

William & Mary Law Review Online

VOLUME 63

No. 4, 2022

WHAT THE LAWYER WELL-BEING MOVEMENT COULD LEARN FROM THE AMERICANS WITH DISABILITIES ACT

ALEX B. LONG*

TABLE OF CONTENTS

INTRODUCTION	65
I. SOCIETAL ATTITUDES TOWARD MENTAL HEALTH ISSUES	67
<i>A. Historical Attitudes Toward Mental Impairments.</i>	67
<i>B. The Americans with Disabilities Act and Mental Impairments</i>	68
II. THE LEGAL PROFESSION'S HISTORY WITH MENTAL HEALTH ISSUES	69
III. A PROFESSION IN CRISIS?	71
IV. THE STIGMATIZING EFFECT OF THE ABA NATIONAL TASK FORCE'S REPORT	72
<i>A. An Overview of the Task Force Report</i>	73
<i>B. The Stigmatizing Effect of the Task Force Report</i>	74
V. THE STIGMATIZING EFFECTS OF ETHICS OPINIONS DEALING WITH MENTAL DISABILITIES	77

* Williford Gragg Distinguished Professor of Law, University of Tennessee College of Law. Thanks to Brad Areheart for his helpful comments on an earlier draft. Thanks also to Will Hitchcock, Morgan Webber, and Michael Trotter for their research assistance.

VI. WHAT THE LAWYER WELL-BEING MOVEMENT COULD	
LEARN FROM THE ADA	80
A. <i>Underlying Policies of the ADA</i>	81
B. <i>Specific ADA Provisions that May Apply in the</i> <i>Case of a Lawyer with Mental Impairments</i>	85
1. <i>Disability-Related Inquiries Under the ADA</i>	85
2. <i>The ADA's Interactive Process</i>	88
CONCLUSION	89

INTRODUCTION

Since the 2017 publication of the National Task Force on Lawyer Well-Being's *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, there has been no shortage of writing on the subject of lawyer well-being.¹ For years, many within the legal profession had expressed alarm over the perception that depression, substance abuse, and related conditions were a serious problem within the profession.² A slew of studies suggesting heightened rates of suicide, substance abuse, and suicide among lawyers lent support to these concerns.³

But the National Task Force's recommendations seem to have triggered a more focused attempt on the part of the profession to address well-being issues. In 2018, the American Bar Association (ABA) passed a resolution "urg[ing] all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set out" in the Task Force's report.⁴ Since the publication of the report, numerous articles and ethics opinions have all referenced the report as part of an increased focus on the perceived crisis concerning well-being in the practice of law.⁵

1. See generally NAT'L TASK FORCE ON LAW. WELL-BEING, *THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE* (2017), <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> [<https://perma.cc/2KQ5-P5T2>] [hereinafter NAT'L TASK FORCE].

2. See, e.g., Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 145 (2016) (noting high rates of depression, anxiety, and alcohol dependence among law students).

3. See *infra* notes 37-42 and accompanying text.

4. ABA WORKING GRP. TO ADVANCE WELL-BEING IN THE LEGAL PRO., COMM'N ON LAW. ASSISTANCE PROGRAMS, STANDING COMM. ON PROFESSIONALISM, & NAT'L ORG. OF BAR COUNS., AM. BAR ASS'N, RESOLUTION 105 (2018), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lc_colap_2018_hod_midyear_105.pdf [<https://perma.cc/9HJT-N46W>].

5. See, e.g., D.C. Bar Ethics Op. 377 (2019) (discussing duties when a lawyer is impaired).

Suggestions concerning how to address the issue range from requiring law schools to include well-being training in their curricula to encouraging law firms to develop well-being committees.⁶ But the lawyer well-being movement also contains a rule-based approach. The report recommends amending the Model Rules of Professional Conduct to explicitly address lawyer well-being and mental health issues and to link well-being with the ethical duty of competence.⁷ And numerous ABA and state legal ethics opinions have focused on other ways in which the Rules of Professional Conduct might be implicated in the case of a lawyer with a mental impairment that impacts the lawyer's ability to practice law.⁸

Perhaps the central theme in all of the lawyer well-being literature is the profession's need to create a culture in which lawyers are proactive about taking care of themselves. This necessarily involves reducing some of the stigma associated with mental health issues so that lawyers feel comfortable to seek help when needed and to otherwise be mindful of their own well-being. The trick, obviously, is adopting an approach that meaningfully addresses the problems of mental health issues within the profession without further stigmatizing mental health issues more generally.

This Article argues that despite its admirable efforts, the legal profession has generally fallen short of this goal. Whether in formal ethics opinions dealing with the issue of lawyers with disabilities or reports such as the National Task Force's *The Path to Lawyer Well-Being*, the lawyer well-being movement has sometimes perpetuated harmful stereotypes concerning disability. This Article suggests that in order to effectively improve lawyer well-being, the organized bar should look more carefully at the text of the Americans with Disabilities Act (ADA), as well as the policies that underlie it.

6. See Martha Knudson, *Well-Being Is Key to Maximizing Your Success as a Lawyer*, 32 UTAH BAR J. 42, 44 (2019); NAT'L TASK FORCE, *supra* note 1, at 27, 31.

7. NAT'L TASK FORCE, *supra* note 1, at 26.

8. See *infra* Part V.

I. SOCIETAL ATTITUDES TOWARD MENTAL HEALTH ISSUES

A. *Historical Attitudes Toward Mental Impairments*

Individuals with mental health issues have long faced societal stigma.⁹ While individuals with physical disabilities have experienced stigma and discrimination throughout history, there is something about mental illness and related conditions that is especially likely to lead to stigmatizing behavior.¹⁰ As one author has stated, “In contrast with physical disabilities, it may be that the problem of bias against those with mental disabilities is growing rather than abating with time.”¹¹ Individuals with mental impairments face a host of stereotypes, but mental illness is often viewed with particular suspicion.¹² Violence and mental illness are often linked in the public consciousness, despite the fact that there is frequently little connection between the two.¹³ Depression is sometimes dismissed as not being a legitimate psychiatric condition.¹⁴ Yet at the same time, there are harmful stereotypes associated with depression. One study found that 45 percent of respondents believed that people with depression were unpredictable and 20 percent believed such people were dangerous.¹⁵

9. See Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 50-51 (2005).

10. See *id.* at 51 (noting that “the animus directed at psychiatric impairments is proportionately greater and more pervasive” than that directed at physical impairments).

11. John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 572 (2008).

12. See Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 414 (2006) (“Studies indicate that people blame individuals with mental illnesses more than they blame those whose disorders are understood as more organic, such as mental retardation.”).

13. See E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH U. L. REV. 519, 528-29 (2012) (noting the belief in the connection between mental illness and violence and stating that the belief “may be fueled more by stigma and stereotype than by reality”); Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585, 586-87 (2003) (noting that individuals with mental disabilities “are seen as more likely to commit acts of violence than are people with physical disabilities”).

14. See Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1364 (2008).

15. Alyssa Dragnich, *Have You Ever ...? How State Bar Association Inquiries into Mental*

B. The Americans with Disabilities Act and Mental Impairments

On a practical level, one of the most pernicious stereotypes surrounding individuals with mental disabilities is that they are not capable of performing the functions of their jobs.¹⁶ The ADA prohibits employment discrimination on the basis of disability.¹⁷ The Act was designed to address the stigma and stereotypical assumptions often associated with disabilities.¹⁸ The ADA, like its predecessor, section 504 of the Rehabilitation Act, reflects the congressional recognition that “society's accumulated myths and fears about disability and disease” are as limiting as “actual impairment.”¹⁹ The ADA reflects this understanding in a variety of ways, from recognizing a claim where an employer regards an employee as having an impairment that is more limiting than it actually is to placing limits on the ability of employers and prospective employers to ask disability-related questions of their employees and job applicants.²⁰

While ADA plaintiffs have often experienced difficulty establishing that they are qualified for their jobs, plaintiffs with psychiatric disabilities have historically experienced particular difficulties in this regard.²¹ One study found that employers tended to react more negatively to an applicant's disclosure of the existence of a psychiatric disability during the interview process than the existence of a physical disability.²² Not only may employers be particularly

Health Violate the Americans with Disabilities Act, 80 BROOK. L. REV. 677, 731 (2015) (citing study).

16. See Waterstone & Stein, *supra* note 14, at 1365-66 (noting the assumption that “mental disability inevitably leads to inadequate work performance”).

17. 42 U.S.C. § 12112(a) (2018).

18. Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 535 (2020).

19. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 284 (1987); *see also* 29 C.F.R. § 1630.2 (2020).

20. See 42 U.S.C. §§ 12102(1)(C), 12112(d)(2).

21. See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272-73 (2000) (discussing difficulties faced by ADA plaintiffs alleging the existence of psychiatric disabilities); Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1134-36 (2017) (noting difficulties faced by ADA plaintiffs even after amendments).

22. Rebecca Spirito Dalgin & James Bellini, *Invisible Disability Disclosure in an Employment Interview: Impact on Employers' Hiring Decisions and Views of Employability*, 52 REHAB. COUNSELING BULL. 6, 8 (2008).

hesitant to hire individuals with mental disabilities based on the stereotypes associated with mental illness, they also may be reluctant to provide needed reasonable accommodations in the case of employees with mental impairments.²³

In addition to the reluctance of employers to provide reasonable accommodations, employees with psychiatric impairments frequently report other adverse consequences of divulging the existence of an impairment, such as excessive supervision and monitoring.²⁴ Employees with mental impairments may also face hostile attitudes from coworkers. For example, in one study, 58 percent of respondents indicated that they would not want to work with an individual with mental illness.²⁵ Perhaps not surprisingly, many employees and job applicants are reluctant to disclose the existence of their mental impairments or to seek needed accommodations due to the stigma involved, despite the legal protections afforded by the ADA.²⁶

II. THE LEGAL PROFESSION'S HISTORY WITH MENTAL HEALTH ISSUES

The legal profession's history of treatment of lawyers with mental health and substance abuse issues is not a proud one. For example, there are numerous examples of stigmatizing judge-made legal rules and statements in judicial decisions concerning mental impairments.²⁷ Commentators have suggested that decisions in

23. See Emens, *supra* note 12, at 416-17 (noting the stereotypes employers may hold with respect to individuals with mental disabilities and how those stereotypes may impact hiring decisions); Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities*, 55 AM. BUS. L.J. 537, 547 (2018) (noting the reluctance of employers to provide certain atypical accommodations for employees dealing with mental illness); Michael Z. Green, *Mediating Psychiatric Disability Accommodations for Workers in Violent Times*, 50 SETON HALL L. REV. 1351, 1375 (2020).

24. See Zlatka Russinova, Shanta Griffin, Philippe Bloch, Nancy J. Wewiorski & Iliana Rosoklija, *Workplace Prejudice and Discrimination Toward Individuals with Mental Illnesses*, 35 J. VOCATIONAL REHAB. 227, 230-31 (2011) (relating results of survey).

25. Dragnich, *supra* note 15, at 731 (citing study).

26. See Stefan, *supra* note 21, at 290 (noting that individuals with psychiatric disabilities are "extraordinarily reluctant to disclose their disabilities" because of the "stigma and shame associated with mental illness"); Hickox & Case, *supra* note 18, at 539 (noting the impact of the threat of stigma on the willingness of employees with hidden disabilities to seek accommodations).

27. See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (observing in a decision involving involuntary sterilization that "[t]hree generations of imbeciles are enough"). See generally John

volving mental disability law often reflect “bias against individuals with mental disabilities and contempt for the mental health professions.”²⁸

There is similar evidence of bias and stereotypical views concerning mental impairments in professional discipline decisions. Some disciplinary decisions involving lawyers with mental impairments or substance abuse issues reflect what one author has described as “a powerful current of blame.”²⁹ Disciplinary authorities have a history of being reluctant to accept evidence of treatment or rehabilitation indicating that lawyers with a history of mental impairment or substance abuse can provide competent representation.³⁰

Questions on bar applications concerning mental health, including counseling, have also provoked widespread concerns over the stigmatization of mental health issues within the profession.³¹ Prior to a 2014 Department of Justice consent decree, it was not uncommon for bar applications to include questions as to whether an applicant had recently sought treatment for mental health issues.³² Numerous critics charged these types of open-ended and invasive questions had the perverse effect of discouraging law students from seeking help for depression, anxiety, alcohol abuse, and related issues.³³ Indeed, a 2016 study of law students found that the perceived threat to an applicant’s chances for bar admission was the factor most likely to deter law students from seeking help for substance abuse issues and one of the factors most likely to deter

V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95, 96 (1999) (“The common law in this country has always mistreated the mentally ill.”).

28. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 30-31 (1993-94).

29. Michael L. Perlin, “Baby, Look Inside Your Mirror”: *The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 595-96 (2008) (emphasis omitted).

30. See *id.* at 595 (noting the tendency of bar discipline cases to reject mitigation arguments); Anita Bernstein, *Lawyers with Disabilities: L’Handicapé C’est Nous*, 69 U. PITT. L. REV. 389, 392 (2008) (“Regulators will cut mentally disabled lawyers little slack.”).

31. See Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLAL. REV. 93, 195-96 (2001).

32. See Dragnich, *supra* note 15, at 688-99 (discussing prior court decisions involving these types of questions).

33. See *id.* at 683; Bauer, *supra* note 31, at 150.

students from seeking help for mental health issues.³⁴ The National Conference of Bar Examiners has revised its questions on the subject, but the questions still remain the target of criticism concerning their potentially stigmatizing effect.³⁵ And individual applicants with histories of mental health issues still sometimes confront recalcitrant bar examiners, including one recent instance in which a federal judge—frustrated by a state bar association’s refusal to admit an applicant with a history of bipolar disorder over a two-year period—referred to the bar as having “a medieval approach to mental health that is as cruel as it is counterproductive.”³⁶

III. A PROFESSION IN CRISIS?

Lawyers increasingly perceive that the profession has a serious problem when it comes to the issue of lawyer well-being. Articles referencing a well-being crisis within the legal profession abound.³⁷ Various studies report higher rates of alcoholism and depression among lawyers than in the general population.³⁸ There are similarly alarming numbers when it comes to suicide within the legal profession. According to one study, the suicide rate among lawyers is greater than the rate among military veterans,³⁹ a cohort commonly

34. Organ et al., *supra* note 2, at 141.

35. See Lindsey Ruta Lusk, Note, *The Poison of Propensity: How Character and Fitness Sacrifices the “Others” in the Name of “Protection”*, 2018 U. ILL. L. REV. 345, 370-71 (2018) (describing the amendment process and noting the criticism); Dragnich, *supra* note 15, at 684 (noting the embarrassment of applicants who must answer these questions).

36. Doe v. Sup. Ct. of Ky., 482 F. Supp. 3d 571, 574-76 (W.D. Ky. 2020).

37. See, e.g., Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for Law Firms to Promote and Prioritize Lawyer Well-Being*, 65 VILL. L. REV. 361, 367-74 (2020); Cheryl Ann Krause & Jane Chong, *Lawyer Wellbeing as a Crisis of the Profession*, 71 S.C. L. REV. 203, 204 (2019).

38. ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-431 n.1 (2003) (citing George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 11 NO. 1 PROF. LAW. 2 (1999)); Louis M. Clothier, *Lawyers, Depression and Suicide: What to Look for—What You Can Do*, 88 J. KAN. BAR ASS’N 21, 22 (2019); Dina Roth Port, *Lawyers Weigh in: Why Is There a Depression Epidemic in the Profession?*, ABA J. (May 11, 2018, 7:00 AM), https://www.aba-journal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession [<https://perma.cc/ZT74-S6VP>]; Tyger Latham, *The Depressed Lawyer: Why Are so Many Lawyers so Unhappy?*, PSYCH. TODAY (May 2, 2011), <https://www.psychologytoday.com/us/blog/therapy-matters/201105/the-depressed-lawyer> [<https://perma.cc/2H6D-HRHG>]; NAT’L TASK FORCE, *supra* note 1, at 7.

39. Robert Herbst, *The Case for Attorney Wellness*, N.Y. STATE BAR ASS’N (Mar. 6, 2020), <https://nysba.org/the-case-for-attorney-wellness-2/> [<https://perma.cc/2W82-BLKY>].

identified as facing an epidemic in terms of its suicide rate.⁴⁰ Suicide is the third-leading cause of death among lawyers, and the CDC reports that between 1999 and 2007, lawyers were 54 percent more likely to die by suicide than members of other professions.⁴¹ It is also important to note that the concerns over well-being extend not just to practicing lawyers but also to law students, who experience heightened rates of depression, anxiety, suicide attempts, and drinking.⁴²

There is some dispute concerning the extent to which lawyers experience greater mental health issues than other professions.⁴³ Regardless, there is certainly a perception that a well-being crisis exists and that the profession has been slow to respond to it.⁴⁴ Even if there is no “crisis,” lawyers should, as a matter of common sense, strive to promote happiness, job satisfaction, and overall well-being within the legal profession, if not for themselves then for the clients they represent. Therefore, this Article focuses on the steps the legal profession is currently taking to encourage this goal, regardless of whether the steps are in response to a real or merely perceived well-being crisis.

IV. THE STIGMATIZING EFFECT OF THE ABA NATIONAL TASK FORCE’S REPORT

Over the past several years, the organized bar has increasingly focused on the issue of well-being. There have been numerous bar journal articles, continuing legal education classes, and bar committee reports on the topic.⁴⁵ Perhaps the best example of the lawyer

40. Matthew Ivey, *The Broken Promises of an All-Volunteer Military*, 86 TEMP. L. REV. 525, 556 (2014) (“Suicide is epidemic among service members and veterans.”).

41. Krause & Chong, *supra* note 37, at 207 (citing statistics).

42. Organ et al., *supra* note 2, at 127, 136-39.

43. Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. EMPIRICAL LEGAL STUD. 4, 4-5 (2021); Nicholas D. Lawson, “*To Be a Good Lawyer, One Has to Be a Healthy Lawyer*”: *Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 76 (2021) (noting conflicting studies).

44. See Perlin, *supra* note 29, at 589 (writing in 2008 that “[t]he legal profession has notoriously ignored the reality that a significant number of its members exhibit signs of serious mental illness (and become addicted or habituated to drugs or alcohol at levels that are statistically significantly elevated from levels of the public at large)”).

45. See *supra* note 6 and accompanying text (referencing bar journal articles); COMM. ON

well-being movement is the National Task Force on Lawyer Well-Being's report, *The Path to Well-Being: Practical Recommendations for Positive Change*, published in 2017.

A. An Overview of the Task Force Report

Citing the statistics signaling “an elevated risk in the legal community for mental health and substance use disorders,” the report urges leaders within the legal profession to take steps to improve lawyer well-being.⁴⁶ The report identifies several themes or goals for improving the well-being of the profession.⁴⁷ For purposes of this Article, the most noteworthy theme in the report is the need to eliminate “the stigma associated with help-seeking behaviors.”⁴⁸ The report notes numerous factors that deter individuals from seeking help for mental health issues, many of which involve concerns over the perceptions of others.⁴⁹ Such concerns include: society's negative attitudes toward mental health conditions, “fear of adverse reactions by others,” “feeling ashamed,” “viewing help-seeking as a sign of weakness,” having “fear of career repercussions,” and “concerns about confidentiality.”⁵⁰ Many of the specific recommendations the Task Force offers—whether it be encouraging states to adopt conditional admission rules or law schools to provide onsite counseling for distressed law students—are designed, in part, to minimize stigma associated with seeking help.⁵¹

The report also recommends that states amend their rules of professional conduct to define “competence” to include the “mental, emotional, and physical ability reasonably necessary” for representation.⁵² A related recommendation involves amending the

LAW. WELL-BEING OF THE SUP. CT. OF VA., A PROFESSION AT RISK 1 (2018) [hereinafter A PROFESSION AT RISK] (“[A]n alarming number of lawyers, judges and law students are experiencing a ‘wellness’ crisis.”); Nevada Lawyer Staff, *Staying Nimble: How the State Bar of Nevada Adapted to Serve Members in 2020*, Dec. 2020 NEV. LAW. 29, 31 (noting CLE programs devoted to lawyer well-being).

46. NAT'L TASK FORCE, *supra* note 1, at 7, 10.

47. *Id.* at 10-11.

48. *Id.* at 2.

49. *Id.* at 13.

50. *Id.*

51. *See id.* at 28, 32, 39.

52. *Id.* at 26 (quoting CAL. RULES OF PRO. CONDUCT r. 3-110 (STATE BAR OF CAL. 1992)).

comments to Rule 1.1 to provide that professional competence requires an ability to comply with all of a jurisdiction's "essential eligibility requirements,"⁵³ such as the abilities "to exercise good judgment in conducting one's professional business" and act "diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others."⁵⁴

The report emphasizes that a lawyer should not be subject to professional discipline simply for a failure to satisfy the well-being or essential eligibility requirements.⁵⁵ Instead, discipline is only appropriate when the lawyer's conduct in the representation of a client actually amounts to incompetence under Rule 1.1.⁵⁶ In keeping with this overall theme, the report recommends that states adopt diversion programs to deal with minor lawyer misconduct stemming from mental health or substance disorders.⁵⁷ On the theory that "[d]iscipline does not make an ill lawyer well," the report suggests that by requiring lawyers to seek treatment for underlying disorders that led to minor misconduct, the Bar can help create a path toward better well-being and better client representation.⁵⁸

B. The Stigmatizing Effect of the Task Force Report

While the National Task Force report deserves considerable praise for helping to bring the issue of lawyer well-being to the forefront of discussion within the legal profession, there are aspects of the report that merit concern. The authors suggest that the proposed amendment to the Rules of Professional Conduct linking well-being with the ethical duty of competence is designed "to reduce stigma associated with mental health disorders, and to

53. *Id.* According to the report, at least fourteen states list such requirements. *Id.* at 28 & n.105.

54. OHIO SUP. CT., DEFINITIONS OF ESSENTIAL ELIGIBILITY REQUIREMENTS FOR THE PRACTICE OF LAW, http://www.supremecourt.ohio.gov/AttySvcs/admissions/pdf/ESSENTIAL_ELIGIBILITY_REQUIREMENTS.pdf [<https://perma.cc/259G-99NG>].

55. NAT'L TASK FORCE, *supra* note 1, at 26.

56. *See id.* ("Enforcement should proceed only in the case of actionable misconduct in the client representation or in connection with disability proceedings under Rule 23 of the ABA Model Rules for Disciplinary Enforcement.").

57. *Id.* at 29.

58. *Id.* at 29-30.

encourage preventative strategies and self-care.”⁵⁹ In reality, several aspects of the report actually contribute to the stigma concerning disability, most notably the stigma associated with mental health disorders.

The report’s very first page announces, “To be a good lawyer, one has to be a healthy lawyer.”⁶⁰ Variations on this theme appear throughout the report, such as the idea that “[f]reedom from substance use and mental health disorders [is] an *indispensable predicate* to fitness to practice.”⁶¹ In support of this idea, the report cites a study asserting that “40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.”⁶² Even where lawyers who experience well-being issues are able to maintain minimum competence, the report suggests that they may struggle to “live up to the aspirational goal articulated in the Preamble to the ABA’s Model Rules of Professional Conduct, which calls lawyers to ‘strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.’”⁶³

There are several problems with the report’s premises and proposals. The report explains that its suggestion that Rule 1.1 be amended to explicitly link competence with well-being is designed “to reduce stigma associated with mental health disorders.”⁶⁴ Yet, in the same breath, the National Task Force tells lawyers with mental health disorders (as well as other members of the profession) that the absence of a mental health disorder is a predicate to fitness to practice law.⁶⁵ In other words, one cannot be a good lawyer if one has some type of mental health disorder. It is difficult to imagine a more stigmatizing comment in a document intended to help reduce the stigma concerning mental health disorders.

59. *Id.* at 26.

60. *Id.* at 1.

61. *Id.* at 17 (emphasis added).

62. *Id.* at 8 (citing D.B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments*, in *STRESS MANAGEMENT FOR LAWYERS* 104-130 (Amiram Elwork ed., 2d ed. 1997)).

63. *Id.* at 8.

64. *Id.* at 26.

65. See *infra* note 99 and accompanying text (defining a “qualified individual” protected under the ADA).

The notion that freedom from substance use and mental health disorders is an indispensable predicate to fitness to practice is not only stigmatizing, but also simply wrong. To be sure, we want everyone—including lawyers—to be free from substance abuse and mental health disorders. And the fact that a lawyer is, for example, actively abusing alcohol or experiencing depression undoubtedly makes it more likely on average that client representation is adversely impacted. But it should be equally obvious that there are also many outstanding lawyers who are actively abusing alcohol or experiencing depression.⁶⁶

Indeed, there is little empirical evidence that the existence of a mental impairment places a lawyer at a significantly greater risk of legal malpractice, incompetence, and other rule violations, or is even significantly predictive of such conduct.⁶⁷ In several instances, individual plaintiffs have challenged the legality of questions related to mental health and treatment in the professional licensing context.⁶⁸ In some instances, when challenged on the issue of whether past mental health treatment was a reliable predictor of future professional misbehavior, states were unable to offer credible evidence in support of their position that it is.⁶⁹ The ABA itself has previously noted that “[r]esearch in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor.”⁷⁰

Of course, a lawyer who is *presently* experiencing the debilitating effects of depression or untreated bipolar disorder would logically be

66. See Dragnich, *supra* note 15, at 707-08 (noting successful lawyers with a history of mental illness).

67. See Bauer, *supra* note 31, at 141 (“[T]here is simply no empirical evidence that [bar] applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney.”).

68. See *Doe v. Jud. Nom. Comm'n for the Fifteenth Jud. Cir. of Fla.*, 906 F. Supp. 1534, 1543-44 (S.D. Fla. 1995) (summarizing cases). In 2014, the Department of Justice advised the Louisiana Supreme Court that its state bar application process violated the ADA, leading the state to change some of the questions it asks concerning mental health. See Dragnich, *supra* note 15, at 700-02.

69. See Dragnich, *supra* note 15, at 694-95, 697 (discussing cases).

70. ABA Comm'n on Mental and Physical Disability Law, *Recommendation to the House of Delegates*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 266, 267 (1998).

more likely to have difficulty providing competent representation than a lawyer not experiencing these conditions. It might even be true that these types of conditions—if not properly treated—are more likely to result in incompetent representation of clients than many physical impairments. But if one of the primary goals of the National Task Force Report is to end the stigma that discourages lawyers from seeking help, it is counterproductive for the report to make sweeping generalizations about the fitness of a lawyer based merely on the diagnosis or existence of a mental impairment.

V. THE STIGMATIZING EFFECTS OF ETHICS OPINIONS DEALING WITH MENTAL DISABILITIES

Ethics opinions on the subject of mental health within the legal profession tend to suffer from similar shortcomings. To date, ABA and state ethics opinions concerning ethical issues involving lawyers with mental impairments have tended to focus on three subjects: (1) the ethical obligation of a lawyer under Model Rule 8.3(a) to report the serious misconduct of another lawyer to disciplinary authorities when the other lawyer's misconduct stems from a mental impairment or substance abuse issue;⁷¹ (2) the ethical obligation of a lawyer within a law firm to inform the clients or potential clients of a lawyer with a mental impairment of facts related to the impairment when the other lawyer leaves the firm;⁷² and (3) the ethical obligations of law firm partners and supervisors when another lawyer in the firm may have a mental impairment or a problem with alcohol or drugs that impacts the lawyer's ability to competently represent clients.⁷³

Like the National Task Force report, these ethics opinions typically fail to distinguish between the mere existence of a mental

71. ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-431 (2003); ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-429 (2003); D.C. Bar Ethics Op. 377 (2019); Va. Legal Ethics Op. 1887 (2017); N.C. State Bar Formal Ethics Op. 2003-2 (2003); N.C. State Bar Formal Ethics Op. 2013-8 (2014); Kan. Bar Ass'n Legal Ethics Op. 14-01 (2014); S.C. Bar Ethics Advisory Op. 02-13 (2002); W. Va. Legal Ethics Op. 92-04 (1992); N.Y. State Bar Ass'n Op. 822 (2008).

72. ABA Formal Op. 03-429; D.C. Bar Ethics Op. 377; S.C. Bar Ethics Advisory Op. 02-13; Phila. Bar Ass'n Ethics Op. 2000-12 (2000).

73. ABA Formal Op. 03-429; D.C. Bar Ethics Op. 377; N.C. Formal Ethics Op. 2013-8; Va. Legal Ethics Op. 1886 (2016); Pa. Bar Ass'n Formal Ethics Op. 2020-400 (2020).

impairment and a mental impairment that is currently limiting the ability of a lawyer to practice in a competent manner. Instead, the opinions speak broadly in terms of “mental impairments” and “impaired lawyers.”⁷⁴ In the process, the opinions often further a stigmatizing view of mental impairments.

For example, several opinions take the position that a firm lawyer has an obligation to notify clients that a departing attorney has a mental impairment when the client has not yet decided whether to remain represented by the firm or to follow the departing lawyer.⁷⁵ These opinions raise several questions. For instance, why do the opinions single out lawyers with mental impairments? If the underlying principle is that a lawyer’s duty of communication requires the lawyer to provide clients with information necessary to make informed decisions about the representation, surely a lawyer has an ethical obligation to disclose *any* information that is necessary to accomplish this goal. This could include the fact that the departing lawyer has a *physical* impairment that impacts the lawyer’s representation, the fact that the departing lawyer has been distracted at work due to personal problems, or the fact that the departing lawyer has sometimes missed deadlines or demonstrated incompetence for reasons having nothing to do with a mental impairment.⁷⁶ If the goal of these opinions is to provide guidance about how the ethical duty to keep a client reasonably informed applies when a lawyer departs a firm, there is no particular reason to devote the entire opinion to a situation involving a lawyer with a mental impairment. Doing so simply perpetuates unhealthy stereotypes concerning mental health.

The same is true of the opinions concerning the ethical obligation of a lawyer to report the misconduct of another lawyer who has a mental impairment and the obligation of a firm lawyer with respect to another lawyer in the firm who has a mental impairment. Model

74. See *supra* notes 71-73. One exception to this trend is Virginia Legal Ethics Opinion 1886, which focuses on ethical issues raised when a lawyer has a “significant impairment.” Va. Legal Ethics Op. 1886.

75. See ABA Formal Op. 03-429; D.C. Bar Ethics Op. 377; Pa. Bar Ass’n Formal Ethics Op. 2020-400.

76. See Jacobi, *supra* note 11, at 573 (questioning “why there is a formal opinion on the supervision of lawyers with mental impairments and not, say, lawyers with visual or mobility impairments”).

Rule 8.3(a) leaves little room for interpretation regarding a lawyer's ethical obligation to report another lawyer's violation of the Rules of Professional Conduct, regardless of the identity of the other lawyer or the underlying causes of the misconduct.⁷⁷ Therefore, it is unclear why there needs to be an entire ethics opinion that focuses on this obligation as it applies to misconduct involving a lawyer with a mental impairment. If ethics committees viewed the opinions as an opportunity to encourage lawyers to offer assistance to other lawyers in need of mental health care, encourage lawyers with mental health issues to seek help, or encourage disciplinary authorities to consider alternatives to traditional professional discipline in such cases, the opinions might serve an important purpose. But there is little discussion of these sorts of issues in the opinions.⁷⁸

Likewise, the opinions discussing ethical obligations of law firm partners and supervisors when there is a concern that another lawyer in the firm may have a mental impairment contribute to the stigma concerning lawyers with mental impairments. Model Rule 5.1 requires that law firm partners and those with similar managerial authority make reasonable efforts to ensure conformity with the Rules of Professional Conduct.⁷⁹ The rule also requires a lawyer with supervisory authority over another lawyer in a firm to reasonably supervise the subordinate lawyer.⁸⁰

The supervisory duties contained in Rule 5.1 are in no way limited to lawyers with mental impairments. The rule is generally unenforced, so lawyers would certainly benefit from the sort of clarification that an ethics opinion might provide.⁸¹ Ethics opinions discussing Rule 5.1 could also use the situation of a lawyer with a mental impairment to help illustrate the duties imposed by the rule. Yet, the exclusive focus of the opinions on the issue of lawyers with mental impairments suggests that bar committees tend to view the

77. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2021).

78. *But see* ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-431 (2003) (suggesting that lawyers report conduct of impaired lawyers to an approved lawyer assistance program, even if the reporting lawyers have no ethical obligation to report such conduct to disciplinary authorities).

79. MODEL RULES OF PRO. CONDUCT r. 5.1(a) (AM. BAR. ASS'N 2021).

80. *Id.* r. 5.1(b).

81. *See* Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 *FORDHAM URB. L.J.* 119, 126 (2005) (describing Rule 5.1(a) as a "disciplinary 'dead letter'" due to its lack of enforcement).

mere presence of a lawyer with a mental impairment within a firm as triggering a heightened ethical responsibility.⁸² The opinions explain that when a law firm partner or supervising lawyer knows that another lawyer has a mental impairment, “close scrutiny is warranted because of the risk that the impairment will result in violations.”⁸³ One opinion suggests that even if a partner or supervising lawyer merely *suspects* that another lawyer has a mental impairment, the partner or supervising lawyer must “closely supervise the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules.”⁸⁴ Some opinions suggest that a firm should have a policy in place encouraging anonymous reporting of the fact that a lawyer has a mental impairment.⁸⁵

These types of opinions contribute to the perception that mental impairments are somehow dangerous or particularly alarming. As Professor John Jacobi has argued, perpetuating these kinds of stereotypes through ethics opinions designed to provide guidance to attorneys “gives free rein to the pervasive bias against people with mental illness and will likely lead to discrimination against mentally impaired lawyers.”⁸⁶

VI. WHAT THE LAWYER WELL-BEING MOVEMENT COULD LEARN FROM THE ADA

Ultimately, what is perhaps most noteworthy about the National Task Force report and the ethics opinions involving lawyers with mental impairments is how little the ADA seems to have influenced them. The ADA is unquestionably the single most important statute on disabilities and disability discrimination. Yet, there is not a single mention of the law in the entire seventy-two pages of the National Task Force report.⁸⁷ While a few ethics opinions reference the ADA, they typically do so only in passing or with the observation that a fuller discussion of the law is beyond the scope of the

82. *See supra* note 73.

83. *E.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-429 (2003).

84. N.C. State Bar Formal Ethics Op. 2013-8 (2014).

85. *See, e.g.*, Pa. Bar Ass’n Formal Ethics Op. 2020-400 (2020).

86. Jacobi, *supra* note 11, at 576.

87. *See generally* NAT’L TASK FORCE, *supra* note 1.

opinion.⁸⁸ Yet, it is impossible to discuss issues related to the employment of individuals with mental impairments in any sort of meaningful way without taking the ADA into consideration. Therefore, the failure of the report or the ethics opinions to do so is quite remarkable. The following sections discuss the various ways that consideration of the underlying policies and specifics of the ADA might better inform the lawyer well-being movement.

A. *Underlying Policies of the ADA*

The ADA defines “disability” as a physical or mental impairment that substantially limits a major life activity.⁸⁹ One also has a disability for purposes of the ADA when one has “a record of such an impairment” or when a defendant takes a prohibited action against that individual based on the perception that the individual has a physical or mental impairment.⁹⁰ The decision to define the concept of disability in terms of impairments that are actually substantially limiting or that cause an employer to subject an individual to adverse treatment is significant.

This definition reflects a deliberate shift from the so-called “medical model” of disability. The medical model tended to reduce the idea of disability to an individual’s underlying medical conditions, rather than involving societal responses to these conditions.⁹¹ Defining disability in terms of underlying medical conditions tended to prevent any inquiry into an individual’s actual abilities.⁹² As one author put it, this view of disability treated disability “as a medically determined category that is inconsistent with work.”⁹³ Under

88. See, e.g., ABA Formal Op. 03-429 n.5 (noting that the opinion does not deal with issues of reasonable accommodation arising under the ADA).

89. 42 U.S.C. § 12102(1)(A).

90. *Id.* § 12102(1)(B)-(C), (3).

91. See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649 (1999) (“The defining characteristic of the medical model is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remediating that disability.”).

92. See Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1058 (1998) (noting that the focus on medical conditions often prevents any inquiry into the ability of an individual to perform the essential functions of a job).

93. *Id.* at 1059.

this view, the existence of a physical or mental impairment was inherently limiting, and the individual “afflicted” with the impairment was in need of a medical cure.⁹⁴ The effect was to label and stigmatize the individual “with a status of physiological inferiority.”⁹⁵

The ADA took a different approach. The ADA’s multi-pronged definition of disability recognizes that not all physical or mental impairments are substantially limiting, and sometimes the limitation may stem from others’ reactions to an impairment.⁹⁶ In short, the ADA recognizes that stereotypical assumptions about what an individual can or cannot do based simply on a medical diagnosis can be as limiting as an impairment itself.⁹⁷

In the employment context, the ultimate inquiry under the ADA is not whether an individual has a physical or mental impairment but whether the individual with a disability is qualified for the position in question. This requires an individualized assessment.⁹⁸ An individual with a disability is qualified for a position when the individual can perform the essential functions of a position with or without a reasonable accommodation.⁹⁹ In addition to recognizing that not all impairments are disqualifying, the ADA recognizes that some individuals with physical or mental impairments are perfectly capable of performing the essential functions of their jobs with relatively inexpensive or minor adjustments to the way the job is normally performed.¹⁰⁰

The ADA has helped reshape the way individuals, employers, and courts think about disability. Yet, the National Task Force report

94. See Nathaniel Counts, *Accommodating One Another: Law and the Social Model of Mental Health*, 25 KAN. J.L. & PUB. POL’Y 1, 6 (2015) (explaining that, under the medical model, “the difference of disability is inherently limiting and ... endogenous to the individual—there is something wrong with *them* and they alone need treatment”).

95. Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1349 (1993).

96. See 42 U.S.C. § 12102(1)(A)-(C), (3).

97. See *supra* note 28 and accompanying text. In contrast, “[t]he medical model views the physiological condition *itself* as the problem.” Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 185-86 (2008).

98. See Diller, *supra* note 92, at 1023.

99. 42 U.S.C. § 12111(8).

100. See *id.*

never references the ADA, and the term “disability” appears only infrequently.¹⁰¹ Instead, the authors employ a medical model of disability that largely views mental impairments or mental health issues as disqualifying. The report regularly discusses “impairments” and the steps other lawyers should take to prevent a lawyer with an impairment from causing harm.¹⁰² But rarely is there any suggestion that not all impairments pose a significant risk of harm to a client or are even always significantly limiting.¹⁰³

The ethics opinions on the subject of lawyers with mental impairments take a similar approach. The opinions tend to dwell not on the issues raised when a lawyer has a mental impairment that substantially limits the ability of the lawyer to competently represent clients, but on the supposed issues raised by the mere fact that a lawyer has a mental impairment.¹⁰⁴ As a result, the opinions usually bypass any discussion of the fact that a lawyer with a mental impairment may be perfectly qualified to perform the essential functions of a lawyer.¹⁰⁵

If ethics committees truly wish to reduce the stigma associated with mental impairments, the opinions could begin by incorporating the ADA’s terminology and concepts. Rather than treating mental impairments as inherently limiting, ethics opinions should discuss impairments in terms of whether they are substantially limiting for a particular attorney, in other words, whether they amount to disabilities. As such, ethics opinions should focus on whether an individual lawyer with a disability can perform the essential functions of a position, with or without a reasonable accommodation.

In doing so, leaders in the legal profession may come to find that the Rules of Professional Conduct and legal rules of the ADA coexist quite nicely. For example, the ADA defines the essential functions of a position as the “fundamental job duties” an employee must be able to perform.¹⁰⁶ Equal Employment Opportunity Commission (EEOC) guidance on the issue of lawyers with disabilities has listed several duties that are essential functions for many attorney

101. See NAT’L TASK FORCE, *supra* note 1, at 26, 28, 34.

102. See *id.* at 7, 9-11, 14, 18, 24-29.

103. See *id.*

104. See *supra* notes 71-73 and accompanying text.

105. See *supra* notes 71-73 and accompanying text.

106. 29 C.F.R. § 1630.2(n)(1) (2020).

positions, including conducting legal research, writing motions and briefs, counseling clients, drafting opinion letters, presenting an argument before an appellate court, and conducting depositions and trials.¹⁰⁷ Of course, the essential functions of a tax lawyer position are likely to be different than the essential functions of a public defender position. But the Rules of Professional Conduct make clear that whatever specific function a lawyer must perform, the lawyer must be able to do so competently and diligently.¹⁰⁸ In short, a lawyer who cannot perform the essential functions of a job in a manner that complies with the Rules of Professional Conduct is not qualified for the position in question.

Ethics opinions may also look to the ADA's reasonable accommodation requirement when discussing a lawyer's supervisory duties under Rule 5.1. In fact, ABA Formal Opinion 03-429 is one of the only ethics opinions to address this requirement in the context of a lawyers' ethical obligations under Rule 5.1.¹⁰⁹ When discussing the obligation of a partner or lawyer with similar managerial authority to make reasonable efforts to adopt measures to prevent an impaired lawyer from violating the Rules of Professional Conduct, the opinion observes that "[s]ome impairments may be accommodated."¹¹⁰ The opinion suggests that if, due to an impairment, a lawyer is unable to perform the essential functions of a job as the job is currently constituted, a supervisory lawyer may be able to satisfy the lawyer's obligations under Rule 5.1 by seeking to alter the manner in which those duties are performed or perhaps by reassigning the lawyer to a position involving duties the lawyer can perform.¹¹¹ In doing so, the supervisory lawyer may fulfill the lawyer's legal obligations under the ADA as well as the lawyer's ethical obligations under Rule 5.1.

107. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2006-2, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES (2006).

108. See MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2021).

109. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 03-429 (2003); *supra* notes 79-85 and accompanying text.

110. Formal Op. 03-429.

111. See *id.*

B. Specific ADA Provisions that May Apply in the Case of a Lawyer with Mental Impairments

One of the other shortcomings of the National Task Force report and the ethics opinions on the subject of lawyers with mental impairments is that they include suggestions that at least come close to violating specific ADA restrictions. For example, some of the opinions that discuss the ethical responsibilities of a supervisory lawyer who believes that another lawyer in the firm has a mental impairment suggest that the supervisory lawyer must take reasonable steps to address the issue. As part of the reasonable steps a supervisory lawyer might take, the opinions recommend that the supervisor “confront the impaired lawyer with the facts of his impairment” and “forcefully urg[e],” “insist,” or “require” that the lawyer “seek appropriate assistance, counseling, therapy, or treatment.”¹¹² Putting aside the question of the therapeutic value in “confronting” a lawyer with the facts of the lawyer’s impairment, there are at least two legal concerns arising under the ADA with taking such action.

1. Disability-Related Inquiries Under the ADA

First, the ADA places limits on the ability of employers to inquire into the medical history of their prospective and current employees.¹¹³ In the case of a current employee, an employer is only permitted to make a “disability-related inquiry”—a question that is likely to elicit information about a disability—when the inquiry is “job-related and consistent with business necessity.”¹¹⁴ In order for a disability-related inquiry to be job-related and consistent with business necessity, the employer must have a reasonable belief based on objective evidence that an employee will either be unable

112. *Id.*; Va. Legal Ethics Op. 1886 (2016); D.C. Bar Ethics Op. 377 (2019). At least one opinion does suggest some other, less confrontational actions, including referring the lawyer with the impairment to a lawyer assistance program, providing the lawyer with information about possible counseling services, or “consult[ing] with mental-health or medical professionals about the lawyer, prior to engaging in any remedial activities.” D.C. Bar Ethics Op. 377.

113. 42 U.S.C. § 12112(d).

114. *Id.* § 12112(d)(4)(A).

to perform the essential functions of his or her job because of a medical condition or pose a direct threat to the safety of others.¹¹⁵ Judicial decisions have emphasized that “[t]he ‘business necessity’ standard is quite high, and ‘is not [to be] confused with mere expediency.’”¹¹⁶ The standard is only met when there is “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.”¹¹⁷

The EEOC has explained that an employer’s reasonable belief “requires an assessment of the employee and his/her position and cannot be based on general assumptions.”¹¹⁸ One of the examples the EEOC provides makes clear that the mere fact that an employee has an impairment does not justify an employer making a disability-related inquiry absent objective evidence that the impairment is likely to impact the employee’s ability to perform the job.¹¹⁹ Judicial decisions take a similar approach, often noting that frequent absences or past work-related problems stemming from a known disability may be sufficient to provide an employer with legitimate reasons “to doubt the employee’s capacity to perform his or her duties.”¹²⁰ But there must be significant evidence of some kind to justify making such an inquiry.

When the ethics opinions addressing a supervisor’s ethical responsibilities towards another lawyer who may have a mental impairment advise supervisory lawyers to confront the other lawyer about the impairment, the opinions are providing legally suspect advice. By confronting an employee about an impairment, the supervisor is likely making a disability-related inquiry or at least engaging in conduct that is likely to lead to such an inquiry. The mere fact that an employee happens to have some type of mental impairment will not necessarily provide a supervisor with legitimate

115. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (2000). For further discussion of this concept, see Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377, 387-90 (2018).

116. *E.g.*, *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001) (quoting *Bentivegna v. U.S. Dep’t of Lab.*, 694 F.2d 619, 621-22 (9th Cir. 1982)).

117. *See Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999).

118. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 115.

119. *See id.*

120. *See, e.g.*, *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir. 2003).

reasons to doubt the other lawyer's ability to perform the duties of a job. In the process, the opinions tend to encourage the type of stigmatization and stereotyping that the ADA's prohibition on disability-related inquiries was intended to prevent.¹²¹

In addition, the ADA prohibits an employer from requiring an employee to undergo a medical examination unless, again, the examination is "job-related and consistent with business necessity."¹²² A medical examination "is a procedure or test that seeks information about an individual's physical or mental impairments or health."¹²³ Therefore, an employer who requires an employee to undergo psychological counseling, therapy, or other mental health treatment as a condition of employment may have to justify such a requirement by pointing to specific evidence that would cause a reasonable person to question the employee's ability to perform the job.¹²⁴ As is the case with judicial decisions involving disability-related inquiries, courts have made clear that an employer must have some objectively reasonable basis to require an employee to undergo a medical examination.¹²⁵ Therefore, requiring an employee to seek treatment for a mental impairment—as some ethics opinions suggest—could potentially violate the ADA absent some individualized and objectively reasonable reason to question a lawyer's ability to perform the duties of the lawyer's job.¹²⁶

121. See S. REP. NO. 101-116, at 137-38 (1989) ("[T]he actual performance on the job is, of course, the best measure of ability to do the job.... An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability."); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 115 ("The ADA's provisions concerning disability-related inquiries and medical examinations reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.")

122. 42 U.S.C. § 12112(d)(4)(A).

123. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 115.

124. See *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1312 (11th Cir. 2013) (treating a "psychiatric/psychological fitness-for-duty evaluation" as a medical examination); *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 820 (6th Cir. 2012) (denying summary judgment to employer on the grounds that a genuine issue of fact existed as to whether psychological counseling qualified as a medical examination); *Painter v. Ill. Dep't of Transp.*, 715 Fed. App'x 538, 539 (7th Cir. 2017) (finding employer's requirement that employee receive treatment from mental health specialist was job-related and consistent with business necessity).

125. See *Befort*, *supra* note 115, at 392-94 (discussing cases).

126. To the extent an employer insists that an employee participate in a company-sponsored wellness program, this action might potentially violate the ADA's provisions

2. *The ADA's Interactive Process*

The second practical problem with advising a supervisory lawyer to confront another lawyer with the facts of the lawyer's mental impairment is that the advice may also run afoul of the ADA's interactive process. Most courts have held that the ADA requires employers to participate in an interactive process with an employee in order to determine an appropriate reasonable accommodation.¹²⁷ The interactive process is supposed to be an informal, cooperative, and nonconfrontational process designed to help the parties exchange information in an effort to determine an appropriate accommodation.¹²⁸ As the Sixth Circuit Court of Appeals has explained, the interactive process "ensure[s] that employers do not disqualify ... employees based on 'stereotypes and generalizations about a disability,'" but instead base their decisions "on the actual disability and the effect that disability has on the particular individual's ability to perform the job."¹²⁹

In assessing whether the two sides have met their obligations when the process breaks down, courts look at whether the parties have participated in the process in good faith.¹³⁰ Once again, confronting a lawyer with the facts of his impairment, as the opinions suggest, hardly seems like the first step a supervisory lawyer should take when seeking to initiate a cooperative, nonconfrontational, interactive process. Such action potentially calls into question whether the firm was acting in good faith in an attempt to

concerning wellness programs. Such programs are permissible only where, inter alia, they are voluntary in nature. 42 U.S.C. § 12112(d)(4)(B); see also Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 WM. & MARY L. REV. 1663, 1684-89 (2020) (discussing confusion surrounding the voluntariness requirement).

127. See *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (stating that "the vast majority" of courts have held that the process is mandatory).

128. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 658 (2004) ("This interactive process is intended to be a cooperative, informational exchange rather than a confrontational process.").

129. *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014) (quoting *Keith v. Cnty. of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013)).

130. See *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary.").

determine the appropriate accommodation that might enable the lawyer to perform the essential functions of the position. If legal employers truly wish to understand the facts surrounding a lawyer's impairment, they should approach the lawyer as a part of a "co-operative dialogue" to determine the appropriate course of conduct.¹³¹ Such an approach would be far more in line with the goals of ensuring compliance with the Rules of Professional Conduct and reasonable supervision established in Rule 5.1 than a confrontational approach containing threats of discharge.

CONCLUSION

As one of the chief Senate sponsors of the ADA noted, the chief "thesis" of the ADA is that "people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged based upon the relevant medical evidence and the abilities they have."¹³² The National Task Force on Lawyer Well-Being's *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* deserves praise for bringing increased attention to the issue of well-being in the legal profession and for some of its recommendations. But the fact that the report fails to incorporate the basic principles and substance of the ADA represents a glaring shortcoming. As a result, the report perpetuates some of the unfounded fear, prejudice, ignorance, and myths the ADA was designed to combat. The ethics opinions concerning lawyers with mental impairments largely suffer from the same flaws. In the process, the opinions provide advice that might create a risk of legal liability.

If and when there is a second edition of the National Task Force report, the authors should strive to communicate the basic thesis of the ADA when addressing the issue of lawyer well-being. Currently, the words "Americans with Disabilities Act" do not even appear in

131. New York City's Human Rights Law uses the term "cooperative dialogue" in place of "interactive process." See *Coronado v. Weill Cornell Med. Coll.*, 114 N.Y.S.3d 193, 199 (N.Y. Sup. Ct. 2019).

132. *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) (quoting 136 CONG. REC. S7422-03, 7347 (daily ed. June 6, 1990) (statement of Sen. Tom Harkin)).

the report, and the term “disability” itself is mentioned only in passing. The report provides an opportunity to help educate lawyers about the nature of disability as it applies to well-being. The only way the authors can truly educate lawyers on the subject is by articulating the values of the ADA. The authors of ethics opinions have a similar opportunity to explain to lawyers how their ethical obligations are consistent with their legal obligations under the ADA.