Reasonable Accommodation as Professional Responsibility, Reasonable Accommodation as Professionalism

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INTRODUCTION

The American legal system has been slow to remove the barriers that exclude individuals with disabilities. Well into the twentieth century, laws existed in many states that excluded blind and deaf individuals from serving on juries.[1] Even after passage of the Americans with Disabilities Act ("ADA") in 1990, there were still statutes on the books in some states that permitted the removal of the "mentally or physically disabled" and the "infirm or decrepit" from jury pools.[2] Courtroom accessibility has also proven to be a challenge.[3] Many courthouses were constructed prior to the passage of federal laws mandating accessibility and were designed without the needs of the disabled in mind.[4] In 2004, the Supreme Court held in *Tennessee v. Lane* that Congress had acted within its constitutional authority when it acted to require states to make their courtrooms accessible to individuals with disabilities.[5] Yet, even after the Court's decision, some individuals with disabilities remain unable to fully participate in the legal process due to accessibility issues.[6]

The legal profession has been similarly slow to welcome individuals with disabilities into the profession.[7] According to the U.S. Census

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[1] *See* Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927, 958 (2011); *cf. id.* at 949 (quoting the judge as saying that courts have been in a "catch-up mode to ensure courtroom accessibility for all of our citizens" since the passage of the ADA).

[2] *See* Tennessee v. Lane, 541 U.S. 509, 524 n.9 (2006) (quoting Tennessee and Michigan statutes as examples of state laws that continued to prohibit persons with disabilities from serving as jurors).

[3] *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1857 (2005) (stating that there has been "significant noncompliance" with the ADA with respect to courthouse accessibility).

[4] Peter Blanck et al., *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 829 (2004).

[5] *See Lane*, 541 U.S. at 533-34.

[6] *See, e.g.*, Edith Brady-Lunny, *Attorney General's Office Releases Report on Livingston County Law and Justice Center*, PANTAGRAPH (Bloomington, Ill.), Apr. 10, 2013, *available at* 2013 WLNR 8693111 (reporting in a news story that there were 100 violations of accessibility codes in a courthouse built in 2011); Matt Hildner, *Alamosa County Outgrowing Courthouse*, PUEBLO CHIEFTAIN (Colo.), Mar. 28, 2013, *available at* 2013 WLNR 7616697 (noting that local courthouse has two courtrooms on the second floor, but no elevator, and is "not accessible by the disabled").

[7] *See* Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 637, 642 (2008) ("[T]here is little evidence to suggest that typical members of the bar have considered thoughtfully whether the structure or practices of the legal profession must or should change to accommodate individuals with disabilities.").

Bureau, 54 million Americans or 19% of the civilian noninstitutionalized population has a disability of some kind.[8] Yet, in a recent survey of law firms that sought disability information for approximately 110,000 lawyers, only 255, or 0.23%, were identified as having a disability.[9] The ADA, as amended by the ADA Amendments Act ("ADAAA"), prohibits public entities from administering licensing programs in a discriminatory manner or imposing eligibility criteria that tend to screen out individuals with disabilities.[10] However, bar applicants with mental disabilities in some states are still required to provide in-depth information concerning their history of impairment, subjected to rigorous and sometimes embarrassing examination concerning those impairments, and run the risk of being denied admission to the bar or granted only conditional admission on the basis of their disabilities.[11] Bar applicants may also sometimes confront the unwillingness of bar examiners to provide testing accommodations on the bar examination itself.[12]

To some extent, the reluctance to welcome individuals with disabilities within the legal profession exists at the law school level as well. Various authors have suggested that law schools have sometimes

[8] U.S. DEP'T OF COMMERCE, P70-117, AMERICANS WITH DISABILITIES: 2005, at 3 tbl.1 (2008), *available at* http://www.census.gov/prod/2008pubs/p70-117.pdf.

[9] *Reported Numbers of Lawyers with Disabilities Remains Small*, NALP BULL. (Dec. 2009) [hereinafter NALP Survey], http://www.nalp.org/dec09disabled. *See generally* 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, 593 (2008) (describing these types of statistics as "appalling").

[10] 28 C.F.R. § 35.130(b)(6)-(8) (2011); *see* 42 U.S.C. § 12132 (2012).

[11] *See* Campbell v. Greisberger, 80 F.3d 703, 704-05 (2d Cir. 1996) (discussing a challenge to mental health-related questions on bar application and the decision to condition admission on provision of medical records related to disability); Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 93 (2001) ("[M]any of the questions currently in use cannot be justified under the ADA, even under the premises of 'relaxed scrutiny.'"); Jennifer Jolly-Ryan, *The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket*, 79 UMKC L. REV. 123, 124 (2010) ("At times, the bar only offers conditional admission to law students with current or past mental health issues.").

[12] *See* Erin Grewe, *Justice May Be Blind, But There Is No Justice for the Visually Disabled: A Guide to the Administration of a Format-Neutral Bar Examination*, 21 TEMP. POL. & CIV. RTS. L. REV. 543, 544 (2012) (discussing the reluctance of the National Conference of Bar Examiners to permit certain accommodations on the bar exam for visually-disabled test-takers); Neha Sampat & Esmé Grant, *Research Project: Bar Examination Accommodations for ADHD Graduates*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1211, 1213 (2011) (postulating that one reason for the lack of diversity within the legal profession with respect to disability is "the unreasonable standards required by bar associations to qualify for testing accommodations").

been reluctant to make the modifications and accommodations necessary to allow for full participation by students with disabilities and to prepare those students for the practice of law.[13] Others have argued that law schools have been slow to recognize and promote the value of diversity with respect to individuals with disabilities,[14] particularly with regard to law faculties.[15] As an example, the American Association of Law Schools ("AALS") touts the benefits of diversity in its bylaws and requires its members to seek diversity "with respect to race, color, and sex."[16] "Disability" is notably lacking from the list.[17]

In some respects, the difficulties lawyers with disabilities have faced in the legal world are similar to the difficulties individuals with disabilities have faced more generally in the employment context. Despite the hopes of the ADA's supporters, the unemployment and poverty rates for the disabled remain depressingly high.[18] Although

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[13] *See* Hensel, *supra* note 7, at 642 ("Law students with learning disabilities that seek accommodation on examinations are routinely faced with suspicion over the extent of their impairments."); John F. Stanton, *Breaking the Sound Barrier: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, 45 VAL. U. L. REV. 1185, 1213-17 (2011) (discussing the historical reluctance on the part of law schools to provide accommodations for deaf law students).

[14] *See* Anita Bernstein, *Lawyers with Disabilities: L'Handicape C'est Nous*, 69 U. PITT. L. REV. 389, 394-95 (2008) (discussing the goal of diversity and suggesting "the need for this profession to do more recruiting, inviting, and supporting of students with disabilities"); *cf.* Meredith George & Wendy Newby, *Inclusive Instruction: Blurring Diversity and Disability in Law School Classrooms Through Universal Design*, 69 U. PITT. L. REV. 475, 493 (2008) (suggesting law student diversity could be improved through greater attention to universal design techniques in law school instruction).

[15] Leslie Pickering Francis & Anita Silver, *No Disability Standpoint Here!: Law School Faculties and the Invisibility Problem*, 69 U. PITT. L. REV. 499, 499 (2008).

[16] ASSOCIATION OF AMERICAN LAW SCHOOLS HANDBOOK: BYLAWS § 6-3(c) (2008), *available at* http://www.aals.org/about_handbook_requirements.php (touting these values in a section labeled "Diversity: Nondiscrimination and Affirmative Action").

[17] *See id.* The ABA's accreditation standards for law schools take a similar approach. Standard 212 requires that law schools "demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities." ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard No. 212, at 16 (2013). But in terms of a commitment to diversity, law schools must only demonstrate "a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." *Id.* Like the AALS Handbook, ABA Standard 212 says nothing about diversity. *Id.*

[18] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 117 (2009) ("[B]y virtually all reports the employment rate for Americans with disabilities has declined over the time the statute has been on the books."); Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 UTAH L.

numerous theories have been advanced for the failure of the ADA to facilitate employment opportunities for individuals with disabilities, part of the reason undoubtedly rests in the ADA's reasonable accommodation requirement.[19] The ADA is unusual in discrimination law insofar as it requires employers to modify existing rules and practices, within reason, to enable individuals with disabilities to perform the essential functions of their jobs.[20] Employers are sometimes reluctant to make these changes. Sometimes the concern involves the costs or difficulties associated with an accommodation.[21] In others, there may simply be a general resistance to stray from the way things have always been done.[22] Regardless, employers may be reluctant to hire an individual with a disability due to the perceived burdens associated with the reasonable accommodation requirement and slow to make accommodations for existing employees for these same reasons.

REV. 429, 431 (citing statistics showing that "[t]he unemployment rate among people who have disabilities is almost 60 percent higher than that of people without disabilities" and that "the incidence of poverty among working-age adults with a disability is about one and one-half times that of comparable individuals without a disability"). Congress referenced similar concerns when the ADA was originally enacted in 1990, noting that discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(8) (2012).

[19] *See* Nicole Buonocore Porter, *Relieving (Most) of the Tension: A Review Essay of Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement*, 20 CORNELL J.L. & PUB. POL'Y 761, 787-88 (2011) (attributing the failure of the ADA to improve employment prospects for individuals with disabilities to the fact that employers are reluctant to hire employees who may need accommodations).

[20] *See* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1232-34 (2003).

[21] *See* Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1092 (2010) (stating that "the principal objection" to the reasonable accommodation requirement "has been the costs imposed on employers"); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1132-33 (2010) [hereinafter *Unreasonable Accommodation*] (discussing ADA legislative history recognizing that some accommodations might be required even though they might involve disruption to standard operating procedures).

[22] Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 796 (2010) (attributing some of the reluctance to depart from established workplace practices to apathy or the "'this is the way we have always done things around here' mentality"); *see* Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 18 (2005) (attributing reluctance of employers to allow flexible work schedules to the cognitive dissonance that results from departing from workplace norms).

These kinds of attitudes may be particularly prevalent in some law firms. All workplaces have their own cultures and norms. But the cultures and norms that exist at many law firms are often particularly resistant to change.[23] Also present in law firms is the ever-increasing pressure for practices to become more cost-effective and efficient.[24] Thus, to the extent accommodations for lawyers with disabilities are viewed as being inefficient or "simply not the way we do things around here," law firms may be particularly resistant to the ADA's reasonable accommodation mandate.

The reasonable accommodation requirement has been described in various ways. As envisioned by the Equal Employment Opportunity Commission ("EEOC"), it is a device that enables individuals to enjoy equal employment opportunities.[25] This is consistent with those who have described the reasonable accommodation requirement as a means of helping to "level the playing field."[26] Others have likened the requirement to affirmative action,[27] at least insofar as described by the Supreme Court, it requires an employer "to treat employees with disabilities differently, i.e., preferentially."[28] The idea that the ADA and its reasonable accommodation requirement are a form of welfare reform also emerges in some of the discussion of the law.[29] To some

[23] *See* Nancy Levit, *Lawyers Suing Law Firms: Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 70 (2011) ("[T]he process of normative change in law firms is often glacially slow."); S.S. Samuelson & Liam Fahey, *Strategic Planning for Law Firms: The Application of Management Theory*, 52 U. PITT. L. REV. 435, 439 (1991) (suggesting that law firms "are still drawn instinctively" to outdated strategies); Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure*, 55 DRAKE L. REV. 165, 193 (2006) ("In their current form, law firms are constrained by a culture and history that is highly resistant to change.").

[24] *See* Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2167 (2010) (noting the increasing pressure on law firms from clients to be more cost-efficient).

[25] 29 C.F.R. app. § 1630.2(o) (2011).

[26] *See* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 41 (2000); Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 905 (2000).

[27] Samuel R. Bagenstos, *Subordination, Stigma, and "Disability*,*"* 86 VA. L. REV. 397, 457 (2000).

[28] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).

[29] *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 927 (2003) [hereinafter *Welfare Reform*] (discussing the "welfare reform basis of the ADA" and arguing its "fundamental inadequacy as a guide

critics, the reasonable accommodation requirement amounts to an ill-defined and potentially expensive and disruptive burden on an employer's business.[30]

This Article suggests a different conception of the reasonable accommodation requirement, at least in the context of lawyers with disabilities. This Article argues that the legal profession should view the legal requirements of reasonable accommodation and equal employment opportunities for lawyers with disabilities as fundamental components of professional responsibility and professionalism. Competent representation lies at the heart of every lawyer's professional obligation to clients. Law firms should view the reasonable accommodation requirement as a means of complying with this obligation. Moreover, law firms should recognize the reasonable accommodation requirement as a means to advance fundamental values of the profession.

Part I describes the role of the reasonable accommodation requirement within the framework of the ADA. Part II focuses on problems confronting lawyers with disabilities in terms of employment opportunities and the role that the reasonable accommodation requirement may play with respect to the employment of lawyers with disabilities. Part III advances the argument that the legal duty of an employer to provide reasonable accommodations is inextricably linked with the ethical duties of law firm partners and supervisory lawyers with respect to other lawyers in the firm, as well as being a device that furthers fundamental values of the legal profession. Therefore, this Article suggests that the legal profession should begin to conceptualize the reasonable accommodation requirement in terms of professional responsibility and professionalism.

I. THE ADA'S REASONABLE ACCOMMODATION REQUIREMENT

A. *The Reasonable Accommodation Requirement in General*

In passing the ADA, Congress articulated a goal of providing equal employment opportunities for individuals with disabilities.[31] The ADA's reasonable accommodation language serves at least two important functions in the statutory scheme in this regard. First, it

to disability employment policy").

[30] *See* Robert C. Bird, *The Power of Uncertainty in Disability Law*, 34 HAMLINE L. REV. 605, 606-07 (2011) (noting that the reasonable accommodation concept has been criticized for being poorly defined).

[31] 42 U.S.C. § 12101(a)(7) (2012).

helps define who has standing under the Act. To be protected under the ADA, one must first be qualified.[32] A qualified individual is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position" the individual holds or seeks.[33]

Second, the accommodation language imposes an affirmative obligation on the part of employers to make changes to their workplaces, practices, and procedures that will enable an individual with a disability to perform the essential functions of a position.[34] Thus, the failure to provide a reasonable accommodation is itself a violation of the Act. The EEOC has explained that the requirement is best understood "as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated."[35] Ultimately, then, the goal of the requirement is to provide an individual with a disability the opportunity "to attain the same level of performance" as is available to "the average similarly situated employee without a disability."[36]

An ADA plaintiff bears the burden of establishing that the accommodation in question is reasonable in the sense of being reasonable on its face or in the run of cases.[37] The employer can then attempt to establish that the requested accommodation is nonetheless unreasonable in this specific instance.[38] Even if an accommodation is reasonable, an employer is relieved of the duty to provide it if providing the accommodation would impose an undue hardship.[39]

The ADA includes an illustrative list of reasonable accommodations, including making existing facilities accessible, job restructuring, and part-time or modified work schedules.[40] Most of the original employer objections to the passage of the ADA related to the costs associated with providing reasonable accommodations.[41] However, financial cost

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[32] *Id.* § 12112(a).

[33] *Id.* § 12111(8).

[34] *See id.* § 12112(b)(5)(A).

[35] 29 C.F.R. app. § 1630.9 (2011).

[36] *Id.*

[37] U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).

[38] *See id.* at 402.

[39] 42 U.S.C. § 12112(b)(5)(A); *see* Weber, *Unreasonable Accommodation*, *supra* note 21, at 1124 (stating that reasonable accommodation and undue hardship are two sides of the same coin).

[40] § 12111(9).

[41] *See* Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 425-27 (1996) (noting how despite repeated concerns by business

has not proven to be a particularly relevant concern in most cases.[42] Indeed, most accommodations cost relatively little, at least in terms of direct expenditures.[43] Instead, the most commonly requested accommodations are those that require employers to modify existing policies or that otherwise impact employer discretion.[44]

For example, an employer could be required to depart from its standard leave policy and grant an employee with a disability extended leave in order to accommodate the employee.[45] An employee might request permission to work a flexible schedule or to sometimes work from home.[46] The EEOC has said that it might also be a reasonable accommodation to alter a supervisory style or provide more detailed instruction or feedback.[47] These are all accommodations that have few direct costs to an employer, but that an employer nonetheless might resist making over a concern about the loss of discretion in managing the workplace.[48]

groups, Congress rejected proposed amendments to clarify "undue hardship" and to limit ADA expenditures).

[42] *See* Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties*," 68 MO. L. REV. 863, 869 (2003) [hereinafter *ADA's Reasonable Accommodation Requirement*] ("Over time, it has become clear that the greatest potential source of conflict over reasonable accommodation involves accommodations that cost employers little or nothing to make.").

[43] *See* Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 47 (2007) ("[S]tudies suggest that reasonable accommodations do not typically cost more than $500.").

[44] Long, *ADA's Reasonable Accommodation Requirement*, *supra* note 42, at 869 ("The most controversial accommodations are not those that are expensive, but those that limit the discretion of employers or adversely impact other employees.").

[45] Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1263 (11th Cir. 2007) (citing U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION & UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), *available at* 2002 WL 31994335).

[46] 42 U.S.C. § 12111(9)(B) (2012); *see* Weber, *Unreasonable Accommodation*, *supra* note 21, at 1157-58 (noting that courts have refused to require employers to permit employees to work from home "even though this would be a reasonable accommodation for many jobs").

[47] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC NO. 915.002, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES para. 26 (1997), *available at* 1997 WL 34622315, at *13.

[48] Perhaps not surprisingly, these are also all accommodations that courts have been reluctant to require employers to make. *See* EEOC v. Ford Motor Co., No. 11-13742 (JCO), 2012 WL 3945540, at *5 (E.D. Mich. Sept. 10, 2012) (declining to "second-guess" employer's business judgment regarding whether it was essential for employee to be present at the office); Arnow-Richman, *supra* note 21, at 1106 ("Thus, courts routinely hold that requests to work from home, alter attendance requirements, or change work schedules are unreasonable and have consistently denied claims based

B. The Benefits of Accommodation

The reasonable accommodation requirement has certainly received its share of criticism. Critics have raised concerns over the potential costs of accommodating disabled employees,[49] the impact that the accommodation requirement may have on employer discretion (including the possibility that employers may have to "lower their standards"),[50] and the lack of clear standards associated with the requirement.[51] Despite these criticisms (whatever their merits), there are also undeniable potential benefits that go along with the reasonable accommodation requirement.[52]

When an employer complies with its obligations under the ADA, it helps make it possible for an employee with a disability to fulfill his or her full potential. Put simply, reasonable accommodations help enable employees with disabilities to perform their jobs to the best of their abilities. By removing the barriers that prevent employees from performing the essential functions of a position, reasonable

on an employer's failure to provide these types of accommodations."). *But see* Core v. Champaign Cnty. Bd. of Cnty. Comm'rs, No. 3:11-cv-166 (TSB), 2012 WL 3073418, at *4 (S.D. Ohio July 30, 2012) (rejecting the view that working from home can be a reasonable accommodation only in the extraordinary case); Kravits v. Shinseki, No. CIV.A. 10-861 (GLL), 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012) (concluding a triable issue existed as to whether requiring employer to provide more detailed instructions was a reasonable accommodation); Bennett v. Unisys Corp., No. 2:99-CV-0446 (FVA), 2000 WL 33126583, at *10 (E.D. Pa. Dec. 11, 2000) (holding that plaintiff had identified a reasonable accommodation in the form of adjusting supervisory methods).

[49] *See* Steven F. Stuhlbarg, Comment, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Undue?*, 59 U. CIN. L. REV. 1311, 1320-22 (1991) (discussing cost-related concerns of small businesses).

[50] *See* Thomas F. O'Neil III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 360 (2001) (criticizing interpretations of the reasonable accommodation requirement on the grounds that they unduly limit employer discretion).

[51] *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 983 (2012) ("Congress originally provided very little in the ADA to assist courts in determining whether an accommodation was reasonable. Moreover, reasonable accommodation decisions are often complex and fact-intensive, and thus tend to provide little guidance in the way of precedent.").

[52] *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 842 (2008) (arguing that courts have often failed to take into account the benefits to third parties that come from reasonable accommodations); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 349-53 (2009) (identifying various third-party benefits flowing from the reasonable accommodation requirement).

accommodations allow employees to fulfill their potential as employees.[53]

Additionally, Professor Elizabeth Emens has identified numerous ways in which accommodations might produce benefits for coworkers. Changes to the physical structure of the workplace or new equipment purchased as part of an accommodation may benefit other employees by making them more productive or reducing their workload.[54] Permitting a disabled employee to have increased flexibility with respect to the employee's work schedule "may reveal flextime to be feasible for many."[55] Similarly, modification of workplace policies and practices may lead to a re-examination of those policies and improved management, "which can lead to improved institutional processes."[56] These kinds of benefits may in turn lead to improved employee morale.[57]

Other third parties may also benefit from an employer's provision of reasonable accommodations. For instance, when an employer installs a ramp within the workplace as part of an accommodation for an employee, mobility-impaired customers may also benefit.[58] An accommodation that helps improve an employee's productivity may also result in better customer service.[59] Emens notes that workplace accommodations may also produce less tangible "attitudinal benefits" in the sense of improved attitudes toward disability.[60] Studies suggest that increased contact with individuals with disabilities tends to improve the nondisableds' attitudes toward disability, particularly where the contact is "between individuals of equal status working cooperatively."[61]

Many of the third-party benefits flowing from accommodations may ultimately redound to the benefit of employers.[62] By enabling an

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[53] *See supra* notes 25-26 and accompanying text.

[54] *See* Emens, *supra* note 52, at 850-51.

[55] *Id.* at 857.

[56] *Id.*

[57] *See* Helen A. Schartz et al., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 349 (2006) (reporting results of survey finding that 60.7% of responding employers reported increased morale as a benefit of accommodations).

[58] Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 28 (2007).

[59] *See* Emens, *supra* note 52, at 887-88 (discussing third-party benefits in terms of coworkers and customers).

[60] *Id.* at 885.

[61] *Id.* at 887.

[62] *Id.* at 848-49; *see also* Harris, *supra* note 58, at 28 (suggesting that because some benefits associated with accommodations redound to the employer, it would be

employee to improve his or her work performance, the employer stands to benefit by providing an accommodation. Accommodations may also reduce the costs associated with employee turnover.[63] When customers benefit from workplace accommodations provided to employees, employers may see the benefit in terms of improved interactions with customers and increased customer bases.[64] Ultimately, providing an accommodation to an individual employee may prove to be cost-effective for an employer.[65]

II. REASONABLE ACCOMMODATIONS FOR LAWYERS WITH DISABILITIES

The ADAAA prohibits discrimination against a qualified individual on the basis of disability.[66] Thus, before the reasonable accommodation concept is even at issue, a plaintiff must first establish the existence of a disability. The ADAAA made dramatic changes to the definition of disability that will undoubtedly lead to an increase in the number of individuals who are classified as having a disability. With more individuals successfully claiming disability status, there will necessarily be greater focus on whether these individuals are entitled to the accommodations they seek. This increased focus on the reasonable accommodations requirement may prove a particular challenge in the case of lawyers with disabilities.

inappropriate to charge the entire cost of an accommodation to the requesting employee).

[63] Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1675 (2000).

[64] Schartz et al., *supra* note 57, at 349 (reporting results of survey listing improved interaction with customers and increased customer base as reported benefits of accommodation); *see* Christopher B. Brown, *Incorporating Third-Party Benefits into the Cost-Benefit Calculus of Reasonable Accommodation*, 18 VA. J. SOC. POL'Y & L. 319, 332 (2010) ("For instance, a wheelchair ramp might be built to accommodate a mobility-impaired employee; depending on the circumstances, it might also improve the firm's accessibility to new customers and members of the public, which would redound to the firm's economic benefit.").

[65] Schartz et al., *supra* note 57, at 350 (discussing the results of a survey, which conveyed the cost effectiveness of provided accommodations); Stein, *supra* note 63, at 1674 (concluding that "available evidence indicates that many accommodation costs are recurrently nonexistent, minimal, or even cost effective for the providing employers").

[66] 42 U.S.C. § 12112(a) (2012).

A. The New Definition of Disability and its Impact on the Reasonable Accommodation Requirement

Prior to the effective date of the ADA Amendments Act in 2010, ADA plaintiffs had relatively little success establishing disability status under the law. In a series of decisions, the United States Supreme Court interpreted the statutory definition of "disability" in a highly restrictive manner.[67] This culminated in a 2002 opinion in which the Court declared that the terms in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[68] This strict approach to the ADA's definition of disability had the effect of dramatically shrinking the class of ADA plaintiffs.[69] As a result, many employment discrimination claims fell at this first hurdle, well before there was any inquiry into whether the individuals were actually qualified for the jobs in question or whether reasonable accommodations were available.[70]

After years of frustration on the part of disability rights advocates, Congress eventually amended the ADA in 2008. Nearly all of the changes in the ADA Amendments Act focused on the definition of "disability."[71] In the Findings and Purposes accompanying the ADAAA, Congress explained that the Supreme Court's restrictive approach to the original definition of disability had eliminated protection from discrimination "for many individuals whom Congress

[67] The decisions, collectively known as the *Sutton* Trilogy, limited the scope of the definition of disability by holding that the ameliorative effects of any corrective measure must be taken into account when determining whether the individual had a disability. Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999).

[68] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

[69] *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1004.

[70] Melanie D. Winegar, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1287 (2006) (explaining that "ruling out plaintiffs on the grounds that they are not disabled within the meaning of the statute means that the more fact-specific determinations" of whether an individual is qualified or an accommodation is reasonable never reach the jury).

[71] 42 U.S.C. § 12102(1) (2012); *see also* Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 228 (2008) ("With the exception of the amendment concerning the accommodation of 'regarded as' plaintiffs and interpretative power of the EEOC, nearly all of the focus of the ADAAA is on the definition of disability.").

intended to protect."[72] Congress specifically overruled several of the Court's more controversial and restrictive holdings.[73] Importantly, Congress also expressly rejected the notion that the terms in the definition of disability should be interpreted strictly.[74]

Instead, Congress noted that its intent was "to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[75] The new statutory definition of disability clearly reflects this congressional intent, as do the accompanying EEOC regulations and Interpretive Guidance. Congress directed the EEOC to develop regulations consistent with this expansive conception of disability. The EEOC complied with regulations that repeatedly emphasize the idea that the focus of ADA claims should be on whether an individual is qualified, not whether the individual has a disability.[76] The statutory definition expands some of the terms in the definition of disability and overrules some of the restrictive interpretations of the federal courts.[77] While stopping short of establishing a list of physical or mental impairments that qualify as "per se disabilities," the regulations list numerous impairments that should, "in virtually all cases," result in a determination that a disability exists.[78]

One result of the changes to the definition of disability is that there will almost certainly be an increase in the number of people who are determined to have disabilities for purpose of the Act.[79] This is by design. Congress made clear in its Findings and Purposes that its intent was to place the focus of inquiry on "whether entities covered under the ADA have complied with their obligations," rather than on the threshold question of whether an individual has a disability.[80] In addition, there is the reality that as baby boomers age, the number of employees with disabilities will grow.[81] As a result, courts will more

[72] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. § 12101 (2012)).

[73] *Id.* § 2(b)(2)-(4).

[74] *Id.* § 2(b)(5).

[75] *Id.*

[76] *See* 29 C.F.R. § 1630.2(j)(1)(iii) (2012).

[77] ADA Amendments Act § 2(b)(2)-(4).

[78] 29 C.F.R. § 1630.2(j)(3)(ii)-(iii).

[79] Cheryl L. Anderson et al., *Discrimination Claims Against Law Firms: Managing Attorney-Employees from Hiring to Firing*, 43 TEX. TECH L. REV. 515, 523 (2011); Befort, *supra* note 69, at 1021.

[80] ADA Amendments Act § 2(b)(5).

[81] *See* Nathan W. Moon et al., *Baby Boomers Are Turning Grey: The Americans with Disabilities Act and Aging Americans*, 19 BUS. L. TODAY 11, 11 (2010) (discussing the

frequently be required to determine whether employers and other entities have complied with the substantive requirements of the Act, including the duty to provide reasonable accommodations.[82]

B. Accommodations for Lawyers with Disabilities

The legal profession is also likely to see an increase in the number of accommodations issues. An increase in the number of Americans with disabilities necessarily means an increase in the number of *lawyers* with disabilities. Moreover, the legal profession is itself aging rapidly. The median age of lawyers is now over 40, with some sources estimating that nearly one quarter of all lawyers in the U.S. are over 65.[83] Thus, as the legal profession ages, so will the number of lawyers with disabilities. These realities present a new set of challenges for the legal profession.

1. Lawyers with Disabilities

The National Association for Legal Career Professionals ("NALP") tracks the number of lawyers with disabilities. NALP's numbers suggest that there exists a significant stigma within the legal profession on the subject of disability. In 2009, NALP sought information from law firms regarding the disability status of approximately 110,000 lawyers. Respondents identified less than one-quarter of one percent of all their lawyers as having a disability.[84] This number stands in stark contrast to the percentage of Black/African-American, Hispanic, and Asian lawyers identified in the same surveys.[85] While other studies report higher percentages of lawyers with disabilities, they all indicate that individuals with disabilities are underrepresented in the legal profession.[86] In addition, NALP's data

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rise in the number of older workers in the workplace and the role of the ADA).

[82] *See* Anderson et al., *supra* note 79, at 523.

[83] Kenneth G. Dau-Schmidt et al., *"Old and Making Hay:" The Results of the Pro Bono Institute Firm Survey on the Viability of a "Second Acts" Program to Transition Attorneys to Retirement Through Pro Bono Work*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 321, 323-24 (2009) (discussing statistics).

[84] NALP Survey, *supra* note 9, at para. 1.

[85] *See Women and Minorities in Law Firms — by Race and Ethnicity*, NALP BULL. (Jan. 2012), http://www.nalp.org/women_minorities_jan2012. In 2011, firms reported that nearly 20% of the associates at their firms fit into one of these categories, with Asian (9.65%) accounting for most of the number, followed by Black/African-American (4.29%), and Hispanic (3.83%). *Id.* at para. 7.

[86] The ABA's 2008 census of members reported a higher percentage of lawyers with disabilities (6.7%), but that percentage is still below what one would expect

suggests that lawyers with disabilities face employment obstacles on a systemic level. According to NALP, disabled lawyers face higher levels of unemployment upon graduation, are more likely to work in jobs not requiring a JD, and tend to earn less money than their nondisabled counterparts.[87]

There are any number of possible explanations for these kinds of figures. One is that law firms as a whole have done little to gather information when it comes to the number of lawyers with disabilities.[88] Another is that the poverty rate for individuals with disabilities is exceptionally high, thus potentially limiting the option of law school for some individuals.[89] Some law school graduates may have faced more pronounced difficulties gaining admission to the bar than their nondisabled counterparts.[90] Some disabled individuals may conclude that the severity of their impairments makes the practice of law an unrealistic option.[91] NALP's data also indicates that disabled law school graduates tend to gravitate more toward government and public service than nondisabled graduates,[92] thus helping to account for the low number of disabled law firm attorneys. Additionally, some lawyers may have non-visible impairments that are unknown to their

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given the percentage of Americans with disabilities. William J. Phelan, IV & John W. Parry, *The ABA Commission on Mental and Physical Disability Law Perspective*, *in* ABA COMM'N ON MENTAL & PHYSICAL DISABILITY LAW, SECOND ABA NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES 20, 22 (John W. Parry & William J. Phelan, IV eds., 2009) [hereinafter SECOND ABA NATIONAL CONFERENCE], *available at* http://www.americanbar.org/content/dam/aba/migrated/disability/PublicDocuments/09report.authcheckdam.pdf. Other studies report lower numbers of disabled lawyers than the ABA census. *See id.* (citing studies reporting percentages of 3.8 and 2.9, with some individual states reporting less than 1.0%).

[87] *See* James G. Leipold, *National Association for Law Placement Perspective*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 16, 17.

[88] NALP reported that a full 18% of law firms did not collect any data on lawyers with disabilities in their firms. NALP Survey, *supra* note 9; *see also* Phelan & Parry, *supra* note 86, at 20, 22 ("According to the ABA, only 3 of 54 American jurisdictions that license attorneys collect information on lawyers with disabilities.").

[89] *See* Mark C. Weber, *Disability Rights, Welfare Law*, 32 CARDOZO L. REV. 2483, 2486 (2011) ("Poverty among people with disabilities is worse in the United States than elsewhere in the developed world.").

[90] *See supra* notes 11-12 and accompanying text.

[91] In a fascinating piece, lawyer John F. Stanton examines the pre-ADA history of deaf lawyers in the legal profession. He speculates that "a self-perpetuating cycle of defeatism [that] existed within the deaf community" led some deaf individuals to conclude that since the practice of law had been closed to them for so long, there was no point in seeking to enter it. Stanton, *supra* note 13, at 1208.

[92] *See* Phelan & Parry, *supra* note 86, at 20, 22 (quoting NALP study).

employers, or have learned to self-accommodate to the point that they no longer view themselves as having a disability.[93]

Despite these possible explanations, it is difficult to ignore the likelihood that there are other, less palatable reasons for the low number of disabled lawyers in law firms. First, one reason why the numbers are so low undoubtedly has to do with the perceived stigma that exists regarding being a lawyer with a disability.[94] Professor Carrie Basas has noted that the practice of law often consists of projecting an aura of strength: "Weaknesses and impairments are not appreciated in the law" and "[p]eople with easily identifiable disabilities are often viewed as liabilities."[95] Perhaps for this reason, many lawyers with disabilities self-accommodate rather than request accommodations from their employers.[96]

As is the problem for disabled employees more generally, another concern is that given the choice between an employee who requires accommodation and one who does not, an employer will choose the one who does not require accommodation.[97] Lawyers with disabilities may face an additional disincentive to revealing the existence of a disability. At least one author has suggested that "if a disability is revealed, the disclosure can be used to bring a case against the lawyer for violating his (or her) ethical obligation to be competent and knowledgeable."[98] As a result of these kinds of concerns, some disabled lawyers simply choose to remain silent about their impairments.[99]

There is at least some reason to believe that the concerns of disabled lawyers are justified. Prior to the passage of the ADA, which finally prohibited employment discrimination in the private sector, some law firm hiring partners were quite open about their reluctance to hire

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93 *See id.* at 24 (suggesting the numbers are low, in part, because some lawyers do not wish to reveal non-visible disabilities or the fact that they have a disability to begin with).

94 *See id.* (suggesting that the fear of being stigmatized accounts for the reluctance of some lawyers to disclose the existence of disabilities).

95 Carrie G. Basas, *Lawyers with Disabilities Add Critical Diversity to the Profession*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 26, 27 [hereinafter *Critical Diversity*].

96 *See* Carrie Griffin Basas, *The New Boys: Women with Legal Disabilities and the Legal Profession*, 25 BERKELEY J. GENDER L. & JUST. 32, 87 (2010) [hereinafter *New Boys*] (reporting results of survey and concluding that self-accommodation is common in the legal profession).

97 *See* Basas, *Critical Diversity*, *supra* note 95, at 26, 27.

98 Phelan & Parry, *supra* note 86, at 20, 24.

99 Basas, *Critical Diversity*, *supra* note 95, at 26, 27.

lawyers with disabilities.[100] One hiring partner at a large Los Angeles firm was quoted as saying that in order to compensate for the lost efficiency resulting from hiring a blind lawyer, the firm would probably have to adjust the lawyer's compensation.[101] Other legal employers also openly cited concerns over reduced efficiency.[102]

While employment prospects for lawyers with disabilities have almost certainly improved following the enactment of the ADA,[103] there is still good reason to believe that discrimination remains fairly common.[104] In a 2007 Florida survey of lawyers with disabilities, nearly three out of ten respondents reported being asked inappropriate (and most likely illegal) questions during job interviews, and over half reported similar conduct post-employment.[105] In some instances, questioners raised concerns about a disabled lawyer's ability to effectively represent clients, carry the normal workload of a lawyer, or discomfort on the part of clients in working with the lawyers.[106] Sixty-eight percent of lawyers with visible disabilities — some of whom were recent law school graduates with stellar credentials — reported in a similar California survey that they believed they had been discriminated against in the hiring process.[107] Although experiences vary widely, many lawyers report encountering resistance to their

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[100] Stanton, *supra* note 13, at 1218-19.

[101] *Id.* (quoting Lis Wiehl, *Case for the Disabled: Alienated Lawyers Make a Plea to Bar Bias and Upgrade Offices*, CHI. TRIB., Jan. 29, 1989, at 7).

[102] *Id.* at 1219 n.165.

[103] *Id.* at 1234 (explaining that employment prospects for deaf lawyers improved after passage of the ADA).

[104] *See* Hensel, *supra* note 7, at 645 ("There is little doubt that an applicant's identification of disability during the hiring process will create significant roadblocks to employment."). There is also reason to believe that there is a gender component to disability discrimination in the legal profession. *See* Basas, *New Boys*, *supra* note 96, at 79-82 (discussing special issues faced by female disabled attorneys); Veta T. Richardson, *Minority Corporate Counsel Association Perspective*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 18, 19 (reporting results of survey finding that "[w]hile 86 percent of the men reported positively (i.e., that they were treated as equals), only 55 percent of women with disabilities responded that they were treated equally by their law firm peers").

[105] THE DISABILITY INDEPENDENCE GRP., FLORIDA LAWYERS WITH DISABILITIES: A SURVEY REPORT 41 (2007) [hereinafter FLORIDA LAWYERS WITH DISABILITIES], *available at* http://www.floridabar.org/TFB/TFBResources.nsf/0/43978A94AFC940F9852573CA00 6E2526/$FILE/DIG%20Survey%20Report%20Final%2012%2007.pdf?OpenElement.

[106] *Id.* at 42; Nancy McCarthy, *Attorneys with Disabilities Face Tough Job Market*, CAL. B.J., Aug. 2004, at para. 13, *available at* http://archive.calbar.ca.gov/Archive.aspx?articleId=57863&categoryId=57714&month=8&year=2004.

[107] McCarthy, *supra* note 106, at para. 15.

requests for accommodations once employed.[108] Others cite the lack of resources or procedures through which lawyers can address concerns.[109]

This lack of integration of disabled lawyers within the legal profession has led to increased attention in recent years.[110] Perhaps the most noteworthy response has come from the American Bar Association ("ABA"). In 2009, the ABA's Commission on Disability Rights began promoting its *Disability Diversity in the Legal Profession: A Pledge for Change*, a one-page pledge for legal employers to sign affirming their commitment to diversity, including disability diversity.[111] In addition, the ABA has held several national conferences devoted to the issue of the employment of lawyers with disabilities.[112] Participants at the conferences discussed the need for the legal profession to be more inclusive with respect to lawyers with disabilities and the kinds of accommodations legal employers can make to accommodate disabled lawyers. The judiciary has also taken notice of the situation. In 2012, the Conference of Chief Justices passed a resolution urging state judiciaries "to set an example for the legal system and the public" with respect to advancing the right to equal employment opportunities for people with disabilities within the judicial system.[113]

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[108] *Challenges to Employment and the Practice of Law Continue to Face Attorneys with Disabilities*, ST. B. CAL. 9 (2004), http://www.calbar.ca.gov/portals/0/documents/publicComment/2004/Disability-Survey-Report.pdf (reporting that 24% of responding attorneys had encountered refusals or resistance to providing reasonable accommodations in the employment setting).

[109] Richardson, *supra* note 104, at 18, 18.

[110] *See* Bernstein, *supra* note 14, at 393 (discussing recent attention devoted to the issue).

[111] AM. BAR ASS'N COMM'N ON DISABILITY RIGHTS, DISABILITY DIVERSITY IN THE LEGAL PROFESSION: A PLEDGE FOR CHANGE 1 (2009) [hereinafter PLEDGE FOR CHANGE], http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/pledge_for_change.authcheckdam.pdf.

[112] *See generally Preface*, SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at viii (documenting the Second ABA Conference); *ABA Commission on Disability Rights*, *in* THIRD NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES (2012), *available at* http://www.americanbar.org/content/dam/aba/events/mental_physical_disability/2012_conference_program.authcheckdam.pdf (documenting Third ABA Conference).

[113] *Resolution 13 in Support of Disability Diversity in the Legal Profession*, CONFERENCE OF CHIEF JUSTICES para. 1 (July 25, 2012), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07252012-Access-Justice-Disability-Diversity-Legal-Profession.ashx.

2. Ethical Issues Confronting Lawyers with Disabilities and Their Employers

In many instances, an employer's concerns over the ability of an employee with a disability to perform the essential functions of a job are based on stereotypes and incomplete information. In other instances, however, an employer's concerns may be justified: the individual may not be capable of performing the essential functions of a position, even with reasonable accommodation. In the case of lawyers with disabilities, questions concerning a lawyer's ability to perform the essential functions of the job may take on increased importance given the special ethical responsibilities of lawyers and their employers.

There are several potential ethical issues that leap to mind when one thinks about an individual with a disability engaged in the practice of law. ABA Model Rule 1.16 speaks specifically to the case of a lawyer with an impairment and prohibits a lawyer from representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."[114] Perhaps the most obvious rule of professional conduct relating to the essential functions of being a lawyer is the fundamental duty of competence. Competent representation involves "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[115] Closely related is the duty to act with diligence and promptness in representing a client.[116] Physical and mental impairments might impair a lawyer's ability to practice law in any number of ways. Therefore, it is not surprising that there have been numerous disciplinary actions against lawyers for violations of the rules regarding competence and diligence in which the lawyers' disabilities appear to have been a contributing factor.[117]

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[114] MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2) (2013).

[115] *Id.* R. 1.1 (2013) (imposing a duty of competence); *see also In re* Mercury, 280 B.R. 35, 48 (Bankr. S.D.N.Y. 2002) (referring to the duty of competence as a fundamental duty).

[116] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2013).

[117] *See, e.g.*, Sheridan's Case, 813 A.2d 449, 452-54 (N.H. 2002) (discussing relationship between lawyer's diagnosed mental disorder with his professional misconduct, including lack of competence); Lawyer Disciplinary Bd. v. Dues, 624 S.E.2d 125, 133-34 (W. Va. 2005) (involving violations of Rules 1.1 and 1.3 related to lawyer's depression). *See generally* Kelly Cahill Timmons, *Disability-Related Misconduct and the Legal Profession: The Role of the Americans with Disabilities Act*, 69 U. PITT. L. REV. 609, 609 (2008) ("[L]awyers facing sanctions for violating professional responsibility rules often claim that their misconduct was disability-related.").

In many of these instances, the attorneys had mental impairments, such as depression or bipolar disorder, that might be expected to impact the attorneys' ability to meet filing deadlines or other responsibilities related to organization.[118] But physical impairments might also conceivably impact a lawyer's ability to competently represent a client.[119] One common concern raised regarding the practice of law by individuals with disabilities relates to billing.[120] As a result of some physical or mental impairments, it might take a lawyer longer to perform a task than is typical, thus creating the potential for overbilling.[121]

These issues present ethical concerns not just for the lawyers in question, but also for the law firms that employ them. In addition to the possibility that a firm might face civil liability resulting from the malpractice of a firm lawyer, partners and supervising attorneys have their own ethical obligations to properly supervise subordinate lawyers within the firm.[122] Thus, the failure of a partner or supervising lawyer to make reasonable efforts to ensure that a subordinate lawyer is practicing in a competent manner may subject the partner or supervising lawyer to professional discipline.[123]

3. Reasonable Accommodations and Lawyers with Disabilities

A reasonable accommodation may enable a lawyer with a disability to satisfy the lawyer's ethical obligations toward a client as well as satisfy the expectations of the lawyer's employer. As discussed, many

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[118] *See, e.g.*, *Sheridan's Case*, 813 A.2d at 453 (bipolar disorder); *Dues*, 624 S.E.2d at 133 (depression); *see also* Christopher D. Kratovil, *Separating Disability from Discipline: The ADA and Bar Discipline*, 78 TEX. L. REV. 993, 994 (2000) ("Obviously, the disabilities most likely to lead to attorney misconduct are mental impairments such as bipolar disorder, depression, attention deficit disorder, and other clinically recognized psychological problems.").

[119] *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(2) (addressing the possibility that a lawyer's physical condition might materially impair the lawyer's ability to represent a client).

[120] *See* Charles S. Brown, *Protecting the Back Door: Retention and Advancement of Lawyers with Disabilities*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 41, 41 ("Too often discussions about lawyers with disabilities involve negative expectations and unproven assumptions about concerns like 'billable hours.'").

[121] *See* Scott Lemond & David Mizgala, *Identifying and Accommodating the Learning-Disabled Lawyer*, 42 S. TEX. L. REV. 69, 75 (2000) (suggesting firms can modify client billing procedures "to compensate for any additional time required to complete tasks and prevent overbilling"). *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2013) (prohibiting a lawyer from charging an unreasonable fee).

[122] MODEL RULES OF PROF'L CONDUCT R. 5.1(a)-(b) (2013).

[123] *See id.* R. 5.1(b).

accommodations cost an employer little or nothing.[124] For example, providing voice-recognition software for a lawyer who is unable to type is a relatively inexpensive accommodation that may permit the lawyer to perform the essential functions of a position.[125] Readjusting furniture to allow wheelchair users greater access costs a law firm nothing.[126] These kinds of accommodations are ordinarily reasonable and should generate little resistance from most legal employers.[127]

At the other extreme are accommodations that are per se unreasonable. For instance, an employer is never required to eliminate an essential function of a job as an accommodation.[128] Thus, a law firm would not be required to accommodate a lawyer's disability by eliminating the requirement that the lawyer write motions or counsel clients.[129] Employers are also not required to lower qualitative or quantitative production standards.[130] The EEOC has taken the position that this means that it is not a reasonable accommodation for a firm to lower the billable hour requirement for a lawyer with a disability.[131]

The difficult cases lie in the middle. Here, given the special nature of the legal profession and the culture of many law firms, disabled lawyers may experience greater resistance to their requests for accommodation than employees in other fields. The insular nature and hierarchical structure of many law firms tends to produce conformity and obedience to existing norms.[132] This may tend to discourage departures from the existing norms of the firm. For instance, the ADA lists part-time or modified work schedules as examples of reasonable accommodation.[133] Yet in the words of one author, "long hours have been strongly embedded in the work culture of law firms as a sign of

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[124] *See supra* notes 42-43 and accompanying text.

[125] *See Reasonable Accommodations for Attorneys with Disabilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N pt. G (Feb. 2, 2011), http://www.eeoc.gov/facts/accommodations-attorneys.html (listing this as potential reasonable accommodation).

[126] *See id.*

[127] *See* FLORIDA LAWYERS WITH DISABILITIES, *supra* note 105, at 40 (citing survey response reporting positive employer responses to requests to improve workplace accessibility).

[128] *Reasonable Accommodations for Attorneys with Disabilities*, *supra* note 125, at pt. H.

[129] *Id.*

[130] 29 C.F.R. app. § 1630.2(n) (2013).

[131] *Reasonable Accommodations for Attorneys with Disabilities*, *supra* note 125, at pt. H.

[132] *See* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 460-61 (2007) (discussing how law firms' structures tend to produce conformity and obedience).

[133] *See* 42 U.S.C. § 12111(9)(B) (2012).

full commitment to both the firm and one's clients."[134] Anything less is often viewed as slacking.[135] At many firms, all associates — regardless of race, age, gender, or disability status — are expected to work exceptionally long hours on their way to becoming partners.[136]

Thus, a law firm associate with a disability may face multiple disincentives to requesting additional leave time or more flexible hours in order to deal with a disability. First, the associate may be hesitant to self-identify as having a disability to begin with for fear of being perceived as weak.[137] But beyond this concern, the culture within a firm may tend to stifle *any* attempts to deviate from the norm, regardless of the reasons.[138]

A recent case involving a lawyer's request for an accommodation illustrates the skepticism that many within the legal profession have when it comes to the subject of accommodations for lawyers. In 2011, a former litigation associate at Bingham McCutchen filed suit against the firm, alleging that the firm failed to accommodate her disability.[139] Specifically, the associate claimed to have a sleep disorder and requested that the firm accommodate her through permitting flexible start times and telecommuting. According to the associate, Bingham McCutchen refused these accommodations and failed to propose any alternative accommodations.[140] In its Fact Sheet addressing reasonable accommodations for lawyers with disabilities, the EEOC provides the example of a lawyer who requests that she be permitted to start the

[134] Shirly Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 69 n.141 (2005).

[135] *Id.*

[136] *See* Levit, *supra* note 23, at 90 (referring to law firms as being "supercompetitive" environments that "are brutal on everyone" (quoting David Segal, *The Final Lesson of the Mungin Race Case*, WASH. POST, Jan. 11, 1999, at F9)).

[137] *See supra* note 99 and accompanying text.

[138] One recent article discusses how some law firm cultures may be hostile to the idea of male lawyers taking primary responsibility with respect to family responsibilities. *See* Joan C. Williams & Allison Tait, *"Mancession" or "Momcession"?: Good Providers, a Bad Economy, and Gender Discrimination*, 86 CHI.-KENT L. REV. 857, 868-69 (2011). While the article focuses primarily on how these types of cultures perpetuate gender stereotypes that prevent females from taking leave, it has implications for the issue of how law firm culture can perpetuate disability discrimination.

[139] Debra Cassens Weiss, *Suit by Ex-Bingham Associate Claims She Was Fired Because of a Rare Sleep Disorder*, ABA J. (Nov. 29, 2011), http://www.abajournal.com/mobile/article/ex-bingham_associate_claims_she_was_fired_because_of_a_rare_sleep_disorder/; Press Release, Business Wire, Law Offices of Tamara S. Freeze Files Wrongful Termination Lawsuit against Bingham McCutchen for Associate Afflicted with Rare Sleep Disorder (Nov. 22, 2011), *available at* http://www.businesswire.com/news/home/20111122005460/en/Law-Offices-Tamara-S.-Freeze-Files-Wrongful.

[140] Press Release, Business Wire, *supra* note 139.

work day at 10 a.m. due to a disability. After taking into account various considerations, the EEOC concludes that this could, depending upon the circumstances, amount to a reasonable accommodation.[141] The Fact Sheet also lists telecommuting as another example of a reasonable accommodation a law firm can make.[142]

It bears emphasizing that the Bingham McCutchen associate's requested accommodations are things either specifically listed in the ADA as being reasonable accommodations or identified by the EEOC as being reasonable within the specific context of law firms.[143] Yet, whatever Bingham McCutchen's reaction may have been, the notion that an associate might have the temerity to even request these kinds of modifications to the standard operating procedure of a large law firm was met with derision in some quarters of the legal profession. The popular online journal *Above the Law* wrote, "What a shock! Biglaw partners are usually so accommodating when you tell them you can't come to work because you need to get some sleep."[144]

Other disabled lawyers have reported similar responses to their requests for these kinds of accommodations. In a survey of Florida lawyers with disabilities, thirty percent of respondents identified law firm policies, practices, or procedures as barriers to practice, with some specifically identifying lack of flexibility in scheduling as an example.[145] Regardless of what firms actually do, the perception exists among many lawyers with disabilities that this lack of flexibility exists. In another survey, forty-three percent of lawyers with disabilities responded that they believed there would be negative career consequences if they chose to work a reduced hours schedule or telecommute.[146]

To be sure, these types of responses are not limited to requests from lawyers with disabilities. Many employers are reluctant to permit telecommuting, allow for flexible work schedules, or depart from existing neutral company policies.[147] Indeed, the problems that disabled lawyers have experienced in this respect resemble the

[141] *Reasonable Accommodations for Attorneys with Disabilities*, *supra* note 125, at pt. F, ex. 11.

[142] *Id.* at pt. G.

[143] *See supra* notes 140-141 and accompanying text.

[144] Elie Mystal, *Are You Allowed to Have a Biglaw Job If You Need to Sleep All the Time?*, ABOVE THE L. (Nov. 8, 2011), http://abovethelaw.com/2011/11/are-you-allowed-to-have-a-biglaw-job-if-you-need-to-sleep-all-the-time/.

[145] FLORIDA LAWYERS WITH DISABILITIES, *supra* note 105, at 44.

[146] Richardson, *supra* note 104, at 18, 20 (reporting findings of Minority Corporate Counsel Association study).

[147] *See supra* note 48 and accompanying text.

problems that some non-disabled employees face. For example, pregnant women sometimes must contend with inflexible leave or attendance policies that adversely affect them.[148] Parents may confront similar obstacles with respect to child care obligations.[149]

But there are at least two aspects of the legal profession's perceived unwillingness to make reasonable accommodations that make it particularly noteworthy. The first is that unlike with some other forms of employer intransigence, the failure to make reasonable accommodations for a qualified individual with a disability is actually prima facie illegal. A neutral employer policy that has a disparate impact on female employees might be actionable under Title VII, just as an employer's adverse decision concerning leave time or some similar policy on the basis of gender stereotypes or animus might be.[150] But, in general, federal law does not require employers to modify existing policies and practices in order to accommodate its employees' needs.[151] In contrast, the ADA specifically requires such employer action. The second noteworthy aspect of the unwillingness of legal employers to accommodate is that it is lawyers — "public citizen[s] having special responsibility for the quality of justice"[152] as the ABA's *Models Rules of Professional Conduct* describes them — who are the ones perceived as not willing to obey well-established law.

When it passed the ADA, Congress made it clear that employers would be required to modify existing practices and procedures in order to allow for equal employment opportunity for individuals with disabilities. Employers in general may not refuse to make these changes on the grounds that "this is the way we've always done it."

[148] *See* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 453 (2012) (discussing problems pregnant workers face with respect to work rules).

[149] Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1468 (2008) (stating that several states and localities have enacted measures prohibiting discrimination based on parental status, familial status, and family responsibilities).

[150] For a discussion of how these issues sometimes arise in the law firm setting, see Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 395-411 (2007).

[151] *See* Maldonado v. U.S. Bank, 186 F.3d 759, 762 (7th Cir. 1999) ("[U]nder the PDA, employers are not required to give pregnant women special treatment; they must only treat them the same as all other employees."); Cox, *supra* note 148, at 453 (noting that the law generally does not provide a right to pregnancy-related accommodations); Farrell & Guertin, *supra* note 149, at 1468 (noting that not all forms of family responsibilities discrimination are actionable under federal law).

[152] MODEL RULES OF PROF'L CONDUCT pmbl. para. 1 (2013).

Legal employers are not exempted from this directive. But the attitudes that breed intolerance for departures from the norm are particularly ingrained in the legal profession.[153] From the first days of law school, would-be lawyers begin to focus on developing bright-line rules and developing a dedication to precedent. These characteristics carry over into the business side of the practice of law as well as the actual practice of law itself. Thus, to the extent the legal profession continues to view lawyers with disabilities as unusual and the reasonable accommodation requirement as at odds with the norms of the legal profession, lawyers with disabilities will continue to face significant employment obstacles.

III. REASONABLE ACCOMMODATION AS PROFESSIONAL RESPONSIBILITY

The ABA and others have taken important steps in helping to change the attitudes of legal employers on the subject of lawyers with disabilities. But the low number of lawyers with disabilities suggests that too many legal employers continue to view the reasonable accommodation requirement as a burden to be avoided where possible. This view ultimately impacts the ability of the ADA to further the goal of providing equal opportunity for individuals with disabilities. To date, much of the discussion concerning the employment of lawyers with disabilities has framed the issue in legal terms. However, the discussion of the issue could benefit from a reframing. This Part suggests an alternative view of the reasonable accommodation requirement for the legal profession: one that views the reasonable accommodation requirement as a component of professional responsibility and as a means of advancing core values of the legal profession.

A. *Reasonable Accommodation as Professional Responsibility*

A handful of jurisdictions have ethical rules that prohibit a lawyer from discriminating on the basis of, *inter alia*, disability.[154] Since the ADA defines "discrimination" to include the failure to make

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[153] *See* Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 984 (2002) ("[T]he instinct of many lawyers is to resist change unless and until it has the force of inevitability about it."); *see also* Williams et al., *supra* note 150, at 401-02 (discussing the legal profession's fixation on the billable hour and its reluctance to permit reduced or part-time schedules).

[154] *E.g.*, N.Y. CODE OF PROF'L RESP. DR 1-102(A) (2002); VERMONT R. PROF'L CONDUCT R. 8.4 (2009).

reasonable accommodations, the legal duty to make reasonable accommodations for an individual with a disability is also arguably an ethical duty. However, the vast majority of jurisdictions do not include such a prohibition in their rules of professional conduct. Thus, one must look elsewhere in the rules to divine an ethical duty to provide reasonable accommodations.

At its most basic level, the reasonable accommodation requirement operates to ensure that disabled employees have the opportunity to perform the essential functions of their jobs. In the specific case of a lawyer with a disability, the reasonable accommodation requirement can operate to ensure that a lawyer is able to provide competent representation. The essential functions of a legal job may vary. For instance, the essential functions of a litigator position might differ from those of a transactional position. However, competent representation is an essential component of any lawyer's job, if for no other reason than it is ethically required. Thus, the legal requirement that an employer provide a reasonable accommodation to a qualified employee with a disability may also have ethical implications for legal employers as well as lawyers with disabilities.

1. Some Initial Observations on the Ethical Duty of Law Firm Management to Make Reasonable Accommodations

As discussed, the ADA requires employers to make modifications, within reason, to existing practices and procedures so that employees with disabilities can perform the essential functions of their jobs. But the Act imposes another, related affirmative obligation upon employers. According to the EEOC, an employer must also "make a reasonable effort to determine the appropriate accommodation."[155] This requires that the employer engage in an interactive process with an employee with a disability in order to determine whether a reasonable accommodation is possible and what the most effective accommodation might be.[156] The failure of an employer to do so may potentially lead to liability on the theory that the employer failed to fulfill its legal duty to make reasonable accommodations under the Act.[157] Importantly, an employer is not permitted to passively wait for a request for accommodation from an employee. If the employer knows an employee has a disability and it is apparent that the disability impacts the employee's ability to perform her job in a

[155] 29 C.F.R. app. § 1630.9 (2012).

[156] *Id.*

[157] Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999).

competent manner, the employer has an affirmative obligation to initiate the interactive process.[158]

A legal employer's *ethical* obligations under the rules of professional conduct are strikingly similar. ABA Model Rule 5.1(a) requires law firm partners and those with similar managerial authority to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."[159] Similarly, Rule 5.1(b) imposes upon a lawyer with supervisory authority over another lawyer a duty to make "reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."[160] While tempting to think of Rule 5.1 as a device to root out particularly egregious forms of misconduct such as overbilling and dishonest practice, the rule also operates at a more basic level. The very first substantive rule listed in the Rules of Professional Conduct is the rule regarding competence.[161] Thus, partners and supervising lawyers have an ethical obligation to work to ensure that other members of the firm are providing competent representation.[162]

Moreover, it is not enough for a firm to simply adopt policies and practices designed to promote competent practice; firm management must monitor how effective the policies and practices actually are in

[158] *See* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999) (stating that an employer's obligation is triggered when the "employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for the accommodation").

[159] MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2013).

[160] *Id.* R. 5.1(b).

[161] *Id.* R. 1.1 (2013). Model Rule 1.0 appears before Rule 1.1, but Rule 1.0 is merely an explanation of the terminology used throughout the rules.

[162] *See, e.g.*, Davis v. Ala. State Bar, 676 So. 2d 306, 308 (Ala. 1996) (suspending partners from the practice of law for violating, *inter alia*, Rule 5.1 imposing policies on associates that prevented the associates from "providing quality and competent legal services"); Attorney Grievance Comm'n v. Ficker, 924 A.2d 1105, 1108-09 (Md. 2007) (suspending lawyer for violating, *inter alia*, Rule 5.1 by fostering an environment in which "rules regarding diligent representation and communication with clients were almost inherently violated"); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 441 (2006) (opining that Rule 5.1 imposes a duty on supervisory lawyers to take reasonable steps to ensure that other lawyers are providing competent representation to their clients); *Are Commonwealth's Attorneys Held to the Same Ethical Requirements as Other Attorneys?*, Va. Legal Ethics Op. 1798, at 9-10 (2004) (concluding that a lawyer who assigns a caseload so large as to preclude competent representation violates Rule 5.1); Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 268 (1994) (explaining that Rule 5.1 requires supervision for compliance with the duty of competence under Rule 1.1).

practice and adjust them as needed.[163] For example, if the firm's policies or practices result in a workload so crushing that its lawyers are unable to competently and diligently represent their clients, the partners have a duty to take steps to rectify the situation.[164] Therefore, much as the reasonable accommodation requirement requires employers to adopt or modify practices and procedures in order to permit an employee to perform the essential functions of a position, Model Rule 5.1 requires law firm management to adopt or modify practices and procedures as needed in order to encourage competent and ethical practice among all firm lawyers.

In addition, Rule 5.1 implicitly requires obligations on the part of firm management akin to employers' obligations under the ADA with respect to the interactive process. A comment to the Rule 5.1 makes clear that making "reasonable efforts" to ensure that other lawyers are in compliance with the rules of professional conduct entails an obligation of affirmative conduct on the part of firm partners: "[P]artners may not assume that all lawyers associated with the firm will inevitably conform to the Rules."[165] Moreover, once firm management is on notice that a lawyer within the firm may be engaged in conduct in violation of the rules, it has an affirmative obligation to engage in heightened supervision or put in place additional measures to ensure the lawyer's ethical behavior.[166] Similarly, Rule 5.1(b)'s requirement that supervisory lawyers make reasonable efforts to supervise subordinates necessarily implies that supervisory lawyers be proactive in their efforts.[167] Thus, as is the case with the ADA's reasonable accommodation requirement, Rule 5.1 may sometimes require firm partners to engage in something at least akin to an interactive process with another lawyer in order to ensure that the lawyer is able to perform the essential functions of his or her job in a competent manner.

[163] *See In re* Phillips, 244 P.3d 549, 552 (Ariz. 2010) (imposing discipline where the firm's formal policy was contrary to actual practices within the firm).

[164] *See* cases and opinions cited *supra* note 162.

[165] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 3.

[166] Bd. of Overseers of the Bar v. Warren, 34 A.3d 1103, 1113 (Me. 2011); *see also* Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 468 (2012) ("[W]hen a firm has notice of a lawyer's prior error[,] . . . there would be a similar obligation of heightened supervision.").

[167] *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 3 (stating "partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules").

2. Some Initial Observations on the Ethical Duty of Subordinate Lawyers to Seek Out Reasonable Accommodations

Importantly, the duties associated with the reasonable accommodation requirement are not one-sided. Employees have their own responsibilities under the ADA. Because an employer is only required to accommodate the known disabilities of an employee, the employee may need to inform the employer about the nature and existence of the impairment before being entitled to an accommodation.[168] Thus, like an employer, an employee with a disability may need to initiate or participate in an interactive process designed to determine a reasonable accommodation. To the extent an employee fails to participate in the interactive process, the employee may lose any claim to an accommodation.[169] Finally, it bears emphasizing that the accommodation to which an employee is entitled must only be reasonable; if the employee cannot perform the essential functions of a position even with that accommodation, the employee is not qualified.[170]

The ethical duties of subordinate lawyers within a firm are similar. ABA Model Rule 5.2 discusses the ethical responsibilities of subordinate lawyers and explains that a subordinate lawyer remains responsible for the lawyer's own violation of the rules, even if the lawyer acted at the direction of a supervising lawyer.[171] The fact that a firm partner or a supervisory lawyer has failed to live up to his or her ethical responsibility to adequately supervise the subordinate lawyer does not excuse the lawyer's own violation of the rules.[172] If the lawyer believes she has not received the supervision or accommodation she needs in order to provide competent representation, the lawyer has an affirmative obligation to seek appropriate supervision.[173] Moreover,

[168] *See* 29 C.F.R. app. § 1630.9 (2012) (explaining that, in general, it is the responsibility of an employee with a disability to inform the employer that an accommodation is needed).

[169] *See* Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996) (granting summary judgment to employer after determining that employee was responsible for the breakdown in the interactive process).

[170] 42 U.S.C. § 12111(8) (2012).

[171] MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2013).

[172] Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 214 (2007) ("[A]ssociates who breach professional duties may face malpractice liability even if their errors are partly attributable to inadequate supervision by senior lawyers."); *see, e.g.*, *In re* Yacavino, 494 A.2d 801 (N.J. 1985) (per curiam) (stating the fact that the associate "was left virtually alone and unsupervised" did not mitigate his fault).

[173] *See* Beverly Hills Concepts, Inc. v. Schatz, 717 A.2d 724, 730 (Conn. 1998).

Rule 5.2 contemplates that when a question arises as to the subordinate lawyer's ethical responsibilities, the subordinate will discuss the matter with the supervisory lawyer in an attempt to reach a reasonable resolution.[174]

Applied to the case of a lawyer with a disability, Rule 5.2 might require the lawyer to initiate an interactive process in order to determine a reasonable accommodation. To be qualified for a position, a lawyer must, of course, be competent. This is as true for lawyers with disabilities as it is for any lawyer.[175] Therefore, if a lawyer needs some type of accommodation in order to provide competent representation, Rule 5.2 suggests that it is incumbent upon the lawyer to inform the employer about the nature and existence of the impairment and the need for an accommodation.[176] The failure to seek out an accommodation under these circumstances would leave the lawyer responsible for any ensuing ethical violation.

3. Reasonable Accommodation as Professional Responsibility

As the foregoing illustrates, the ethical obligations of legal employers and lawyers with disabilities are closely related to the legal obligations of the parties with respect to the ADA. But the ethical obligations are also intertwined with the legal obligations to the point of being inseparable. In order for firm management to satisfy its ethical obligations under Rule 5.1 with respect to lawyers with disabilities, it must ordinarily also satisfy its legal obligations under the ADA with respect to the reasonable accommodation requirement.

Both the ADA and Rule 5.1 impose an affirmative obligation to modify existing policies and procedures within reason with respect to lawyers with disabilities. Rule 5.1(a) discusses the need for firms to develop internal policies and procedures designed to promote ethical

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[174] *See* MODEL RULES OF PROF'L CONDUCT R. 5.2(b) ("A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."). *See generally id.* cmt. 2 (explaining that where there is an arguable question of professional responsibility, the subordinate may defer to the supervisor's reasonable resolution of the issue).

[175] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 429 (2003) ("Impaired lawyers have the same obligations under the Model Rules as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation.").

[176] *See* 29 C.F.R. app. § 1630 (2011) ("In general, . . . it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.").

practice.[177] Ordinarily, we think of such measures as having general applicability: the measures are neutral, firm-wide policies and procedures.[178] Some of the specific examples cited in the comments — such as conflict-detection devices and calendaring systems[179] — support this view of the rule. Indeed, much of the intent behind Rule 5.1 appears to have been to encourage firms to develop consistent, internal procedures in an effort to improve the overall "ethical atmosphere of a firm."[180]

But Rule 5.1 is also clear that partners and supervisory lawyers have individual-specific responsibilities.[181] Under Rule 5.1(a), firm management must make reasonable efforts to ensure that the firm's internal measures are designed to provide reasonable assurance that *all* lawyers in the firm conform to the rules of professional conduct.[182] A firm's generally applicable policy or procedure may provide reasonable assurance that nine out of ten firm lawyers are practicing competently. But if it is apparent to firm management that the policy or procedure fails to provide the necessary guidance and support to enable the tenth lawyer to practice in a competent manner, and if that shortcoming can be remedied through reasonable efforts, the partners in the firm have failed to live up to their ethical responsibilities. For example, a firm's procedures for assigning work may be perfectly appropriate for lawyers doing transactional work, but if the procedures result in the lone litigation associate being so overwhelmed that the associate is unable to

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[177] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2 (2013).

[178] *See* Miller, *supra* note 162, at 282 ("Unmistakably, Rule 5.1(a) is designed to affirmatively motivate partners to institute policies and safeguards at the firm-wide level.").

[179] *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 2 (identifying these examples).

[180] *Id.* cmt. 3; *see, e.g.*, Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1992) [hereinafter *Professional Discipline*] (explaining that "a law firm's organization, policies, and operating procedures constitute an 'ethical infrastructure' that cuts across particular lawyers and tasks").

[181] *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 905 (2012) (discussing law firm's obligations under Rule 5.1(a) to ensure that a newly-hired lawyer is instructed regarding confidentiality and the newly-hired lawyer has an independent obligation to ensure that he/she does not reveal confidential information); S.C. Bar Ethics Advisory Comm., Advisory Op. 12 (2004) (explaining that Rule 5.1 suggests that a supervisory lawyer has an ethical obligation to ensure that a subordinate attorney does not have a caseload that leads to violations of the rules of professional conduct and the subordinate attorney, in turn, has an ethical obligation to inform his/her supervisor that their caseload is interfering with required basic functions of lawyers).

[182] MODEL RULES OF PROF'L CONDUCT R. 5.1(a).

competently represent the firm's clients, firm management has an obligation to modify its procedures within reason.

A 2011 decision from Maine illustrates this point nicely. In *Board of Overseers of the Bar v. Warren*,[183] a law firm discovered that one of its partners had engaged in unethical billing practices. Believing the lawyer to be suicidal, the firm's executive committee failed to notify the head of the partner's practice group so that he could implement more rigorous measures to ensure the partner's future compliance with the rules.[184] Several months later, the firm learned that the lawyer had engaged in more mishandling of client funds.[185] The Maine Supreme Court concluded that firm management had failed to satisfy its obligations under Maine's equivalent of Rule 5.1.[186] While acknowledging that informal supervision of more experienced attorneys is ordinarily sufficient to satisfy firm management's obligations under Rule 5.1(a), informal supervision was insufficient under the facts of the case.[187] The court explained that firm management's obligations "vary not only depending on whether an attorney is experienced or inexperienced, but also on whether the attorney is understood to be suffering from a serious emotional impairment."[188] While the court stopped short of specifying precisely what measures the firm's executive committee should have implemented, presumably they would have included, at a minimum, a discussion with the lawyer in question and reasonable modifications of existing practices to ensure that he did not repeat his unethical behavior.

Similarly, Rule 5.1(b) does not impose a generalized duty of supervision, but a duty of supervision with respect to a specific lawyer.[189] A lawyer with supervisory authority over another lawyer must make "reasonable efforts to ensure that the *other lawyer*" is practicing ethically.[190] A uniform, firm-wide practice regarding the supervision of inexperienced lawyers that provides reasonable assurance that fifth-year associates are adequately supervised, but first-year associates are not, is inadequate under Rule 5.1.[191]

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[183] 34 A.3d 1103 (Me. 2011).
[184] *Id.* at 1106, 1113.
[185] *Id.* at 1106-07.
[186] *Id.* at 1113.
[187] *Id.*
[188] *Id.*
[189] *See* MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2013).
[190] *Id.* (emphasis added).
[191] *See id.* R. 5.1 cmt. 2 (identifying that Rule 5.1(a) requires a policy and procedure of ensuring that inexperienced lawyers are properly supervised).

The clear meaning of Rule 5.1 is that partners and supervising lawyers cannot simply adopt generalized policies and procedures and then take an inflexible approach when the policies and procedures prove ineffective for individual lawyers within the firm. Individual supervision and modification of uniform policies and procedures may be required. This is also the essence of the ADA's reasonable accommodation requirement. By their nature, accommodations are individualized.[192] If an employer's general practices prevent an employee with a disability from performing the essential functions of a position, the employer is required to modify that practice, within reason, so as to provide the individual employee with the same opportunity to perform the job as other employees.[193]

An ABA ethics opinion on the subject of the obligations of partners or supervisory lawyers with respect to a mentally impaired lawyer in the firm illustrates exactly how intertwined the legal and ethical requirements confronting firm management and lawyers with disabilities really are.[194] In particular, ABA Formal Opinion 03-429 discusses the application of Rule 5.1 in these situations. The opinion emphasizes the need for proactive measures on the part of partners and supervisory lawyers when dealing with a lawyer with an impairment. The opinion reiterates the requirements that a firm "establish appropriate preventive policies and procedures" and that supervisory lawyers "make reasonable efforts to ensure that the supervised lawyer conforms to the Model Rules."[195] But the opinion also notes that the firm may need to engage the impaired lawyer in a discussion about the need to represent clients effectively and to discuss with the lawyer measures the lawyer and the firm may take to ensure effective representation.[196] Thus, while the opinion does not use the phrase "interactive process," the process it describes is nearly identical.

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[192] *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 398 (2002) (rejecting the idea that an employer may not be required to depart from a neutral workplace rule as part of its accommodation requirement); Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165, 1193 (2011) ("Accommodations cannot be, by the very nature of the term, one-size-fits-all; a program which is standardized for all . . . is not accommodating.").

[193] *See Barnett*, 535 U.S. at 397 ("The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.").

[194] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 429, at 4 (2003).

[195] *Id.*

[196] *Id.*

The ABA's ethics opinion disavows any opinion as to a firm's legal responsibilities under the ADA,[197] but it nonetheless actually references the reasonable accommodation requirement in discussing an employer's ethical obligations and notes possible accommodations a firm might make.[198] The accommodations identified are some of those referenced in the ADA. For example, the ADA lists job restructuring as one possible accommodation.[199] According to the EEOC, job restructuring may entail altering when and how an essential function is performed.[200] The ABA opinion identifies one form of job restructuring when it suggests that to comply with its obligations under Rule 5.1, firm management might consider altering a disabled lawyer's job to reduce strict deadlines and related time pressures.[201] Another possible accommodation included within the ADA's statutory text is reassignment to a vacant position. If an employee with a disability is unable to perform the essential functions of her current position even with a reasonable accommodation, it may be a reasonable accommodation for the employer to reassign the employee to a vacant position.[202] The ABA opinion identifies reassignment as another means of accommodating a disabled lawyer when it suggests that a lawyer who is unable to handle the stress of litigation might instead be reassigned the task of drafting transaction documents.[203]

The ABA's formal opinion contains a number of limitations. While the same ethical issues that apply to the supervision of lawyers with mental impairments also apply to lawyers with physical impairments, the opinion singles out mental impairments for special treatment, thus furthering the stigmas associated with mental impairments.[204] In describing firm management's obligation to engage in an interactive process with a disabled lawyer, the opinion imagines an unnecessarily

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[197] *See id.* at 2 n.5 ("This opinion does not deal with the issues that could arise for the firm vis-à-vis its responsibilities to accommodate an impaired lawyer under the Americans with Disabilities Act of 1990.").

[198] *See id.* at 4.

[199] 42 U.S.C. § 12111(9)(B) (2012).

[200] *See* 29 C.F.R. app. § 1630.9 (2011).

[201] *See* ABA Formal Op. 429 (suggesting accommodating the lawyer by permitting him to work in "an unpressured environment").

[202] *See* 42 U.S.C. § 12111(9)(B).

[203] *See* ABA Formal Op. 429.

[204] *See generally* John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 573 (2008) (noting the opinion's failure to address lawyers with physical impairments, such as visual or mobility impairments).

confrontational scenario in which firm management may need to "*confront* the impaired lawyer" and "*forcefully* urg[e] the impaired lawyer to accept assistance."[205] While this language was perhaps included to reassure firm management that they still retain discretion as to how to run their own firms and to convey the seriousness of the ethical issues involved, it unnecessarily injects an adversarial tone to a discussion of a process that is envisioned as being cooperative.[206] Finally, as noted, the opinion stops short of directly linking the ethical and legal requirements firm managements have with respect to lawyers with disabilities.[207]

Ultimately, however, the opinion provides a useful way for disabled lawyers and those that employ them to view their respective ethical and legal obligations. The obligations imposed by the ADA and the rules of professional conduct complement each other. Both sets of rules require employers to be proactive in their attempts to eliminate the barriers that prevent an employee from performing the essential functions of a position, and both require employers to make reasonable efforts to remove those barriers once identified. From the employees' perspective, the ethical rule requiring competent representation may impose upon lawyers with disabilities an affirmative obligation to initiate and engage in a good faith, interactive process designed to identify the modifications necessary to enable the lawyer to perform the essential functions of her job. Thus, the opinion illustrates the point that when considering the issue of reasonable accommodations for lawyers with disabilities, the legal profession should not forget that the legal questions involved are intimately connected to the ethical issues involved.

4. Promoting the Connection Between Professional Responsibility and Reasonable Accommodation

As part of their efforts to address the underrepresentation of lawyers with disabilities within the legal profession, leaders of the bench and bar should emphasize the connection between firm management's ethical obligations under the rules of professional conduct and its legal obligations under the ADA. Perhaps the most efficient means of making explicit the connection between a lawyer's ethical and legal obligations with respect to a lawyer with a disability would be to include a new comment to Rule 5.1 based on Formal Opinion 03-429:

[205] ABA Formal Op. 429 (emphasis added).
[206] *See* Feliberty v. Kemper Corp., 98 F.3d 274, 280 (7th Cir. 1996).
[207] *See supra* note 197 and accompanying text.

> The reasonable efforts described in paragraph (a) may include making reasonable accommodations to the known physical or mental impairments of a lawyer with a disability. Reasonable accommodations may include, but are not limited to, changes in the work environment or to the firm's standard practices and procedures that enable the lawyer to provide competent representation to clients. As part of a lawyer's obligations under paragraphs (a) and (b), it may be necessary to initiate or participate in an interactive process in which the parties discuss the need to represent clients effectively and explore measures the lawyer with a disability and the firm may take to ensure effective representation.[208]

In addition, the use of ethics advisory opinions and bar-sponsored continuing legal education courses could further publicize and explain the connection between the rules of professional conduct and the ADA.

5. The Benefits of Framing the Issue in Terms of Professional Responsibility

Framing the issue of reasonable accommodations for lawyers at least partly in terms of a professional responsibility has several potential benefits. First, framing the issue in this manner places the ultimate focus where it needs to be: on providing competent representation to clients. In terms of the daily practice of law, the legal profession needs to think of the reasonable accommodation as a device to help ensure competent representation of clients. Rather than thinking in terms of abstract notions of "essential functions" and "undue hardship" and then trying to apply those concepts to the law firm setting, the legal profession can focus more squarely on a concept most lawyers are able to grasp intuitively. This may have the added benefit of reducing the potential for conflict between the affected parties and reducing tensions within the legal profession on the subject more generally. When the reasonable accommodation requirement is viewed through the lens of a means of providing effective representation to clients, lawyers are more likely to apply a client-centered analysis to the issue of reasonable accommodation. The affected parties may be more likely to drop their antagonistic postures and adopt a problem-solving approach. Both sides should recognize the value of this approach in terms of retaining clients and avoiding professional discipline or civil liability.

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[208] This language roughly tracks the EEOC's explanation of the reasonable accommodation requirement. *Cf.* 29 C.F.R. app. § 1630.9 (2011).

Finally, legal employers may be less resistant to change if they come to appreciate that the ADA only requires them to do what the rules of professional conduct largely already require. It is certainly open to debate how well law firm partners have complied with their ethical obligations under Rule 5.1. But one would at least hope that there should be less resistance to complying with an internal rule adopted by the members of one's own profession than to complying with a legal obligation imposed by outsiders. The legal profession as a whole is notoriously hostile to the idea of external regulation.[209] To the extent law firms view the ADA's reasonable accommodation requirement purely as an external legal requirement that limits their ability to run their firms as they see fit, they are likely to view the requirement with skepticism. If, however, the requirement is presented more as part and parcel of firm management's duty to take reasonable steps to ensure that firm lawyers are providing competent representation, they may be more receptive.

B. *Reasonable Accommodation as Professionalism*

> *When women and men of diverse backgrounds, including persons with disabilities, face systemic barriers to either entering law school, graduating law school, passing the bar exam, or rising in the ranks of our profession, it's more than just a lack of opportunity for those individuals. It is a lost opportunity for the legal profession.*
>
> —Former ABA President H. Thomas Wells, Jr.[210]

In discussing the employment of attorneys with disabilities, the legal profession would also do well to frame the issue partly in terms of an issue of professionalism. Professional responsibility, in the sense of compliance with ethical rules, is an essential component of professionalism. But the concept of professionalism includes more than mere compliance with ethical standards outlined in the relevant rules of professional conduct. Professionalism also entails acceptance and conduct in keeping with "the core values and ideals of the legal profession."[211] While there is a certain slipperiness in trying to identify

[209] *See* Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33, 43 n.52 (1996) (noting "the ABA's hostility to legislative or executive branch rulemaking for lawyers").

[210] *Welcome from the Conference Primary Sponsors*, SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 2.

[211] Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW. 4, 4-5 (2008); *see also* Heather M. Kolinsky, *Just Because You Can Doesn't Mean You Should: Reconciling*

exactly what the legal profession considers to be core values and ideals,[212] there are several values about which there is nearly universal agreement.

1. Devotion to the Client

One of the most fundamental values of the legal profession is devotion to one's client.[213] Providing competent representation and placing the interests of the client above those of the lawyer are values that lie at the core of what it means to be a lawyer.[214] By complying with the ADA's reasonable accommodation requirement, law firms can foster the ethic of devotion to the client's interests.

Like Model Rule 5.1(a), the reasonable accommodation requirement requires legal employers to be proactive in supervising lawyers and establishing and (as needed) modifying policies and practices designed to lead to competent and ethical practice. As a comment to Rule 5.1 explains, the rule is premised on the idea that "the ethical atmosphere of a firm can influence the conduct of all of its members."[215] By developing "ethical infrastructures" and complying with the supervisory obligations imposed by Rule 5.1, law firm management may shape the professional values of the lawyers within the firm.[216] In the process, they may help foster a greater sense of professionalism and commitment to the ethic of client-centered practice.[217]

Attorney Conduct in the Context of Defamation with the New Professionalism, 37 NOVA L. REV. 113, 123 (2012) (noting that professionalism is often "distinguished as a step above the professional rules, an ideal to aspire to and behavior that should be expected").

[212] *See* Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 221 n.19 (2002) ("As many commentators have noted, there is no uniform definition of 'professionalism.'").

[213] *See* Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 483 (2008); Milton C. Regan, Jr. et al., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 33 (1999).

[214] *See* Regan, Jr. et al., *supra* note 213, at 34.

[215] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 3 (2013).

[216] *See* Schneyer, *Professional Discipline*, *supra* note 180, at 10 (using the term "ethical infrastructure to describe the policies and procedures promoting ethics in a firm"); Paul R. Tremblay et al., *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L.J. 568, 569 (2011) (explaining that lawyers' professional identities and values "are constantly being shaped and formed, at both a conscious and unconscious level, by the norms that arise from practice settings, the surrounding culture, and the structural systems in which the lawyers work").

[217] *See generally* McMorrow, *supra* note 166, at 460-61 (linking effective ethical infrastructure to furtherance of professionalism).

When law firm management complies with its obligations under Rule 5.1 with respect to all lawyers within the firm (including those with disabilities), it signals to other lawyers within the firm its commitment to providing competent and client-centered representation. Firm management does the same when it expressly takes disability into account when developing firm-wide policies and practices or modifying existing policies and practices in order to accommodate a lawyer with a disability under the ADA. For example, by formally centralizing the process through which firm lawyers request and obtain accommodations, firm management can establish the type of "internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct" that Rule 5.1 envisions.[218] In the process, firm management is facilitating the interactive process envisioned by the ADA.[219] Particularly when adopted as part of a broader effort to develop a cohesive set of policies and procedures that all firm lawyers may take advantage of, a firm signals to all of its attorneys that competent representation is a core value of the firm, thereby influencing the culture within the firm.[220]

2. Fostering Diversity

In recent years, members of the legal profession have increasingly identified the goal of fostering diversity as a core value[221] Although typically addressed in terms of race and gender,[222] there is a growing realization within the legal profession and corporate America that the

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[218] MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 1; *see also Creating the Most Inviting Workplace for Lawyers with Disabilities — Panel Roundtable*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 47, 51 [hereinafter *Most Inviting Workplace*] (statement of Eve Hill) (recommending that employers centralize the process for requesting and obtaining accommodations).

[219] *See generally* Basas, *New Boys*, *supra* note 96, at 102 ("Respect for the interactive process of the ADA's reasonable accommodations provisions is fundamental for the survival and advancement of attorneys with disabilities.").

[220] *See Most Inviting Workplace*, *supra* note 218, at 47, 48 (statement of Eve Hill) (explaining how adoption of policies can change the culture within law firms).

[221] *See* Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153, 182 (2013) [hereinafter *Law Firm Ethics*] (stating that the values of diversity and pluralism "coincide with traditional notions of professionalism").

[222] Emens, *supra* note 52, at 913-14; *see also* Phoebe Ball et al., *Disability as Diversity in Fortune 100 Companies*, 23 BEHAV. SCI. & L. 97, 98 (2005) (reporting that in 2003 less than half of Fortune 100 companies expressly mentioned disability as part of their diversity policies).

concept of diversity also includes diversity with respect to disability.[223] Diversity initiatives have special relevance for the legal profession. As Professor Eli Wald explains, "diversity initiatives embody an effort to overcome bias, address discrimination, and pursue equality, all core values of the legal profession and the rule of law."[224] In its report, the ABA's Presidential Diversity Initiative explained the important role that diversity plays in upholding the rule of law: "Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from mechanisms of justice."[225] Thus, there is a normative argument that in order to preserve the public's trust in its legal systems — trust that is essential to the continued viability of those systems — the legal profession needs to be a leader in promoting diversity.[226]

Some lawyers have willingly embraced the equality-based justifications for promoting diversity. However, the reality is that many firms have championed diversity for more utilitarian reasons.[227] Diversity is viewed as being good for business.[228] As part of their corporate social responsibility programs, for example, some corporate clients impose diversity requirements for outside counsel.[229] Some law firms tout their firm's commitment to diversity and use this commitment to distinguish the firm from others when recruiting new

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[223] *See* Amy Cunningham, *Diversity: Is It More than Just Race and Gender?*, ADVOCATE (Idaho), Jan. 2013, at 16 (discussing disability diversity within the legal profession); Katherine Lee McBride, *Disability as Diversity Within the Legal Profession*, 81 J. KAN. BAR ASS'N 15, 15 (2012) (stating that the perspectives of attorneys with disabilities should be considered in discussions about diversity); Rebecca R. Hastings, *Disability Employment Practices Vary, SHRM/Cornell Research Finds*, SHRM ONLINE (Apr. 11, 2012), http://www.shrm.org/hrdisciplines/diversity/articles/pages/disabilityemploymentpracticesvary.aspx (reporting that 61% of responding employers referenced people with disabilities in their diversity policies).

[224] Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1101 (2011).

[225] AM. BAR ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (2010).

[226] *See* Wald, *supra* note 224, at 1101.

[227] *See id.* at 1091 (explaining that many law firms developed diversity initiatives based on "growing client pressures to diversify and the business case for diversity").

[228] *See* David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004) (noting the shift from a moral justification for diversity to one of "diversity is good for business").

[229] Whelan & Ziv, *Law Firm Ethics*, *supra* note 221, at 160; Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2595 (2012).

clients.[230] Providing workplace accommodations for disabled lawyers as part of an overall diversity initiative may make similar business sense. Given the rise in the number of Americans with disabilities, law firms, like other businesses, can increasingly expect to deal with clients with disabilities.[231] Improving diversity regarding disability may improve a firm's competitiveness when competing for business.[232] Providing workplace accommodations may help to make a law firm more competitive in other ways as well. For example, studies suggest that an employer's willingness to provide workplace accommodations tends to lead to decreased turnover.[233]

Some have argued that the "business case" for diversity within law firms — originally designed to serve as a supplement to normative-based arguments for disability — has actually become the primary justification offered and, in the process, hindered the legal profession's willingness to accept normative-based arguments in favor of diversity.[234] This may be true, and there are certainly questions as to how effective the business case for diversity has actually been in terms of increasing diversity within the legal profession.[235] But in promoting passage of the ADA, congressional supporters routinely advanced economic arguments in support of the ADA in addition to more traditional equality-based arguments.[236] Requiring employers to make inexpensive accommodations would, it was argued, help bring millions of Americans with disabilities into the workplace, thereby benefitting the American economy as a whole.[237] Therefore, there

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[230] *See Best Accommodation Practices in the Legal Profession — Panel Roundtable*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 56, 60 (statement of Emily S. Blumenthal) (discussing efforts to publicize firm's diversity efforts).

[231] *See supra* note 81 and accompanying text.

[232] One study found that over 15% of employers reported increased customer bases as a result of providing accommodations for their employees and nearly one in three reported increased profitability. Schartz et al., *supra* note 57, at 349.

[233] *Id.* at 346.

[234] Wald, *supra* note 224, at 1081; David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 855-56 (1998).

[235] *See* INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING? 8 (2011), *available at* http://www.theiilp.com/resources/Documents/IILPBusinessCaseforDiversity.pdf ("For law firms as a group, the lack of measurable increases in the amount of business they receive in recognition of their diversity efforts has resulted in a relatively uniform approach to diversity where few firms find it worthwhile to step outside of the parameters of acceptable diversity programs and activities.").

[236] *See* Bagenstos, *Welfare Reform*, *supra* note 29, at 961-63.

[237] *See id.* at 966.

should be room for leaders to advance the business reasons as well as the equality-based reasons for encouraging diversity.

The ABA has articulated its view of the importance of disability diversity through its *Pledge for Change*, a one-page pledge for legal employers to sign:

> Our pledge is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business.[238]

The ABA's *Pledge for Change* advances an equality-based justification for diversity, but it also advances several other justifications. The *Pledge* recognizes the growing diversity and pluralism within communities and explains that, as a result, a client-centered approach to representation requires diversity within law firms.

Implicit in this recognition is the idea that lawyers with disabilities may bring valuable insights and abilities that may benefit their clients and employers. Many individuals with disabilities have had to overcome significant obstacles, thereby making them more creative and effective problem-solvers.[239] They may have had to work harder to achieve their success.[240] They may also be more empathetic to their client's situations as a result of their own experiences.[241] And having faced skeptical audiences in the past, they may be particularly adept at persuasion.[242] These are all marketable skills for any attorney that may ultimately lead to more effective representation.[243]

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[238] PLEDGE FOR CHANGE, *supra* note 111, at 1.

[239] The Honorable Chief Judge Richard S. Brown, *Personal Perspectives of Lawyers with Disabilities*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 13, 13; Scott C. LaBarre, *Personal Perspectives of Lawyers with Disabilities*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 6, 7.

[240] *See* Judge R.S. Brown, *supra* note 239, at 13, 13.

[241] *Id.*

[242] *See id.*

[243] *See* Matthew W. Dietz, *Reasonable Accommodations for Attorneys with Disabilities*, 81 FLA. B.J. 66, 66 (2007) (explaining that "overcoming barriers and adversity in their own lives inures to the benefit of their clients"). According to one source, "research that reviewed 90 studies reveals that employees with a disability have better safety records, equal or better turnover and absentee rates, equal or better job assignment flexibility and better than average attendance records, compared to non-disabled employees. They work hard, are reliable, punctual and as productive as others." *Diversity Management Series Part III: Employing People with Disabilities*, SOC'Y FOR HUMAN RES. MGMT. 1-2 (Apr. 1, 2005), http://www.cwsvt.com/media/Diversity%20Management%20Series%20Part%20III_%20Employing%20People%20With%20Disabilities.pdf.

By embracing the values underlying the reasonable accommodation requirement, the legal profession can also help further the value of fostering diversity within the profession. Once again, Model Rule 5.1 and the reasonable accommodation requirement can work in conjunction to bring about this result. Rule 5.1 encourages law firm management to engage in meaningful supervision and hands-on mentoring of associates.[244] Mentoring programs can provide the support and supervision that more junior lawyers may need to practice competently.[245] Indeed, the willingness to mentor future generations of lawyers has itself been identified as a component of professionalism.[246]

Providing mentoring or increased supervision could also be a reasonable accommodation.[247] The EEOC takes the position that it may be a reasonable accommodation for an employer to provide a job coach on a temporary basis to assist in the training of a qualified individual with a disability.[248] Several courts have agreed.[249] At least one court has recognized that allowing a job coach on an ongoing basis could be a reasonable accommodation. In *Menchaca v. Maricopa Community College District*, the employee had previously met with her

[244] *See* Arthur J. Lachman, *What You Should Know Can Hurt You: Management and Supervisory Responsibility for the Misconduct of Others Under Model Rules 5.1 and 5.3*, 18 PROF. LAW. 1, 6 (2007) (suggesting the use of a mentoring program as a means of satisfying the obligation under Rule 5.1(a)). *See generally* Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. LAW. 131, 135 (stating that training programs for associates should be part of a firm's ethical infrastructure).

[245] *See* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 282-83 (2000) ("Without mentoring, associates struggle to learn how to practice law competently and ethically."); Miller, *supra* note 162, at 272 (stating that by encouraging mentoring, "the bar can better achieve its goal of competence").

[246] *See* Blair McBride, *Transition to Practice Update*, 76 TEX. B.J. 217, 218 (2013) ("Mentoring and professionalism are innately connected."); Miller, *supra* note 162, at 324 ("Genuine self-regulation of the legal profession involves not just being accountable for one's own professional conduct today; it also requires accepting responsibility for tomorrow by mentoring and nurturing the next generation.").

[247] *See* Charles P. Mileski, Note, *Those Lost but Not Forgotten: Applicants with Severe Disabilities, Title I of the ADA, and Retail Corporations*, 40 HOFSTRA L. REV. 553, 567 (2011) (equating the provision of mentors with reasonable accommodation).

[248] *See* 29 C.F.R. app. § 1630.9 (2011).

[249] *See* EEOC v. Dollar Gen. Corp., 252 F. Supp. 2d 277, 292 (M.D.N.C. 2003); Miami Univ. v. Ohio Civil Rights Comm'n, 726 N.E.2d 1032, 1042 (Ohio Ct. App. 1999); *see also* Johnson v. Greenfield Dist. Court, No. 05-P-175, slip op. at 2, (Mass. Ct. App. Mar. 13, 2006) (referring to job coaching as a reasonable accommodation); Emens, *supra* note 52, at 857 n.40 (identifying allowing a job coach as a commonly requested accommodation for psychiatric disabilities).

job coach "'almost weekly' for 'about an hour,' and they would discuss [the employee's] activities."[250] The court concluded that permitting such an arrangement on ongoing basis could qualify as a reasonable accommodation.[251] The EEOC has also stated that altering a supervisory style or providing more detailed instruction could be reasonable accommodations.[252] Therefore, mentoring and increased supervision for a lawyer with a disability would be consistent with a firm's legal and ethical obligations.

Since an employer is only required to provide a reasonable accommodation, not necessarily the employee's preferred accommodation,[253] providing a mentor will not be required as a matter of law in the vast majority of cases. Likewise, disciplinary authorities have stopped short of establishing a bright-line rule that firms must establish formal mentoring programs in order to comply with Rule 5.1(a). However, mentoring *may* be a way of satisfying both rules. Mentoring is also consistent with the goals of both rules and may be a relatively easy way of encouraging competent job performance.

Mentoring has also been identified as an essential tool with respect to retaining lawyers with disabilities.[254] While hiring practices may contribute to diversity within an organization and help shape the organization's culture, retention practices are far more critical.[255] Only by retaining a diverse range of employees can the culture of an organization truly change.[256] There is near universal agreement that mentoring programs are one of the most effective means of retaining

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[250] 595 F. Supp. 2d 1063, 1072 (D. Ariz. 2009).

[251] *Id.* at 1073.

[252] *See supra* note 47 and accompanying text.

[253] *See* Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 131 (1st Cir. 2004).

[254] *See* C.S. Brown, *supra* note 120, at 41, 42-43 (mentioning the benefits of mentoring with regard to promoting effective communication regarding work performance); Eve L. Hill, *So You've Hired a Lawyer with a Disability . . . Now What?*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 52, 53 (stating that mentoring can "give lawyers with disabilities access to perhaps one of the most important elements of professional success"); Andrew J. Imparato, *Personal Perspectives of Lawyers with Disabilities*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 15, 15 (discussing "the importance of mentors to help create a path for people with disabilities in the legal profession").

[255] *See* C.S. Brown, *supra* note 120, at 41, 41 (discussing the importance of retention in relation to hiring).

[256] *See* Michael Stein, *Best Practices for Mentoring, Retaining, and Promoting Lawyers with Disabilities — Panel Discussion*, *in* SECOND ABA NATIONAL CONFERENCE, *supra* note 86, at 43, 43 (discussing the importance of promotion and retention in changing workplace cultures).

qualified lawyers.[257] Therefore, by viewing reasonable accommodations as part of the broader goal of retaining qualified employees, the legal profession can further the core value of diversity.

3. Access to Justice

Finally, the legal profession should start to conceptualize the ADA's reasonable accommodation requirement as a means of furthering the core professional value of ensuring access to justice. The organized bar has increasingly devoted time and energy to the task of increasing access to justice to lower income individuals and traditionally underrepresented groups.[258] From increased pro bono efforts to relaxed rules regarding limited-scope representation, members of the bar have, in recent years, come to recognize the task of promoting access to justice as a core value of the legal profession.[259] This goal includes not only helping to make legal services available but taking steps to ensure that courthouses and courtrooms are also accessible to all members of the public.[260]

People with disabilities have long faced barriers to the legal process. The ADA's legislative history contains examples of exclusion from the legal process that individuals with disabilities have faced.[261] From inaccessible courthouses to discriminatory jury selection rules,

[257] *See* Levit, *supra* note 23, at 106 ("The law firms that have been most successful in retaining newer lawyers have adopted structural reforms that provide training, feedback, mentoring, and transparency."); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1071 (2011) ("Mentoring programs, by contrast, are among the most effective diversity strategies."). Mentoring can also lead to better networking and the establishment of support systems for other lawyers with disabilities. Basas, *New Boys*, *supra* note 96, at 108.

[258] *See, e.g.*, Thomas G. Wilkinson, Jr., *A Year in Full*, 35 PA. LAW. 11, 12 (2013) (noting the efforts of the Pennsylvania Bar, through a grant from the ABA Access to Justice Commission, to improve access to justice among low-income individuals).

[259] *See, e.g.*, Amelia Craig Cramer, *Enhancing Access to Justice*, 49 ARIZ. ATT'Y 46, 46 (2012) (referring to promoting justice as a core value of the legal profession); AM. BAR ASS'N, *MDP Recommendation — Center for Professional Responsibility*, http://www.abanet.org/cpr/mdp/mdprecom10f.html (last visited Mar. 5, 2014) (listing the duty to promote access to justice as one of the core values of the legal profession).

[260] *See* John W. Amberg et al., *Ethics Roundup*, 36 L.A. LAW. 25, 25 (2013) (stating that the closure of courtrooms presents "access to justice issues for all people"); Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L & COMP. L. 281, 282 (2011) ("'Access to Justice' is a broad concept, encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice.").

[261] *See* Tennessee v. Lane, 541 U.S. 509, 527 (2006) (citing legislative history).

individuals with disabilities have often been excluded from the courtroom.[262] Given the high unemployment and poverty rates among people with disabilities, quality legal representation is unaffordable to many individuals.[263] In addition, some disabled individuals who can afford legal representation experience resistance on the part of their lawyers in terms of their willingness to make their facilities available or to make whatever accommodations are necessary to ensure effective representation.[264]

The ABA and some state bar associations have taken steps to promote access to justice among individuals with disabilities. For example, the ABA's House of Delegates has passed resolutions calling for improved courtroom and firm website accessibility and the development of resources for lawyers to make their website accessible to individuals with disabilities.[265] State bar organizations are increasingly recognizing the need to include individuals with disabilities in their access to justice initiatives.[266] A few state bars have gone so far as to establish Communication Access Funds, which finance the provision of auxiliary aids and services for lawyers representing deaf clients.[267]

Most of the discussion regarding the reasonable accommodation has focused on the employment context. However, the concept of reasonable accommodation or reasonable modification (as it is termed in other parts of the ADA) is crucial to the statute as a whole.[268] In

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[262] *See supra* notes 1-6 and accompanying text.

[263] Ortoleva, *supra* note 260, at 300-01.

[264] *See generally* Michael Steven Stein & Emily Teplin, *Rational Discrimination and Shared Compliance: Lessons from Title IV of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1095, 1103 (2011) (discussing the reluctance of covered entities to provide interpreters and auxiliary aids to deaf customers).

[265] *See* Scott C. LaBarre, *ABA Resolution and Report on Website Accessibility*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 504, 504-05 (2007); *FYI: Website Accessibility*, A.B.A., http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/webaccessibility.html (last visited Apr. 2, 2014).

[266] *See, e.g.*, *Disabilities*, JUST. FOR ALL: A TENN. SUPREME COURT INITIATIVE (Feb. 2012), http://justiceforalltn.com/node/355 (listing legal and other resources for individuals with disabilities).

[267] *See* Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143, 1176 (2011). Tax credits are also available to businesses in this situation. *Id.* at 1177.

[268] *See id.* at 1153 ("The crux of Title III is its 'accommodation mandate.'" (quoting Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 223 (2000))); Waterstone, *supra* note 3, at 1823 (stating that Titles II and III of the ADA "are just as important to the ADA's goals as Title I").

addition to requiring public entities to make their facilities accessible to individuals with disabilities, Title II of the ADA requires public entities to make reasonable modifications in policies, practices, and procedures when necessary to avoid discrimination on the basis of disability.[269] Title III likewise requires public accommodations (such as restaurants, theatres, and other businesses) to make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities.[270] Public accommodations are also required to provide auxiliary aids or interpreters where necessary to ensure effective communication and receipt of the services provided by the public accommodation.[271]

In the legal context, Title III of the ADA might require a lawyer to hold client meetings at an accessible location or alter the lawyer's normal modes of client communication.[272] One commonly cited example is that a lawyer might be required to provide an interpreter in order to allow for effective communication with a deaf client.[273] Importantly, the accommodations that the ADA might require of a lawyer are also the kinds of things that may already be required of the lawyer as an ethical matter.[274] For example, a lawyer's ethical duty of effective communication with a client requires a lawyer to explain matters in a manner that permits the client to make informed and intelligent decisions.[275] Good lawyers already vary their communication style depending upon the client they are addressing,[276]

[269] 28 C.F.R. § 35.130(b)(7) (2010).

[270] 42 U.S.C. § 12182(b)(2)(A)(iii) (2012).

[271] *See id.*

[272] *See id.* § 12182(b)(2)(A)(iv) (listing the "failure to remove architectural barriers" as a form of discrimination under Title III); Michael A. Schwartz, *Deaf Patients, Doctors, and the Law: Compelling a Conversation about Communication*, 35 FLA. ST. U. L. REV. 947, 977 (2008) (explaining that the effective communication requirement is flexible and that a public accommodation "can choose among various alternatives as long as the result is effective communication"). Title III of the ADA specifically lists a lawyer's office as an example of a public accommodation subject to the Act. § 12181(7)(F).

[273] Dawson, *supra* note 267, at 1149-50.

[274] MODEL RULE OF PROF'L CONDUCT R. 1.4(b) (2013) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *id.* cmt. 1 ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."). For a discussion of some of the more difficult ethical issues associated with representing a client with a disability, see Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 633-35 (1989–1990).

[275] Dawson, *supra* note 267, at 1172.

[276] *See generally* Beth Caldwell, *Appealing to Empathy: Counsel's Obligation to*

and even bad lawyers cannot, as a matter of professional responsibility, insist upon a one-size-fits-all approach when it comes to explaining matters to clients.[277] Thus, altering one's communication style in order to reasonably communicate with a client — whether disabled or not — is a matter of professional responsibility.[278]

The specific case of the representation of deaf clients illustrates the interplay between compliance with ethical obligations and professionalism. As is the case with the employment of lawyers with disabilities, some lawyers and law firms will simply decide that the costs and burdens associated with representing a deaf client outweigh the benefits and will decline to represent the individual.[279] Like Title I of the ADA, Title III requires businesses to sometimes make expenditures in order to provide equal access to customers and clients with disabilities and prohibits them from directly passing those costs on to those same individuals.[280] This is an especially foreign concept for lawyers, who routinely pass along some of the costs of representation (including filing fees, copying costs, etc.) to their clients.[281] Indeed, anecdotal evidence strongly suggests that despite the ADA's legal requirements, many deaf individuals face great difficulty in finding lawyers who are willing to represent them.[282] No amount of appeal to a lawyer's legal obligations or sense of professionalism is likely to change the minds of some lawyers. However, perhaps an appeal to the legal profession's commitment to access to justice may influence some. Perhaps the legal profession can do a better job of framing the issue of access to justice as an issue with particular

Present Mitigating Evidence for Juveniles in Adult Court, 64 ME. L. REV. 391, 417 (2012) (discussing the need for attorneys to alter their communication style when representing young clients).

[277] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 6 (explaining the need for a lawyer to adjust communication style depending on the type of client).

[278] *See* Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 12 (1995) (discussing a lawyer's ethical obligations regarding communication with a client in the context of providing interpreters in the case of deaf clients).

[279] Dawson, *supra* note 267, at 1155 ("All things being equal, a lawyer is just as likely to refuse to take on a deaf or hard of hearing client as an employer is to refuse to hire them.").

[280] 28 C.F.R. § 36.301(c) (2014) ("A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures . . . that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.").

[281] *See* Dawson, *supra* note 267, at 1169.

[282] *Id.* at 1157.

relevance for individuals with disabilities. In the process, the leaders of the bench and bar can explain how the reasonable accommodation requirement takes multiple forms, thus potentially reducing some of the resistance to providing accommodations in the practice of law and in the employment setting.[283]

To make the connection between ethics, professionalism, and legal responsibilities even clearer, the ABA and adopting jurisdictions could amend Model Rule 1.4 to include a comment addressing the issue.[284] In 1995, the Association of the Bar of the City of New York issued a formal ethics opinion that addressed the ethical implications of representing a client with a hearing impairment.[285] Borrowing from that opinion, a new comment to Rule 1.4 might include the following language:

> A lawyer who undertakes to represent a client with whom effective direct lawyer-client communication can only be maintained through an interpreter, auxiliary aids and services, or alternative forms of communication must consider the most appropriate means of communication necessary for effective representation and, where necessary, secure and pay for the services of a qualified interpreter or provision of auxiliary aids and services.[286]

CONCLUSION

Despite the problems discussed in this Article, the legal profession has made major strides with respect to providing equality of opportunity for individuals with disabilities. The ABA and local bar leaders have demonstrated increased sensitivity and commitment to

[283] Moreover, there is also the business case for access to justice: an attorney who is willing to make reasonable modifications in his or her practice may attract more clients. Individuals with disabilities make up a growing component of the market for legal services. *See* Elayne E. Greenberg, *Overcoming Our Global Disability in the Workforce: Mediating the Dream*, 86 ST. JOHN'S L. REV. 579, 585 (2012) ("According to the World Health Organization, the number of persons with disabilities is increasing because of the advances in medical, population growth and the aging process.").

[284] One author has suggested adding a comment that specifically references the ADA and informs lawyers that they may be required to provide and pay for auxiliary aids and services. Dawson, *supra* note 267, at 1173-74.

[285] Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 12 (1995).

[286] *Cf. id.* ("A lawyer who undertakes to represent a client with whom effective direct lawyer-client communication can only be maintained through an interpreter must consider the need for interpreter services and when necessary take steps to secure the services of a qualified interpreter.").

the goal of removing the barriers that prevent access to the legal profession and its institutions. However, as the low number of lawyers with disabilities attests, there is still significant work to be done.

There are a number of reasons why the ADA has not been as successful as its supporters initially hoped. The most important is that the Act's reasonable accommodation requirement is too often viewed as a burden. This same mindset undoubtedly has impacted the legal profession's treatment of individuals with disabilities, most notably with respect to the employment of lawyers with disabilities. Regrettably, the legal mechanisms that exist to enforce the reasonable accommodation mandate are somewhat limited. Proving employment discrimination — particularly involving a failure to hire — is quite difficult given the fact that employers are almost always able to identify a plausible, legitimate non-discriminatory reason for their actions.[287] Proving disability discrimination in the employment setting presents similar challenges.[288] Outside of the employment setting, public entities and private law firms may similarly be able to assert plausible reasons for their refusal to make their facilities accessible or modify their practices, thereby avoiding liability.[289] Moreover, given the chronic under-enforcement of Titles II and III of the ADA, they can do so with relatively little fear.[290]

Perhaps, then, it is time for the legal profession to try an alternative (or at least complementary) approach. Leaders of the bench and bar should emphasize the ways in which the ADA embodies the values of the legal profession when it comes to individuals with disabilities and how the ADA's legal requirements are consistent with a lawyer's ethical requirements. To be sure, this approach is no panacea. But lawyers have special obligations to promote confidence in the rule of law and its institutions, to promote access to justice, and to improve the quality of legal representation.[291] Therefore, the underrepresentation of lawyers

[287] *See* Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 882-83 (2010) (discussing problems of establishing causation in disparate treatment cases); Margo Schlanger, *Second Best Damage Deterrence*, 55 DEPAUL L. REV. 517, 533 (2006) ("[F]ailure-to-hire violations are extremely difficult for the affected applicants to detect or prove . . . .").

[288] *See* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 121 (2010) (discussing the high number of disability discrimination claims that are dismissed on motions to dismiss).

[289] *See* Dawson, *supra* note 267, at 1161 ("Generally, alleged discrimination by an attorney against a deaf or hard of hearing person might be difficult to prove because an attorney can refuse a client by simply saying they are too busy.").

[290] *See id.* at 1156.

[291] MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (2013).

with disabilities in the legal profession and continued problems of access to justice for individuals with disabilities should be of particular concern. Perhaps by emphasizing the ways in which the reasonable accommodation requirement may be matters of professional responsibility and professionalism, the legal profession can take another step toward providing equality of opportunity for individuals with disabilities.