause for compassion, and help, not necessarily discipline. Some states such as Massachusetts and Ohio require a legal professional to report only to the disciplinary authority and to no other. See, respectively, www.mass.gov/obcbbo/misconduct.htm <http://www.mass.gov/obcbbo/misconduct.htm> , and www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/rule_8_3.pdf <http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/rule_8_3.pdf> .

In other states such as Utah and Mississippi, legal professionals there report to an "appropriate professional authority", leaving much to discretion. For instance, an official comment to Mississippi's version of Rule 8.3 observes,

> A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency *unless some other agency, such as a peer review agency, is more appropriate in the circumstances.* (Italics supplied).

Recent attention to mental health issues among professionals has created lawyer assistance programs. In 1988, the ABA created the Commission on Impaired Attorneys to assist with the problems of alcoholism. expanding it to include a wide range of mental health problems such as stress, depression and compulsive gambling in 1996. As its primary function, the Commission's educates the legal community on the impairments facing lawyers and how to respond confidentially. The commission also provides technical resources to state and local lawyer assistance programs and outreach to lawyers and their families. Now, every state has a lawyer assistance programs or committees.[1] <http://mailcenter.comcast.net/wm/toolbar/notheme.html#_ftn1> Certainly a humane rule would read that reporting to an assistance program could constitute an "appropriate professional authority" under ABA Model Rule 8.3. The legal professional would have to check the applicable rules in their state.

Advancing age, like other impairments, is measured in degrees. It can also be coupled with an illness that compromises a person's abilities. There must be a balancing between compassion for the elderly attorney, and the real need to protect clients from incompetent representation.

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[1] <http://mailcenter.comcast.net/wm/toolbar/notheme.html#_ftnref1> The Virginia State Bar's lawyer assistance program has listed "Signs of Lawyer Impairment" (*See*, http://www.vsb.org/publications/valawyer/feb01/news.pdf)

Attendance:

Arriving late/leaving early

Returns late or fails to return from lunch

Fails to keep scheduled appointments

Fails to appear at depositions or court hearings

Frequent days off and unexplained absences

Job Performance:

Pattern of missed deadlines

Neglects processing of mail or timely return of calls

Decline in productivity

Decline in overall quality of work

Overreacts to criticism; shifts blame to others

Deteriorating relationships with colleagues and staff

Decline in performance throughout the day

Client complaints about performance/accessibility/communication

Co-mingles or borrows clients, trust funds

Smelling of alcohol or appearing under the influence in office and during court appearances

Personal Behavior:

Deterioration/neglect of personal appearance, health, hygiene

Loss of control at social gatherings, even where professional decorum is expected

Distorts truth; is dishonest

Manages finances poorly; fails to make tax filings and payments on time

Arrested for DUI, drunkenness in public, possession of illegal drug

Withdrawal from friends and associates

Pattern of family crises; marital infidelity

Pattern of unpredictable emotional reactions or mood swings.

MCLE ARTICLE AND SELF-ASSESSMENT TEST

By reading this article and answering the accompanying test questions, you can earn one MCLE credit.

To apply for credit, please follow the instructions on the test answer sheet on page 23.

by KEVIN RIVERA

ACCOMMODATING *Attorneys*

The interactive process that a law firm establishes to assist disabled staff is key to selecting appropriate accommodations

LAW FIRMS and other legal employers in California have an affirmative legal duty under state and federal law to provide reasonable accommodation to their attorneys with disabilities unless doing so would cause undue hardship. According to the most recent data provided by the Equal Employment Opportunity Commission, 35.3 percent of EEOC claims filed in California in 2017 were based on disability, surpassing the number of claims filed based on any other protected characteristic, including race, sex, color, religion, national origin, or age.[1]

Similarly, the California Department of Fair Employment and Housing (DFEH) reported that the majority of employment-based discrimination claims it received in 2016 were based on disability.[2] This is not surprising given the complexity of the law on accommodating individuals with disabilities. Providing reasonable accommodation to attorneys with disabilities lifts barriers to employment faced by disabled attorneys and serves the larger goal of enabling legal employers to diversify their workforce.

Reasonable Accommodation

A California employer's duty to provide reasonable accommodation to individuals with disabilities is principally derived from two laws, the federal Americans with Disabilities Act (ADA)[3] and the California Fair Employment and Housing Act (FEHA).[4] The ADA prohibits private sector employers from discriminating against employees on the basis of disability and requires employers to provide reasonable accommodation to qualified applicants and employees with disabilities, unless doing so would cause undue hardship.[5] Like the ADA, the FEHA requires employers to provide reasonable accommodation for the known physical or mental disability of an applicant or employee, unless doing so would impose an undue hardship.[6] One major difference between the FEHA and ADA is that while the ADA applies to employers with 15 or more employees,

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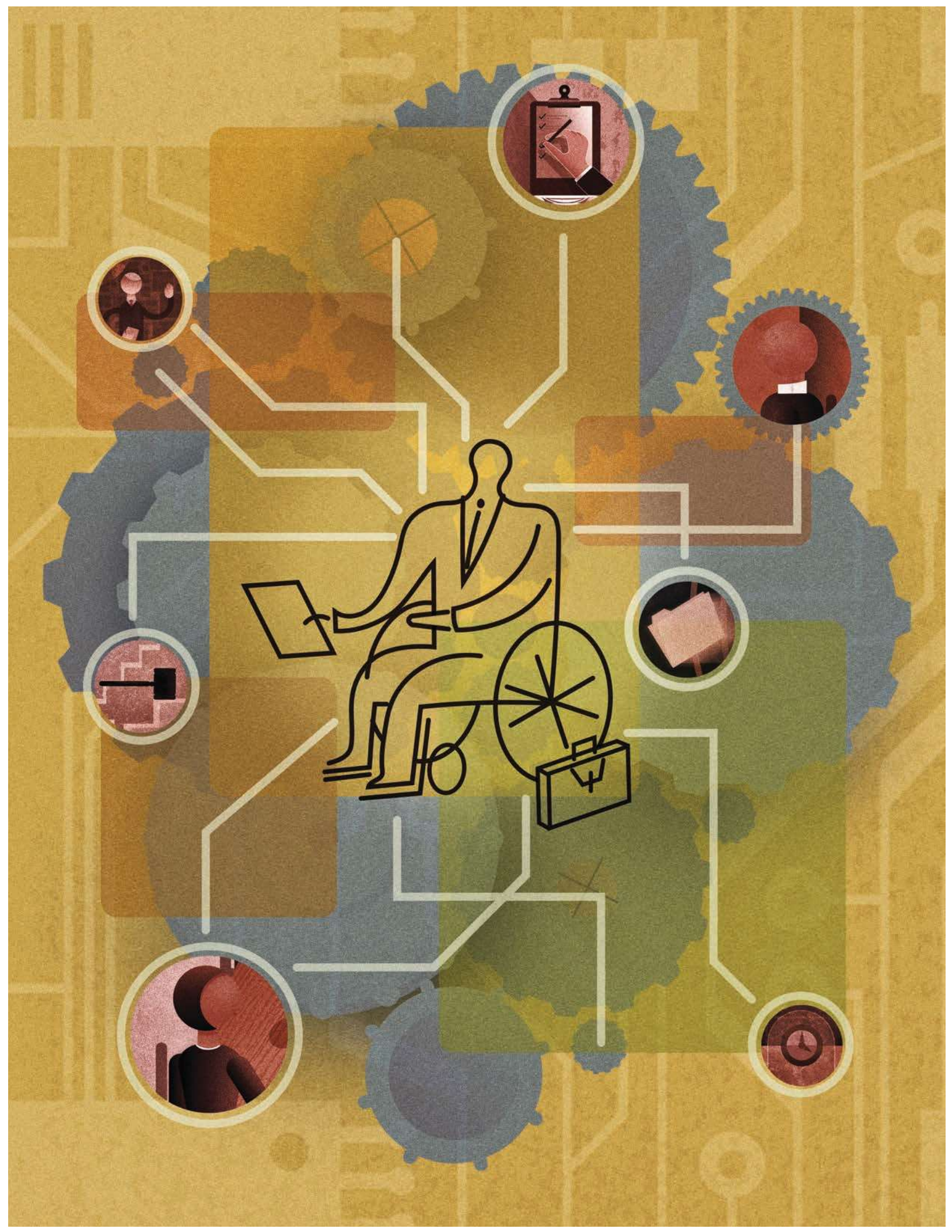

the FEHA applies to employers who regularly employ just five or more employees.[7]

Under the FEHA, an employer has an affirmative duty to provide reasonable accommodation(s) for the disability of an applicant or employee unless it can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.[8] Thus, an employer's duty with respect to disabled attorneys encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in an "interactive process." "Reasonable accommodation" refers to a modification or adjustment to the work environment that enables an employee to perform the essential functions of the job he or she holds.[9] An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate accommodation.[10]

Undue Hardship

If providing a reasonable accommodation for an employee's disability would impose an undue hardship on the employer, the accommodation is not required.[11] The FEHA defines "undue hardship" as "an action requiring significant difficulty or expense" when considered in light of several factors: the nature and cost of the accommodation; the employer's ability to pay for the accommodation; the type of operations conducted at the facility; the impact on the operations of the facility; the number of employees and the relationship of the employees' duties to one another; the number, type, and location of the employer's facilities; and the geographic, administrative, and financial relationship of the facilities to one another.[12]

While the cost of an accommodation and an employer's ability to pay for it are factors used to assess undue hardship, the determination cannot be made by making a cost-benefit analysis.[13] For example, if an organization's only in-house intellectual property attorney with significant experience and expertise requires two months off as a reasonable accommodation to recover from back surgery, and his or her caseload cannot be handled by the organization's other attorneys, the company might engage a legal staffing agency that places highly specialized attorneys in-house on a temporary basis. Granting the leave would not be an undue hardship if the firm has the financial ability to hire a qualified temporary attorney through the staffing agency, even if the cost of doing so will be more than what the company would have paid to the disabled attorney for the same period of time. This is because whether the cost of a particular accommodation imposes an undue hardship depends on the employer's resources and ability to pay, and not on the accommodation's benefit to the employer and attorney in relation to its cost.

Undue hardship includes "reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business."[14] Law firms and other employers, however, should exercise caution when denying an accommodation based on undue hardship, as "[t]he bar for undue hardship is 'high.'"[15] If the determination is later challenged in court, the employer will have to present "proof of actual imposition or disruption" that would have resulted from granting the accommodation.[16] "Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."[17] Whether a reasonable accommodation will cause undue hardship should be based on a case-by-case basis, careful analysis, and be meticulously documented.

Interactive Process

FEHA regulations provide that the employer must initiate the interactive process when any of the following conditions occur.[18]

A disabled applicant or employee requests reasonable accommodations. Importantly, an attorney need not mention the words "reasonable accommodation" when making a request. Any plain English request will suffice. For example, an associate attorney might tell a partner at the firm that his or her migraines are making it difficult to complete tasks on time, that walking from the office to the courthouse is difficult due to a leg injury, or that he or she cannot sit at the office desk for long stretches of time due to back pain flaring up. Each of these would constitute a request for reasonable accommodation, triggering the employer's duty to initiate the interactive process.

The employer becomes aware of the need for an accommodation through a third party or by observation. Even if an attorney does not say he or she is disabled or request an accommodation, the employer must nonetheless initiate the interactive process if the employer learns of the need for an accommodation. For example, if an in-house attorney's spouse calls the attorney's boss to advise that the attorney was rushed to the hospital due to a heart condition requiring surgery or an attorney is observed coming into the office in a wheelchair with his or her arm in a cast, either scenario would trigger the employer's duty to start the interactive process.

A disabled employee has exhausted leave under state or federal law or under the employer's leave policy, and the employee or employee's health care provider indicates that further accommodation is necessary. Often, an employee's doctor will place an employee on medical leave for a duration that exceeds the amount of leave the employee is entitled to by law or under the employer's leave policy. Employers are required to take a request for such additional time off as a request for accommodation. For example, in a hypothetical situation, an in-house attorney is out under the Family and Medical Leave Act due to a serious health condition, and his or her leave entitlement ends on June 1,[19] and, on May 30, the attorney submits medical documentation to the supervisor indicating that he or she must remain off work until June 25, the employer is required to interpret the doctor's note as a request by the attorney for accommodation for the period starting June 2.

Medical Documentation

If an attorney's disability or need for accommodation is not obvious, his or her employer may require the attorney to provide "reasonable medical documentation" from a health care provider that confirms the existence of the disability and the need for accommodation.[20] In this instance, the employer may require documentation that contains the name and credentials of the attorney's health care provider, a statement that the attorney has a physical or mental condition that limits a major life activity, and a description of why the attorney needs a reasonable accommodation.[21]

The attorney must then cooperate "in good faith" and provide the documentation.[22] If an attorney provides insufficient documentation in response to the employer's initial request, the employer must explain why the documentation is insufficient and give the attorney an opportunity to provide supplemental information in a timely manner from his or her health care provider.[23] Importantly, all such medical information and records obtained during the interactive process must be maintained in a medical file separate from the attorney's personnel file, and must be kept confidential.[24]

Accommodations for Attorneys

An employer is required to consider any and all reasonable accommodations of which it is aware or that are brought to its attention, except for those that create an undue hardship.[25] Thus, the employer should consider all potential accommodations and assess their effectiveness in enabling an attorney to perform the essen-

MCLE Test No. 276

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour. You may take tests from back issues online at http://www.lacba.org/mcleselftests.

1. Disability discrimination was the most reported employment-based discrimination claim made to the California Department of Fair Employment and Housing in 2016.
True
False

2. Disability discrimination was the third most reported employment-based discrimination claim made to the Equal Employment Opportunity Commission (EEOC) in California in 2017.
True
False

3. The California Fair Employment and Housing Act (FEHA) applies to employers only if they have 10 or more employees.
True
False

4. An "interactive process" consists of a dialogue between an employer and employee to assist the employer in selecting an appropriate reasonable accommodation.
True
False

5. An employer has no obligation to provide a reasonable accommodation to an employee if doing so would cause undue hardship.
True
False

6. An employer's duty with respect to disabled individuals encompasses two distinct yet related obligations: to make "reasonable accommodation" and to engage in a "communicative dialogue."
True
False

7. An undue hardship determination may be based on a cost-benefit analysis.
True
False

8. Employers should be cautious when denying an accommodation based on undue hardship because it is a high bar to meet.
True
False

9. An employer is required to engage in an interactive process only if an employee specifically requests an accommodation.
True
False

10. An employer may require an employee to provide medical documentation as part of the interactive process.
True
False

11. All medical information and records obtained during the interactive process must be maintained in a medical file separate from the attorney's personnel file.
True
False

12. The FEHA regulations provide an exhaustive list of all possible types of reasonable accommodations an employer must consider.
True
False

13. An employer may not require an attorney to take a leave of absence as an accommodation if other reasonable accommodations are available.
True
False

14. Providing a reduced schedule may be a reasonable accommodation.
True
False

15. An employer is never required to allow an attorney to bring an animal that provides emotional support into the workplace as a form of reasonable accommodation.
True
False

16. Permitting a disabled attorney to work from home for a short duration may be a reasonable accommodation.
True
False

17. An employer does not have to reassign a disabled attorney to a different supervisor as a reasonable accommodation if the current supervisor causes the attorney to experience stress.
True
False

18. An employer is not required to provide an indefinite leave of absence as a reasonable accommodation.
True
False

19. An employer has no obligation to provide any further reasonable accommodation once the attorney is no longer disabled.
True
False

20. The EEOC has taken the position that a law firm has no obligation to lower its billable hours requirement as a form of reasonable accommodation for a disabled attorney.
True
False

MCLE Answer Sheet #276

ACCOMMODATING ATTORNEYS

Name _____

Law Firm/Organization _____

Address _____

City _____

State/Zip _____

E-mail _____

Phone _____

State Bar # _____

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.

2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.

3. Mail the answer sheet and the $20 testing fee ($25 for non-LACBA members) to:

Los Angeles Lawyer
MCLE Test
P.O. Box 55020
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-study activity.

5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False
2.	☐ True	☐ False
3.	☐ True	☐ False
4.	☐ True	☐ False
5.	☐ True	☐ False
6.	☐ True	☐ False
7.	☐ True	☐ False
8.	☐ True	☐ False
9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

tial job functions.[26] Although an employer is required to consider an employee's preferred accommodation, it has the ultimate discretion to choose among effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.[27]

FEHA regulations provide a nonexhaustive list of examples of the different kinds of accommodations that employers may provide to employees in general, irrespective of industry or the type of work performed.[28] Attorneys with disabilities often require reasonable accommodations similar to those required by employees in other business environments. However, law firms and other legal employers may face unique challenges when providing reasonable accommodation to their attorneys, taking into account factors such as billable-hour requirements, demanding caseloads, and the ability to work under pressure.

Following are various examples of reasonable accommodations that may be provided to attorneys with disabilities.

Making existing facilities readily accessible to and usable by disabled attorneys. This may include providing accessible office space, break rooms, and restrooms, acquiring or modifying furniture, equipment, or devices, or making other similar adjustments in the work environment. For example, a firm may need to provide an attorney with a wheelchair-accessible desk and arrange furniture in the office to clear a path so that the attorney can easily maneuver about in a wheelchair.

Transferring an attorney to a more accessible office building. If a law firm has more than one office location, temporarily transferring an attorney to a different office may be a reasonable accommodation. For example, if an attorney has weekly physical therapy appointments near his or her firm's secondary office, allowing the attorney to work at the closer office on the days he or she has physical therapy appointments may be a reasonable accommodation.

Providing assistive aids and services. For attorneys who are blind or have vision loss, their employer might provide a qualified reader or a computer screen-reading program. For those who are deaf or have hearing loss, the employer might provide a qualified notetaker or sign language interpreter, or use real-time captioning technology (a service similar to court reporting in which a transcriber types what is being said at a meeting or event into a computer that projects the words onto a screen).

Job restructuring. This method may include reallocation or redistribution of an attorney's nonessential job functions. For example, a litigator's essential job functions may entail legal research, drafting briefs, and taking depositions, and nonessential job functions may include entertaining clients, updating the firm's legal blog, and serving on the firm's hiring committee. Temporarily reassigning these nonessential functions to another attorney may be a reasonable accommodation.

Modifying supervisory methods. An employer may need to modify the ways in which it exercises supervisory oversight of an attorney's performance as a reasonable accommodation. For example, for an attorney with a learning disability, this might mean that instead of requiring that a brief be completed by a certain date, the supervising attorney may set different deadlines for completing the fact, law, and analysis sections, or using daily, weekly, and monthly task lists. Modifying supervisory methods does not require assigning an attorney to a new supervising attorney. An employee's inability to work for a particular supervisor due to anxiety or stress related to the supervisor's standard oversight of the employee's job performance does not constitute a disability under the FEHA.[29]

Permitting a disabled attorney to work from home. For many attorneys, much of their work involves using a computer and communicating via phone and e-mail, which usually can be performed anywhere with an Internet and phone connection. Permitting these attorneys to work from home for a short duration may be a reasonable accommodation, depending on the circumstances. However, if an attorney's essential job functions include collaborating closely with other attorneys in the office and supervising filings, permitting a telecommuting arrangement may not be reasonable.

FEHA regulations provide that employers may also be required to provide reasonable accommodation for the "residual effects of a disability."[30] For example, an attorney may need a schedule change to permit him or her to attend follow-up appointments with a health care provider.

Leaves of Absence

If an attorney cannot perform the essential job functions or otherwise needs time away from the job for treatment and recovery, holding the position open so the attorney may take a leave of absence may be a reasonable accommodation. Similarly, providing an attorney leave on an intermittent or reduced-schedule basis to obtain planned medical treatment may also be a reasonable accommodation.[31] Employers are not required to provide paid leave, but they may elect to do so. If the attorney can work with a reasonable accommodation other than a leave of absence, the employer cannot require the attorney to go on leave.[32] Importantly, an employer is not required to provide an indefinite leave of absence as a reasonable accommodation, meaning an employer need not provide an open-ended leave with no return date.[33]

In determining the amount of time off to provide, if any, the employer may consider factors such as the size of the employer's organization, how busy the attorney's practice is, and whether the attorney's workload can be distributed to other attorneys at the firm without burdening their workloads. For example, a large law firm with attorneys in multiple offices may be better able to provide a four-month leave of absence as a reasonable accommodation than a small firm with just five attorneys. Because there are no bright-line rules in the statutes or case law as to how much leave, if any, should be provided, this is a heavily litigated area in failure-to-accommodate cases. Therefore,

it is important that employers carefully document their analysis when determining the appropriate amount of time off to provide and its impact on the employer's business operations.

Billable-Hour Requirements

Like the ADA, the FEHA regulations provide that where a quality or quantity standard is an essential job function, an employer is not required to lower the standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its quality or quantity standards.[34] The EEOC has taken the position, with respect to the ADA, that "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-hour requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement."[35] Thus, under the ADA and FEHA, a law firm's billable-hour requirement may be an essential job function tied to a quantity standard, and a firm would have no obligation to reduce or waive its billable-hour requirement as an accommodation.

However, a law firm may not penalize an attorney for failing to meet its billable-hour requirement if the firm has granted the attorney leave as an accommodation and the attorney's failure to meet the hours requirement is due to taking the leave. The EEOC has advised that penalizing an attorney in such instance would amount to retaliation for the attorney's use of a reasonable accommodation, would violate the ADA, and would render the leave an ineffective accommodation.[36] An employer should also exercise caution if it plans to give an attorney an unsatisfactory performance review when the attorney was out on leave for a significant portion of the review period. Otherwise, it may violate the ADA and FEHA, and amount to retaliation. Instead, the employer should delay the evaluation for several months until after the attorney has resumed a normal workload, thus enabling the firm to conduct a more accurate review of the attorney's work.

Attorneys with disabilities may require a range of accommodations to perform the essential functions of their jobs. Legal employers can take a number of steps to create a climate in which their attorneys feel comfortable requesting an accommodation and to ensure that attorneys and managers are aware of their legal obligations. At a minimum, employers should have clear, written policies and procedures in place for handling accommodation requests and that confirm the employer's commitment to nondiscrimination and providing reasonable accommodation. Employers can also ensure that their attorneys and other employees receive proper training on the interactive process and reasonable accommodation requirements. ■

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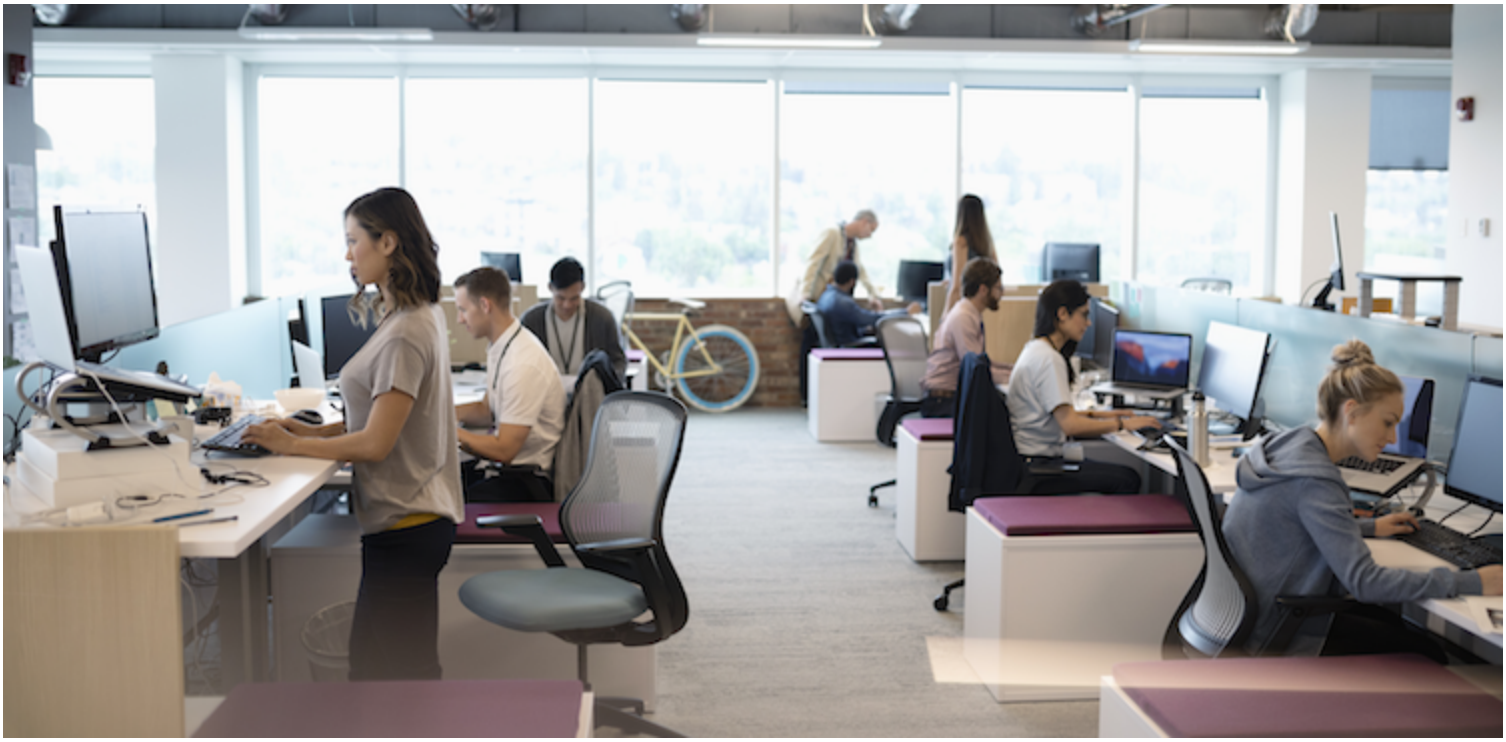
[1] U.S. Equal Emp. Opportunity Comm'n, EEOC Charge Receipts by State (includes U.S. Territories) and Basis for 2016, *available at* https://www1.eeoc.gov/eeoc/statistics/enforcement/state_17.cfm.
[2] California Dep't of Fair Emp. and Housing, 2016 Annual Report (2017).
[3] 42 U.S.C. §§12101 *et seq.*
[4] Gov't Code §§12900 *et seq.*
[5] 42 U.S.C. §12112(b)(5)(A).
[6] Gov't Code §12940(m).
[7] 42 U.S.C. §12111(5)(A); Gov't Code §12926(d).
[8] Cal. Code Regs. tit. 2, §11068(a).
[9] Nealy v. City of Santa Monica, 234 Cal. App. 4th 359, 373 (2015); Cal. Code Regs. tit. 2, §11065(p).
[10] Gov't Code §12940(n); Cal. Code Regs. tit. 2, §11069(a).
[11] Gov't Code §12940(m).
[12] Gov't Code §12926(u). The Job Accommodation Network (JAN) provides cost information for reasonable accommodations at http://askjan.org/links/faqs.htm and http://askjan.org/media/LowCostHighImpact.doc. The California Department of Rehabilitation, at www.dor.ca.gov, offers programs that may offset the costs of accommodations.
[13] U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), #45.
[14] EEOC v. Placer ARC, 114 F.Supp.3d 1048, 1058 (E.D. Cal. 2015).
[15] *Id.*
[16] EEOC v. Abercrombie & Fitch Stores, Inc., 966 F. Supp. 2d 949, 962 (N.D. Cal. 2013).
[17] *Id.*
[18] Cal. Code Regs. tit. 2, §11069(b).
[19] The Family and Medical Leave Act (FMLA) and analogous California Family Rights Act (CFRA) provide up to 12 weeks of unpaid leave per year to employees who meet certain eligibility requirements and who work for employers with 50 or more employees. An employer's obligation to provide reasonable accommodation exists independently of its duty to comply with the FMLA, CFRA, and other leave laws.
[20] Cal. Code Regs. tit. 2, §11069(c)(2).
[21] Cal. Code Regs. tit. 2, §11069(d)(5)(A),(B).
[22] Cal. Code Regs. tit. 2, §11069(d).
[23] Cal. Code Regs. tit. 2, §11069(d)(5)(C).
[24] Cal. Code Regs. tit. 2, §11069(g).
[25] Cal. Code Regs. tit. 2, §11068(e).
[26] Cal. Code Regs. tit. 2, §11069(c)(7).
[27] Cal. Code Regs. tit. 2, §11069(c)(8); Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 228 (1999).
[28] Cal. Code Regs. tit. 2, §11065(p).
[29] Higgins-Williams v. Sutter Medical Found., 237 Cal. App. 4th 78, 84-85 (2015).
[30] Cal. Code Regs. tit. 2, §11068(g).
[31] Cal. Code Regs. tit. 2, §11069(d)(9).
[32] Cal. Code Regs. tit. 2, §11068(c).
[33] Cal. Code Regs. tit. 2, §11068(c).
[34] Cal. Code Regs. tit. 2, §11068(b).
[35] EEOC, Reasonable Accommodations for Attorneys with Disabilities (2011), *available at* https://www.eeoc.gov/facts/accommodations-attorneys.html; *see also,* Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 405-406 (2002) (lawyer who could not meet law firm's minimum billable hours requirement would not be performing an essential function of position).
[36] *Id.*

5 Steps to Disclosing an Invisible Disability at Work

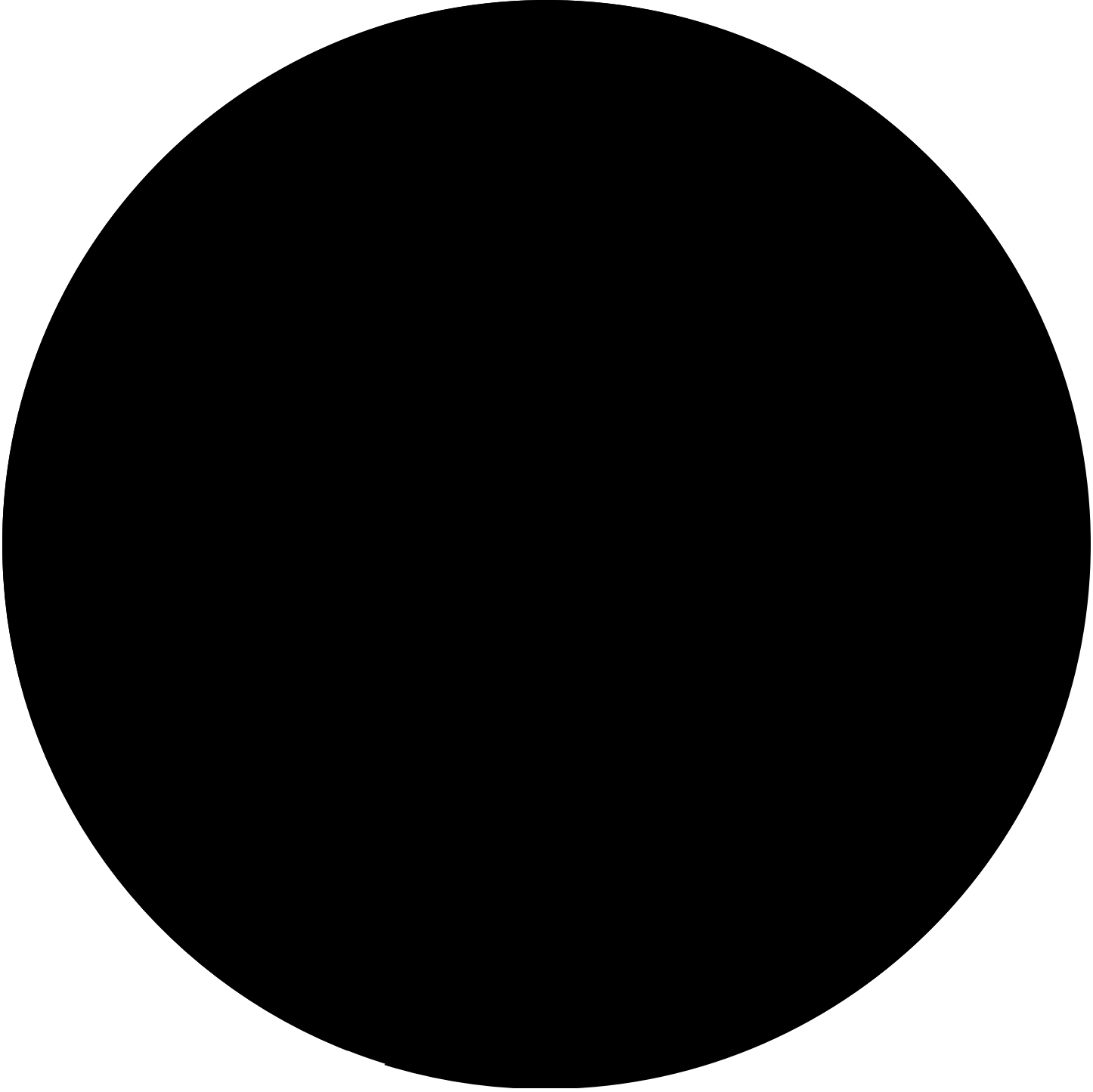
themuse

themuse

by
Dibs Baer



Hero Images/Getty Images



Once upon a time, I had a high-level job at a national magazine. I was up for a promotion to editor-in-chief and was invited to lunch with the company's VP. He was a tall guy with legs as long as a giraffe's and walked at warp speed.

He didn't know that I have rheumatoid arthritis (RA), which causes me debilitating foot pain. I'd disclosed it to my immediate supervisor right after I was diagnosed because I was unsure how my new medications would affect me. But for privacy reasons, she was the only person I'd told at work.

As the VP and I hustled to the restaurant, I trailed behind. Reluctantly and politely, I asked him to slow down. He actually seemed annoyed, and I instantly felt judged and weak.

I didn't get the job.

Did my invisible disability kill my chances for the promotion or was I just an untalented hack? We may never know. What I do know for sure is that I am not the only one who's ever felt that my disability has negatively affected me at work. Invisible disabilities include a wide range of conditions, such as fibromyalgia, ADHD, Lupus, PTSD, OCD, HIV, depression, and more. And while it's difficult to pinpoint exactly how many people fall into this category, workers with invisible disabilities face unique challenges compared to those with visible ones when it comes to disclosure, according to a paper published in the *Journal of Industrial and Organizational Psychology*.

“We think of health as the norm in our culture, but it’s really a fantasy that everybody in the workforce is in perfect health,” says Katie Willard Virant, a psychotherapist in St. Louis who has Crohn’s disease and is the author of the *Psychology Today* blog *Chronically Me: The Emotional Landscape of Chronic Illness*. “There are many people struggling with chronic illness. We need to normalize it more.”

Understandably, Willard Virant says, employees with invisible disabilities are confused about when—or if—they should disclose their illness at work. They’re scared to tell their bosses and co-workers about their conditions for fear of being outcast at best and fired at worst. “There are feelings of shame, embarrassment, vulnerability, paranoia. Disclosing your illness can make you feel isolated and less valuable.”

Before you do anything, read these five important steps to make the best decision for you and, if you do decide to disclose, to figure out the best way to go about it.

Step 1: Decide If You Actually Want to Disclose It

According to the Americans with Disabilities Act, “the law says that you can disclose or not disclose at any time,” explains Claudia Center, senior staff attorney with the national ACLU disability rights program. “Most people do not disclose during the application process itself.” But some will because they want to know upfront if the company will be accepting and supportive—or not. “Some people do because they’ve had bad experiences in the past and they just want to be open and just throw it all out there,” Center says. “Or some people might have disability pride, like, ‘I'm proud of who I am as a person with a disability.’”

Potential employers are not allowed to ask you specific medical questions, get into anything designed to elicit medical information, or make inquiries about a potential disability during an interview. They can’t ask what medications you’re on or how many days you missed on your last job because of worker’s comp claims.

But they can ask you, for example, if you are able to do the task. “That’s never going to be illegal,” Center says. They can also ask why you have a years-long gap on your resume. “Absolutely do not lie,” Center says, “but you can be creative about your answer. Figure out something that you did during that gap. Maybe you were too sick to work during that time, but you were in a class or doing some volunteer work, then you could list that on your resume or speak about it during the interview. Or perhaps you were taking care of a sick parent,” she says. “You can say, ‘I was helping a family member during that time and you know, I was lucky enough that I didn't have to work.’”

The decision to disclose isn’t easy at any time, whether it’s during the interview process, after being hired, or down the road during your employment. If you’re unsure what to do, think about why you would choose to disclose and what outcome you’d hope for. Are you disclosing because you want to make sure you’ve had an initial conversation in case your condition worsens? Or are you suddenly in pain and can’t do your job effectively? “Different people have different privacy values,” Center adds. Choices about if, when, and how to disclose—and the reasons behind them—vary based on the person and their particular situation.

Gabi DeLorenzo, who is on her feet eight hours a day working at a truck stop, decided to tell her employer everything about her psoriatic arthritis, an autoimmune disease, at her interview so there would be no surprises if she got the job. Luckily, her boss was immediately supportive. “I was hired on the spot and came back the same day for training.”

Kai Hibbard, a social worker who has ADHD, blurted it out during a court appearance one day when she felt it was affecting a presentation. “I told a room full of people all at once, including attorneys, the magistrate, the head of family recovery court, other social workers, the head attorney for Child Protective Services, and other human services contractors,” says Hibbard, who hadn’t gone in that morning thinking she would talk about her ADHD. “I was giving a case report and realized I kept jumping from topic to topic. Think Doug in *Up*: ‘Squirrel!’ I stopped, took a breath and let them know I had ADHD and had forgotten my meds that morning.”

David Iserson, a television and film writer/producer who is constantly working on new projects with new people, would prefer to never disclose his Crohn’s disease, “but it often becomes necessary. I need to explain why I obviously have to duck out to the bathroom more than most people,” he says. “I’ve tried to not say anything and then had a boss lecture me on not drinking as much water, so I wouldn’t have to go as often. And that was embarrassing. It’s very hard.” Ironically, Iserson

says, his invisible disease makes him very visible in a way he'd rather not be. He tends to land in the hospital for a week or so every couple of years. "You definitely are branded as a sick person and everyone at work signs a card. Which I hate."

Others hold off disclosing for as long as possible. "I want to be considered for promotions," says Mandy C., who works for her state government. "I know that legally they can't hold your illness against you, but I live in the real world, and they hold it against you. So the longer they are in the dark, the better."

Most employees wait until they've been on the job for a while and "try to get relationships going with their co-workers and supervisors and have that goodwill in place" before they disclose, Center adds. But if you're having trouble performing certain functions and people are noticing—maybe you're even getting written up—"we advise you to disclose so at least there's an attempt to accommodate you before you lose your job."

Step 2: Know Your Legal Rights

Before you disclose—if you choose to at all—it's imperative to know whether or not your specific invisible illness is covered and what that even means. The good news is that in 2008, Congress passed amendments to the ADA revising the definition of what constitutes a "disability," intentionally broadening it to include those of us who may look "healthy" on the outside but are suffering on the inside. "The ADA does not contain a list of medical conditions that constitute disabilities," explains Center. "Instead, the ADA has a general definition of disability that each person must meet."

According to the Job Accommodation Network, the general litmus test to figure out if you're covered under the ADA is:

1. Do you have an impairment? If yes,
2. Does it affect a major life activity (such as work)? If yes,
3. Does it substantially limit the major life activity?

You cannot be fired for having an invisible illness covered under the ADA—but you have to be able to do the job you were hired to do. If you can't, your employer is required to make "reasonable accommodations" to help you succeed in your job (see Step 5 below) or find you a lateral move within the company to a vacant job you're qualified for, Center notes. If there's no open role at an equivalent level, they are allowed to demote you to another open position.

Charlotte H., for example, had been at her job at an engineering firm for almost a decade when she suddenly and rapidly started developing symptoms of ankylosing spondylitis (AS), a type of arthritis that causes excruciating back pain. "I actually ended up getting a demotion, though they called it a lateral move, due to needing to work from home," she says.

If neither a lateral move nor a demotion is possible or it doesn't work out, a company may be legally allowed to let you go.

Step 3: Choose Whom to Disclose To

By law, you are allowed to only tell HR, if you prefer. You can inform your boss or supervisor as well, but you aren't legally required to. In other words, that part is entirely up to you and might depend on your manager and the specifics of your situation.

"I have chosen to be very open about my circumstances with my boss in an effort to have [fewer] issues," says AS patient Sara Bertram. "I always feel it's easier to understand someone else's situation if you know a little more about what's going on. They have been really great about it. I will say though, that I could see where some places I maybe wouldn't do that in fear of negative responses."

Because not everybody gets a warm and fuzzy reaction. "I was open about the journey I went through to get a diagnosis. It sucked," says Charlotte. "My bosses weren't really supportive but I get why. People think illnesses are black and white. That you go to the doctor and write you a script and you're fixed. That isn't the case with systemic autoimmune disease."

You can also disclose to your co-workers but that can, in some cases, trigger nasty gossip or cause resentment if they feel you get special treatment or have to pick up the slack for you. "I felt like I was letting everyone down," admits certified

athletic trainer Cheryl W. “I missed 30 hours of work last year and after eight years of glowing reviews it didn’t matter anymore. I still got chastised and my supervisor suggested I drop hours. I said no.”

But there can also be a cost to hiding your disability from your colleagues. “If you’re keeping something secret, that can be kind of weird and make people have anxiety and not feel comfortable,” Center says. “Some people do something in between. They might disclose to their close friends at work, but not to everybody.” If you don’t want everyone to know, make sure to ask those you do tell to keep the information private.

If you decide to disclose, Willard Virant recommends finding allies in the workplace. “[Make] sure that you have those people, your tribe, that you can talk to about these feelings,” Willard Virant says. “People that you can go to and say, ‘Well, you know, this just happened. This was tough.’ I think knowing that you have those safe people is super important.”

Mary Hommel, who has psoriatic arthritis, found an ally in her supervisor. “It took me a year to tell my boss but I’m glad I finally did,” Hommel says. “When people would say stuff he’d defend me. He’d even scold me when he knew I was overdoing it.”

Step 4: Draft an Email

Disclosing your invisible illness is perhaps as nerve-racking as asking for a raise. Center recommends sending some sort of official correspondence for the record. The JAN website is an amazing resource for all things related to disclosing your disability and has sample form letters for many different kinds of disabilities that you can use as a guide. In a nutshell, JAN says, your letter should:

- Identify yourself as a person with a disability
- Say that you’re requesting accommodations under the ADA (if you’re a federal employee, you’ll want to cite the Rehabilitation Act of 1973 instead)
- Describe the specific job tasks that are problematic
- Describe your ideas for accommodations
- Ask for your employer’s input on accommodation options
- Attached medical documentation if relevant
- Ask for a timely response to your request

“I have been routinely informing my employers for about ten years,” says Mark McIntyre. “Each time I change jobs or get a new boss, I have a one-to-one and explain about my condition and what it means for my work capability. I follow it up with a standard email confirming what I have said so they have a record.” You can start with a meeting, as McIntyre does, or skip straight to the email, depending on your comfort level.

Step 5: Ask for “Reasonable Accomodations”

If you want to request accommodations—a lateral move, a standing desk, an ergonomic chair, schedule modifications, time off for infusions or other appointments, work from home days, etc.—“your employer is permitted to ask you for reasonable medical documentation, which generally speaking is a note from your doctor confirming that you have a disability covered by the act and that you need an accommodation,” Center explains.

Karen Schlosberg, a proofreader/copy editor, has several invisible illnesses including Lyme disease, ADHD, IBS, and depression. “My work became erratic. The brain fog was the worst. My memory was full of holes and I had trouble finding words. I had trouble organizing and reading instructions,” Schlosberg says. “I disclosed that I had ADHD and I needed a bigger monitor and some adjustment in the proofreading protocol. I have mixed feelings about asking for accommodations but ultimately if it comes down to getting a bad review or asking for accommodations, I’d say ask.”

Willard Virant suggests not just presenting your employer with a problem but bringing them potential solutions as well. It shows your employer you’re being proactive but it’s also “a way to empower yourself,” she says. At the same time, be open to other ideas your employer proposes. There may be solutions that you’re not aware of or ones you can brainstorm together.

Kathy Carbrey, a supervisor at a billing company, has had a very positive experience since disclosing she has AS. “It’s imperative for me to be in the office due to having staff under me,” she says. But her company set up a computer for her at home so she could work remotely on days she isn’t feeling well. “My bosses have also been very understanding with the multiple doctor appointments and physical therapy twice a week,” she adds, and “my immediate boss has taken the time to learn about AS and how it affects my daily life.”

Unfortunately, not all companies respond as Carbrey’s did. If you have a dispute with your employer around what falls under “reasonable accommodations”—which is open to interpretation and varies widely depending on the state, the size of the company, and more—or are receiving bad performance reviews you feel aren’t warranted, contact a local legal clinic or the JAN.

Disclosing an invisible illness at work is difficult and can crush your confidence in your abilities. Whatever you decide to do and however you decide to go about it, it’s essential to remember that just because you have a disability, it doesn’t mean you’re not good at your job. Remind yourself of that often.

“Remind yourself of the strengths that you do bring to the workforce, some of which are because of your chronic illness, like courage and empathy. There are certainly negatives and drawbacks, but there are strengths, also. We have to own those,” Willard Virant says. “Reclaim your strength and what you bring to the workplace, like your intelligence, your hard work, and your training. Know that you bring something of value—and that your illness doesn't diminish that.”

Dibs Baer

Dibs Baer is an entertainment journalist and a New York Times bestselling author/coauthor of six books, including *Lady Tigers in the Concrete Jungle: How Softball and Sisterhood Saved Lives in the South Bronx*, out now.

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Supervisor a Headache? Court Says No to ADA Claim

By Scott M. Wich
April 15, 2020

An employee who complains of migraines affecting the ability to perform essential job functions will usually draw the attention of HR. Migraines can be debilitating, and there is good reason to conclude that such an employee should be considered for reasonable accommodations under the Americans with Disabilities Act (ADA). However, as recently decided by the 2nd U.S. Circuit Court of Appeals, such is not always the case.

An employee worked for Bloomberg L.P. as a sales representative in the U.S. market. Between 2011 and 2013, he suffered migraines that left him temporarily incapacitated, which impaired his work ability and his life activities, generally. Around the same time, the employee received poor performance reviews. The company identified several deficiencies and strategies for improvement.

In 2013, the employee made several requests to transfer to Asia, as he believed his performance would improve based on his interests and experience in the region. In May 2013, the employee submitted a doctor's note stating that the employee's migraine condition could result in "serious health consequences." The note further stated that work-related stress was a trigger for the migraines and that "[absent] a change in his current work environment … a medical leave of absence … alone will not significantly mitigate this stress."

In turn, the employee requested as an accommodation that he be permitted to perform his same job but under different supervision. The company declined the request and, following a subsequent poor performance review and written warning, fired the employee.

He sued and alleged that he was discriminated against under the ADA due to his migraines. The lower court granted summary judgment to the company. The appeals court affirmed the dismissal, concluding that the employee did not suffer from a "disability" as defined by the ADA.

[SHRM members-only toolkit: Accommodating Employees' Disabilities (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/accommodatingdisabilities.aspx)*]*

The appeals court noted that medical conditions that substantially limit an employee's ability to work are protected by the ADA. Nonetheless, a medical condition that merely limits an employee from working in just one situation—for example, under a particular supervisor—does not amount to an ADA-recognized disability.

The court opined that an employee's "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Rather, an employee must show that "his condition precludes him from working in a class or broad range of jobs."

The 2nd Circuit concluded that nothing in the 2008 amendments to the ADA, which broadened the definition of an ADA disability, give rise to a different result.

Because the employee admitted he could do the same job so long as the supervision was different, he was not disabled in the major life activity of working. As such, the ADA did not apply to him.

Woolf v. Strada, 2nd Cir., No. 19-860 (Feb. 6, 2020).

Professional Pointer: Disability and accommodation issues can be some of the most challenging for employers. Particular care must be taken when denying an accommodation based on a determination of whether a condition is a legally protected "disability." Particularly under state and local laws that define the term more broadly, an adverse employment action based on an assumption that a disability is not protected can be a costly error.

Scott M. Wich is an attorney with Clifton Budd & DeMaria LLP in New York City.

[Visit SHRM's resource page on the Americans with Disabilities Act (www.shrm.org/ResourcesAndTools/Pages/Americans-with-Disabilities-Act.aspx)*.]*

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How Should The Bar Weigh Aspiring Attorneys' Mental Health?

By **Celeste Bott** | September 27, 2020, 8:02 PM EDT

The high court bid of a rejected applicant to the Illinois bar is raising fresh questions about whether members of state bar admissions boards are best suited to make decisions about candidates' mental disabilities, especially amid calls across the legal industry to take mental health issues more seriously.

Thomas Skelton in June **urged the U.S. Supreme Court** to review his case so it can clarify whether the Americans with Disabilities Act is applicable to considerations of admission to state bars, and whether an applicant's disability and any related "reasonable" accommodations should be factors to be considered in making such determinations, according to his petition for certiorari.

Skelton had requested conditional admission, a practice in which he'd be admitted to the bar, but his ongoing mental health treatment would be supervised by the Illinois Attorney Registration & Disciplinary Commission, the agency responsible for disciplining attorneys in Illinois, for an agreed upon period of time — typically two years, unless a longer period is ordered.

Trisha Rich, a Holland & Knight LLP attorney who represents Skelton, told Law360 that conditional

admission would have been the "perfect remedy" in his situation, where her client has a track record of being under treatment.

"Since we filed this we've heard from a few people across the country who have had similar issues," Rich said. "I do see this as a systemic problem."

But some mental health advocates say that conditional admission isn't necessarily a better alternative, and can relegate attorneys who are fully qualified to practice law despite a mental illness diagnosis to "second-class citizenship."

Other attorneys say members of character and fitness committees have a duty to protect the public first and foremost, and that can mean making some tough calls about whether an applicant is truly ready to be a lawyer.

"We're handling people's lives. We can't mess up," said Carol Langford, a California attorney who works on admissions cases.

Bringing in Experts

Skelton graduated from the University of Illinois at Chicago John Marshall Law School and passed the Illinois bar in 2017, but was rejected by the Committee on Character and Fitness for the First Judicial District, which is appointed by the Illinois Supreme Court and reviews the "general fitness" and "moral character" of those seeking to practice law in the state, according to his petition to the Supreme Court.

During the course of the committee's review of his application, he sent approximately 40 emails to the member of the committee assigned to review his case and to staff members contending that they lacked integrity, using "charged language, including political rhetoric and themes of persecution" in his writings, according to the petition.

Skelton was subsequently diagnosed with a delusional disorder, began taking medication to treat the diagnosis, and met with a psychiatrist and a psychotherapist, according to his petition. His boss at the City of Chicago Department of Law, where he worked as a Freedom of Information Act officer, also reported that he was adjusting well to the pressures of the job.

Yet an inquiry panel of the committee voted in March 2018 against recommending that Skelton be certified for admission, citing his mental health history, his "misconduct" in sending the emails, their own opinions of his "self-reported internal thoughts" and his ongoing symptoms, without attempting to offer accommodations for his disability, according to the petition.

But it's not doctors or therapists or social workers who sit on that committee, Rich said, and the

committee ignored Skelton's doctors' testimony that he has his illness under control.

"That testimony was unrebutted, and the committee disregarded it," she said. "His medical providers show up and say the treatment is working, and we say, that's still not good enough for us, that really undercuts our goal to tell people to get help."

Licensing boards should involve mental health professionals or social workers in this process, Rich argued.

Robert Dinerstein, director of the Disability Rights Law Clinic at American University Washington College of Law, told Law360 he shares Rich's concerns that members of character and fitness committees don't necessarily have the skills required to make conclusions about an applicant's mental health.

"We can all play armchair psychiatrist, but we're not all trained to make those kinds of distinctions," Dinerstein said. "This is an element of character and fitness that people doing the assessment don't really understand unless you've got the expertise ... it's not that they're bad people, but they're part of a society that is still figuring out what it means to have a mental illness, and how to treat it."

The ADA is premised on individuals and looking at their situations in an individual way, Dinerstein said. Not everyone with the same diagnosis has the same experience, and boards making decisions about who can practice law have to bear that in mind, he said.

"For one person, [a mental illness] may be debilitating, for another who may have the same diagnosis, it isn't that limiting for that person," Dinerstein said.

Protecting the Public

Langford told Law360 that character and fitness committees have to focus on protecting an aspiring lawyer's potential clients above all else.

There's simply too much at stake, she said, and the costs can be enormous if a mental disability isn't controlled — clients could go to prison, get deported or lose custody of their kids, to name a few examples, she said.

"It is sad, because there are very bright people who have these issues. And you want to help them, but at the same time, the lodestar has to be the public interest," Langford said. "To me everything has to be looked at from a public protection standard. You have to first step back and do that. What's done for the potential lawyers comes second."

"How long ago" is the first question Langford said she asks aspiring lawyers who come to her with

admissions cases — and in Skelton's case, he was having symptoms of his mental illness at the very time he was applying to the state bar, she said.

"It's too close in time to the application," she said. "People forget the burden is on the applicant. You're banging at their door."

Susan Stefan, an expert in mental disability law, told Law360 that in an unusual way, the board's rejection in Skelton's case represents a kind of step forward because they're pointing to behavior, including the emails he sent to the committee, and not just his diagnosis.

"We have fought for decades the exclusion of people from licensure solely on the basis of diagnoses and receiving treatment," Stefan said. "Our argument is that you need to look at people's behavior, not their diagnosis or treatment."

Stefan said she was "torn" about Skelton's case and questioned if it was the best vehicle for Supreme Court review, or if he was the best candidate for conditional admission, a practice she says is overused and compares to "second-class citizenship."

"A better thing for his life would be to work for a year and go back and ask for admission," she said.

Rich knows that that's what many would want her client to do — to put his head down, stay out of trouble and try again in a few years. But while the Illinois board concluded Skelton wasn't ready to be an attorney, it was a conclusion "that was not borne out by the evidence," she said.

"There wasn't a single witness on the other side," Rich said. "Character and fitness are volunteer lawyers doing this in their spare time. I know it's a tough job. But it's a really important job."

Deterred From Seeking Help

Skelton's petition to the high court referenced a 2017 report from the American Bar Association National Task Force on Lawyer Well-Being, addressing lawyer well-being, mental illness and addiction in the legal profession. Its findings emphasize that lawyers and law students often avoid seeking assistance for mental health or addiction issues because of fear that seeking help will impact their licensure, Skelton said.

"The majority's decision contributes to the stigma that results in lawyers and law students avoiding mental health treatment by grounding its finding of unfitness in Mr. Skelton's mental health status," the petition said.

Universities and law schools some time ago had to recognize if they were going to accept more students with disabilities, then they would have an obligation to help them thrive and succeed,

Dinerstein said. But it's been more of a mixed bag at bar admissions, he said.

"The last thing I think you want is for people to not seek help that they need," he said.

Dinerstein said he's seen more willingness to talk about mental illness and disability in the last ten years, but stigma remains. And while there has been more focus on a bar applicant's conduct rather than diagnostic category, "it's been a slower development than it should have been."

Still, some states have moved to drop bar applicant questions about mental health and treatment altogether.

In February, **New York's chief judge said** the question on the bar admission form has deterred law students from seeking treatment because they fear denials and other repercussions. In June, the New Hampshire Supreme Court Committee on Character and Fitness **announced** it would no longer ask applicants about their mental health history or whether they have received any related treatments or diagnoses, citing the same reason.

A Kentucky federal judge **in August compared** the state's bar admission system to a "cartel," predicting that a law student will die one day over not obtaining mental health care out of fear state officials would use the treatment against the student and saying the state's system punishes people who get help.

And the Florida Supreme Court in September **changed state bar rules** to no longer treat members with a history of drug, alcohol or psychological issues as a separate class of "conditionally admitted members."

Rich told Law360 she felt it was vitally important to bring Skelton's case, saying the legal industry can't "feign surprise" about experiences like his anymore.

"The profession cannot talk out of both sides of its mouth on this any longer," Rich said. "Either this is something we care deeply about and are committed to working on and fixing, or it's not."

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--Additional reporting by Kevin Penton, Andrew Strickler and Nathan Hale. Editing by Katherine Rautenberg.

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Legal Ethics

California Bans Inquiries on Would-be Lawyers' Mental Health

By Joyce E. Cutler

July 30, 2019, 3:41 PM

- Legislation designed to reduce mental health stigma in the profession
- Law effective at the start of 2020

The California Bar starting in January will be prohibited from seeking prospective lawyers' mental health records under a just-enacted law.

California becomes the latest state to remove the requirement for prospective lawyers to indicate their mental health and sign over medical records under Senate Bill 544. California lawyers once they pass the bar must be determined to be of "good moral character" under the state Business & Professions Code Section 6060(b). California lawyers are subject to regulation by the legislature and admission and discipline by the California Supreme Court.

Gov. Gavin Newsom signed S.B. 544, which was introduced by Sen. Thomas Umberg (D), on July 30. The bill received no opposition or no votes. The bill is sponsored by Disability Rights California, a nonprofit advocating for people with disabilities. It was signed 29 years after the passage of the Americans with Disabilities Act, which further protects those with disabilities from discrimination.

"The purpose of the bill is to reduce the stigma of mental health issues, and to help mitigate any chilling effect that prevent[s] law students from getting treatment for mental health issues, including sexual assault and PTSD," Umberg said in a statement. "There are candidates who do not seek honest and warranted professional help, out of fear they have to divulge those records. SB 544 will stop the bar from asking for access to those records in most cases."

Neither the bar nor the examining committee can seek, consider, or review an applicant's medical records relating to mental health when deciding whether an applicant is of good moral character under the new law. The law contains an exception if applicants seek to use the record to demonstrate they are of good moral character or as a mitigating factor.

Virginia, Washington, and Louisiana have already enacted similar prohibitions on seeking attorneys' mental health records.

The New York State Bar Association launched a task force June 10 to review the state's bar application, making sure mental health treatment does not negatively affect admission. The goal is to have recommendations by November.

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U.S. Equal Employment Opportunity Commission

Reasonable Accommodations for Attorneys with Disabilities

This guidance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

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Attorneys, Employers, HR Practitioners

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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.[1]

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.[2] Section 501 of the Rehabilitation Act of 1973 imposes the same requirements on federal agencies, regardless of the number of employees they have.[3]

This fact sheet addresses the application of the reasonable accommodation obligation to attorneys and their employers.[4] Attorneys with disabilities, both as applicants and employees,[5] 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. [6] 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).[7]

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.[8] 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.[9]

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? [10]

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.[11] 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.[12] 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.[13] 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.[14]

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.[15] 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.[16] 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.[17]

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[18] 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)[19]
- 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)[20]
- 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)[21]
- reassignment to a vacant position.[22]

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.[23] 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.[24]

H. Actions Not Required as Reasonable Accommodation

Certain actions are not required as reasonable accommodations.

> 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 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.

- 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.[25]

- Employers are not required to change an attorney's supervisor as a reasonable accommodation.[26] 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.[27] (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.[28] 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.[29] 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.[30] 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.[31]

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.[32]

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.[33] The need for reasonable accommodation also can change over time, particularly for degenerative disabilities.[34] 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.[35]

> 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.[36]

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,[37] 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.[38] 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."[39] 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);[40] (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.[41]

> 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.[42] 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.[43]

> 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.[44] An employer should also determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.[45] 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.[46] 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.[47]

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.

Endnotes

[1] See http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/#intro.

[2] 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).

[3] 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.

[4] 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 [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.

[5] 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).

[6] 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.

[7] 29 C.F.R. § 1630.2(o)(1)(i-iii) (emphasis added).

[8] 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.

[9] See section M, infra, "Reasonable Accommodation To Gain Equal Access To Benefits of Employment."

[10] 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. 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.

[11] 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-Negroni 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.).

[12]See Question 4 in "Reasonable Accommodation," supra note 4.

[13]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.

[14] 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).

[15] 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).

[16] 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).

[17] See Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

[18] 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.

[19] See Section H, "Actions Not Required as Reasonable Accommodation," for information on the difference between essential and marginal functions.

[20]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. 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).

[21] 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.

[22] 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).

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

[24] For more information on "undue hardship," see section N, infra, "Limitation on Providing Reasonable Accommodation: Undue Hardship."

[25] See section E, supra, "When to Request a Reasonable Accommodation."

[26] 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).

[27] 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).

[28] See Question 10 in "Reasonable Accommodation," supra note 4.

[29] See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[30] See Question 9 in "Reasonable Accommodation," supra note 4. See, e.g., Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003).

[31] 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).

[32] 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 l) 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.

[33] See, e.g., Ralph v. Lucent Tech., Inc., 135 F.3d 166 (1st Cir. 1998).

[34] 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).

[35] See Question 8, Example B in "Reasonable Accommodation," supra note 4.

[36] 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).

[37] 42 U.S.C. § 12183.

[38] 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; "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.

[39] See footnotes 14 and 15 and accompanying text in "Reasonable Accommodation," supra note 4.

[40] See id. at Question 15.

[41] 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 (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 (same).

[42] 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.

[43] 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).

[44] The Job Accommodation Network (JAN) website, 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).

[45] 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.

[46] See 29 C.F.R. pt. 1630 app. § 1630.15(d).

[47] 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.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 03-431 **August 8, 2003**

Lawyer's Duty to Report
Rule Violations by Another Lawyer
Who May Suffer from Disability or Impairment

A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.

In this opinion, we examine the obligation of a lawyer who acquires knowledge that another lawyer, not in his firm, suffers from a mental condition that materially impairs the subject lawyer's ability to represent a client.[1] Under Rule 1.16(a)(2) of the Model Rules of Professional Conduct,[2] a lawyer must not undertake or continue representation of a client when that lawyer suffers from a mental condition that "materially impairs the lawyer's ability to represent the client."[3] That requirement reflects the conclusion that allowing persons who do

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1. In ABA Standing Committee on Professional Responsibility Formal Opinion 03-429 (Obligations With Respect to Mentally Impaired Lawyer in the Firm) (June 11, 2003), we addressed the obligations of lawyers within a firm when another lawyer within that firm violates the Model Rules of Professional Conduct due to mental impairment. Like that opinion, this opinion deals only with mental impairment, which may be either temporary or permanent. Physical impairments are beyond the scope of this opinion unless they also result in the impairment of mental faculties. In addition to Alzheimer's disease and other mental conditions that are age-related and affect the entire population, lawyers have been found to suffer from alcoholism and substance abuse at a rate at least twice as high as the general population. *See* George Edward Bailly, *Impairment, The Profession and Your Law Partner,* 11 No. 1 PROF. LAW. 2 (1999).

2. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional responsibility, and opinions promulgated in the individual jurisdictions are controlling.

3. Rule 1.16(a)(2) states that a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if "the

not possess the capacity to make the professional judgments and perform the services expected of a lawyer is not only harmful to the interests of clients, but also undermines the integrity of the legal system and the profession.

Under Rule 8.3(a), a lawyer with knowledge[4] that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority.[5] Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3[6].

When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.[7]

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lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." *See*, *e.g.*, In re Morris, 541 S.E.2d 844 (S.C. 2001) (lawyer failed to notify clients that he would be unavailable while being treated at in-patient drug and alcohol rehabilitation program); State ex rel. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1 (Okla. 2000) (lawyer had been suffering severe, untreated vitamin B-12 illness that essentially destroyed his short-term memory and exacerbated his depression; lawyer neglected five clients and their cases); In re Francis, 4 P.3d 579 (Kan. 2000) (lawyer's depression resulted in misconduct, including failure to comply with discovery requests, to prosecute civil suit, to return telephone calls, and to withdraw from representing client); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991) (lawyer who neglected, deceived, and abandoned clients due to drugs, alcohol, and depression failed to withdraw); State v. Ledvina, 237 N.W.2d 683 (Wis. 1976) (lawyer with compulsive personality disorder with paranoid trends engaged in hostile and aggressive conduct).

4. "Knows" denotes actual knowledge, which may be inferred from the circumstances. Rule 1.0(f). Thus, the duty to report the violation caused by the mental impairment of another lawyer will likely arise only in very limited situations.

5. Note that the disclosure obligation does not apply to information protected by Rule 1.6 or acquired by the lawyer from his participation in an approved lawyers assistance program. Rule 8.3(c).

6. As noted in Comment [3] to Rule 8.3, the rule "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."

7. A single act of aberrant behavior may be part of a pattern of conduct affecting the lawyer while under the influence of drugs or alcohol or while displaying the symp-

A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction,[8] substance abuse, chemical dependency, or mental illness.[9] Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist.[10] Nonetheless, a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (*e.g.*, patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).

Each situation, therefore, must be addressed based on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients[11].

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties.[12] He might consider contacting an

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toms of a mental illness that manifest themselves only on occasion. As noted in Comment [1] to Rule 8.3, "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

8. In certain cases, the conduct of the lawyer may involve violation of applicable criminal law. In such cases, Rule 8.4(b) is implicated. That rule provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

9. *See* ABA Formal Opinion 03-429 for discussion of mental impairments that affect a lawyer only on occasion.

10. There is a wealth of information about impairments available for the general reader. For an initial overview, *see* such sources as David R. Goldmann, AMERICAN COLLEGE OF PHYSICIANS COMPLETE HOME MEDICAL GUIDE WITH INTERACTIVE HUMAN ANATOMY CD-ROM (DK Publishing 1999); Charles R. Clayman, THE AMERICAN MEDICAL ASSOCIATION FAMILY MEDICAL GUIDE (3rd ed. Random House 1994); and Anthony L. Komaroff, THE HARVARD MEDICAL SCHOOL FAMILY HEALTH GUIDE (Simon & Schuster 1999). Websites for various organizations also can be a good starting point for information. The American Medical Association's website at http://www.ama-assn.org has links to various sites, as does the website of the National Institutes of Health, http://www.nih.gov. For Alzheimer's disease and related conditions, *see* the websites of the Alzheimer's Disease Education and Referral Center, http://www.alzheimers.org, and the American Association of Geriatric Psychiatry, http://www.aagpgpa.org.

11. *See* Rule 1.16(a)(2).

12. The reporting lawyer may become aware of the impaired lawyer's conduct either from personal observation or from a third party, such as a client of the lawyer who complains of the impaired lawyer's conduct.

established lawyer assistance program.[13] In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some circumstances, that may help a lawyer understand the conduct and why it occurred, either confirming or alleviating his concerns. In such a situation, however, the affected lawyer may deny that any problem exists or maintain that although it did exist, it no longer does. This places the lawyer in the position of assessing the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule 8.3.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers.[14] If the affected lawyer's partners or supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We note that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to the appropriate authority.

If a lawyer concludes there is material impairment that raises a substantial question about another lawyer's fitness to practice, his obligation ordinarily is to report to the appropriate professional authority.[15] As we said in ABA Formal Opinion 03-429, however, if information relating to the representation of one's own client would be disclosed in the course of making the report to the appropriate authority, that client's informed consent to the disclosure is required. In the usual case, information gained by a lawyer about another lawyer is unlikely to be information protected by Rule 1.6, for example, observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions. Given the breadth of information protected by Rule 1.6,[16] however, the reporting lawyer should obtain the client's

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13. In most states, lawyer assistance programs are operated through the state or major metropolitan bar associations. Information about these systems is available from the staff of the ABA Commission on Lawyer Assistance Programs. *See* http://www.abanet.org/legalservices/colap/home.html.

14. Such contact is solely discretionary. Although partners and supervising lawyers have a responsibility to ensure that lawyers in their own firms comply with the rules of professional conduct, *see* ABA Formal Opinion 03-429, no lawyer is obligated under the Model Rules to take any action to ensure compliance with the rules by lawyers in other firms.

15. Rule 8.3 cmt. 3. There is no duty to report information learned from participation in an approved lawyers assistance program.

16. Rule 1.6 cmts. 3 and 4.

informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer.

Whether the lawyer is obligated under Model Rule 8.3 to make a report or not, he may report the conduct in question to an approved lawyers assistance program, which may be able to provide the impaired lawyer with confidential education, referrals, and other assistance. Indeed, that may well be in the best interests of the affected lawyer, her family, her clients. and the profession. Nevertheless, such a report is not a substitute for reporting to a disciplinary authority with responsibility for assessing the fitness of lawyers licensed to practice in the jurisdiction.

In conclusion, a lawyer should review the situation and determine his responsibilities under Rule 8.3 when he has information that another lawyer has failed to meet her obligation to withdraw from the representation of client when suffering from a mental condition materially impairing her ability to represent her clients.

Calif. Gov. Signs Law Requiring Corporate Board Diversity

By Dave Simpson

Law360 (September 30, 2020, 11:59 PM EDT) -- California Gov. Gavin Newsom signed a bill Wednesday requiring publicly held corporations headquartered in the state to include at least one person from an "underrepresented community" on their boards by the end of next year, and two to three, depending on the size of the board, by the end of 2022.

Assembly Bill 979 defines a member of an underrepresented community as anyone "who self-identifies as" Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual or transgender.

The bill requires corporate boards with more than four members to include two members from underrepresented communities, while corporations with more than nine must have a minimum of three by the end of 2022.

The bill was jointly authored by Assemblymembers Chris Holden, Cristina Garcia and David Chiu, with Assemblymember Eloise Gomez Reyes and Sen. Ben Hueso as principal co-authors.

"The new law represents a big step forward for racial equity," Holden said in a release. "While some corporations were already leading the way to combat implicit bias, now, all of California's corporate boards will better reflect the diversity of our state. This is a win-win as ethnically diverse boards have shown to outperform those that lack diversity."

A 2018 Deloitte study found that out of 1,222 new board members of Fortune 100 companies, 77% were white, the authors of the bill said in a release.

In September 2018, then Gov. Jerry Brown signed a similar bill, Senate Bill 826, which requires California companies to place a minimum number of women on their boards of directors.

S.B. 826 mandated that public companies based in the state have at least one woman on

their boards of directors by the end of 2019.

The law also set higher minimum benchmarks for businesses to meet in the following years. By the end of 2021, public businesses in California must have at least two female directors if the corporation has five directors or three female directors if the corporation has six or more. Businesses could be liable for fines of at least $100,000 for violating those requirements.

That bill has been challenged in several court cases.

In April, a California federal judge tossed a lawsuit that challenged the constitutionality of that law, saying the injury claimed in the suit by Creighton Meland Jr., a shareholder of systems designer and manufacturer OSI Systems Inc., is "purely hypothetical."

U.S. District Judge John A. Mendez said Meland "has ignored and/or distorted the plain language" of California's S.B. 826 statute.

"S.B. 826 places a requirement and a possible penalty on publicly held corporations, but plaintiff is not a publicly held corporation. He is a shareholder. And that is a distinction with a difference," the judge said, granting California's motion to dismiss the suit without prejudice for lack of standing.

Meland sued California Secretary of State Alex Padilla in federal court in November, saying the "woman quota" created by the new law is unconstitutional as it violates the Fourteenth Amendment's equal protection clause.

Represented by attorneys at the Pacific Legal Foundation, a nonprofit legal organization, Meland argued that California's new law would impose unlawful limitations on the way shareholders could vote on their board members.

--Editing by Jay Jackson Jr.