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

Alex B. Long*

INTRODUCTION

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

But the National Task Force's recommendations seem to have triggered a more focused attempt on the part of the profession to address well-being issues. In 2018, the ABA passed a resolution "encouraging all federal, state, local, territorial, and tribal courts, bar associations, lawyer regulatory entities, institutions of legal education, lawyer assistance programs, professional liability carriers, law firms, and other entities employing lawyers to consider the recommendations set out" in the Task Force's report.⁴ Since the publication of the report, numerous articles, and ethics

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¹ NATIONAL TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE RECOMMENDATIONS 20.4 & 24.1 (2017), <https://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf> [hereinafter NATIONAL TASK FORCE]. The Task Force consisted of numerous groups, including the ABA Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers. *Id.* 1.

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

³ See *infra* notes 35-42 and accompanying text.

⁴ American Bar Association, ABA WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION COMMISSION ON LAWYER ASSISTANCE PROGRAMS, STANDING COMMITTEE ON PROFESSIONALISM NATIONAL ORGANIZATION OF BAR COUNSEL Resolution 105 (2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2

opinions have all referenced the Report as part of an increased focus on the perceived crisis concerning well-being in the practice of law.⁵

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

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

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

I. SOCIETAL ATTITUDES TOWARD MENTAL HEALTH ISSUES

A. *Historical Attitudes Toward Mental Impairments*

Individuals with mental health issues have long faced societal stigma.⁷

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⁵ See DC Bar Ethics Op. No. 377, *Duties When a Lawyer is Impaired* (Oct. 2019).

⁶ See Martha Knudson, *Well-Being Is Key to Maximizing Your Success As A Lawyer*, 32 UTAH B.J. 41, 44 (2019); NATIONAL TASK FORCE, *supra* note 1, at 20.4 & 24.1.

⁷ See Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 50-51 (2006).

While individuals with physical disabilities have experienced stigma and discrimination throughout history, there is something about mental illness and related conditions that are especially likely to lead stigmatizing behavior.⁸ As one author has stated, “In contrast with physical disabilities, it may be that the problem of bias against those with mental disabilities is growing rather than abating with time.”⁹ Individuals with mental impairments in general face a host of stereotypes, but mental illness is often viewed with particular suspicion.¹⁰ Violence and mental illness are often linked in the public consciousness, despite the fact that there is frequently little connection between the two.¹¹ Depression is sometimes dismissed as not being a legitimate psychiatric condition.¹² Yet at the same time, there are harmful stereotypes associated with depression. One study found that 45% of respondents believed that people with depression were unpredictable and 20% believed such people were dangerous.¹³

B. The Americans with Disabilities Act and Mental Impairments

On a practical level, one of the most pernicious stereotypes surrounding individuals with mental disabilities is that they are not being capable of performing the functions of their jobs.¹⁴ The ADA prohibits employment discrimination on the basis of disability.¹⁵ The Act was designed to address

⁸ See Hensel & Jones, *supra* note 7, at 50-51 (noting that “the animus directed at psychiatric impairments is proportionately greater and more pervasive” than that directed at physical impairments).

⁹ John V. Jacobi, *Professionalism and Protection: Disabled Lawyers and Ethical Practice*, 69 U. PITT. L. REV. 567, 572 (2008).

¹⁰ See Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399, 414 (2006) (“Studies indicate that people blame individuals with mental illnesses more than they blame those whose disorders are understood as more organic, such as mental retardation.”).

¹¹ See E. Lea Johnson, *Theorizing Mental Health Courts*, 89 WASH U. L. REV. 519, 529 (2012) (noting the belief in the connection between mental illness and violence and stating that the belief “may be fueled more by stigma and stereotype than by reality”); Jane Byeff Korn, *Crazy (Mental Illness under the ADA)*, 36 U. MICH. J.L. REFORM 585, 586-87 (2003) (noting that individuals with mental disabilities “are seen as more likely to commit acts of violence than are people with physical disabilities”).

¹² See Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1364 (2008).

¹³ See Alyssa Dragnich, *Have You Ever ...?: How State Bar Association Inquiries Into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 731 (2015) (citing study).

¹⁴ See Waterstone & Stein, *supra* note 12, at 1365-66 (noting the assumption that “mental disability inevitably leads to inadequate work performance”).

¹⁵ 42 U.S.C. § 12112 (2018).

the stigma and stereotypical assumptions often associated with disabilities.¹⁶ The ADA, like its predecessor, Section 504 of the Rehabilitation Act, reflects the congressional recognition that that society's accumulated myths and fears about disability and disease are as limiting as the limitations that flow from actual impairment.¹⁷ The Act reflects this understanding in a variety of ways, from recognizing a claim where an employer regards an employee as having an impairment that is more limiting than it actually is to placing limits on the ability of employers and prospective employers to ask disability-related questions of their employees and job applicants.¹⁸

While ADA plaintiffs in general have often experienced difficulty establishing that they are qualified for their jobs, plaintiffs with psychiatric disabilities have historically experienced particular difficulties in this regard.¹⁹ One study found that employers tended to react more negatively to an applicant's disclosure of the existence of a psychiatric disability during the interview process than the existence of a physical disability.²⁰ Not only may employers be particularly hesitant to hire individuals with mental disabilities based on the stereotypes associated with mental illness, they are sometimes reluctant to provide needed reasonable accommodations in the case of employees with mental impairments.²¹

In addition to the reluctance of employers to provide reasonable accommodations, employees with psychiatric impairments frequently report other adverse consequences of divulging the existence of an impairment, such as excessive supervision and monitoring.²² Employees with mental

¹⁶ See Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 535 (2020).

¹⁷ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987); 29 C.F.R. pt. 1630 app. § 1630.2(l) (2020)

¹⁸ 42 U.S.C. § 12102(1)(C); *id.* § 12112(d).

¹⁹ See Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 272-73 (2000) (discussing difficulties faced by ADA plaintiffs alleging the existence of psychiatric disabilities); Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1134-36 (2017) (noting difficulties faced by ADA plaintiffs even after amendments).

²⁰ Rebecca Spirito Dalgin & James Bellini, *Invisible Disability Disclosure in an Employment Interview: Impact on Employers' Hiring Decisions and Views of Employability*, 52 REHABILITATION COUNSELING BULL. 6, 7 (2008).

²¹ See Emens, *supra* note 10, at 416-17 (noting the stereotypes employers may hold with respect to individuals with mental disabilities and how those stereotypes may impact hiring decisions); Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees with Psychiatric Disabilities*, 55 AM. BUS. L.J. 537, 547 (2018) (noting the reluctance of employers to provide certain atypical accommodations for employees dealing with mental illness); Michael Z. Green, *Mediating Psychiatric Disability Accommodations for Workers in Violent Times*, 50 SETON HALL L. REV. 1351, 1375 (2020).

²² See Zlatka Russinova, *Workplace Prejudice and Discrimination Toward Individuals*

impairments may also face hostile attitudes from co-workers. For example, in one study, 58% of respondents indicated that they would not want to work with an individual with mental illness.²³ Perhaps not surprisingly, many employees and job applicants are reluctant to disclose the existence of their mental impairments or to seek needed accommodations due to the stigma involved, despite the legal protections afforded by the ADA.²⁴

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

The legal profession's history of treatment of lawyers with mental health and substance abuse issues is not a proud one. For example, there are numerous examples of stigmatizing judge-made legal rules and statements in judicial decisions concerning mental impairments.²⁵ Commentators have suggested that decisions involving mental disability law often reflect "bias against individuals with mental disabilities and contempt for the mental health professions."²⁶

There is similar evidence of bias and stereotypical views concerning mental impairments in professional discipline decisions. Some disciplinary decisions involving lawyers with mental impairments or substance abuse issues reflect what one author has described as "a powerful current of blame."²⁷ Disciplinary authorities have a history of being reluctant to accept evidence of treatment or rehabilitation indicating that lawyers with a history of mental impairment or substance abuse can provide competent representation.²⁸

with *Mental Illnesses*, 35 JOURNAL OF VOCATIONAL REHABILITATION 227, 231 (2011) (relating results of survey), <https://cpr.bu.edu/wp-content/uploads/2013/11/Russinova-et-al.-2011.pdf>

²³ See Dragnich, *supra* note 13, at 731 (citing study).

²⁴ See Stefan, *supra* note 19, at 290 (noting that individuals with psychiatric disabilities are "extraordinarily reluctant to disclose their disabilities" because of the "stigma and shame associated with mental illness"); Hickox & Case, *supra* note 16, at 539 (noting the threat of stigma on the willingness of employees with hidden disabilities to seek accommodations).

²⁵ See *Buck v. Bell*, 274 U.S. 200, 206-07 (1927) (observing in a decision involving involuntary sterilization that "three generations of imbeciles are enough"). See generally John J. Jacobi, *Fakers, Nuts, and Federalism: The Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95, 96 (1999) ("The common law in this country has always mistreated the mentally ill.").

²⁶ Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. HEALTH 15, 30-31 (1993-94).

²⁷ Michael L. Perlin, "Baby, Look Inside Your Mirror": *The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities*, 69 U. PITT. L. REV. 589, 595-96 (2008).

²⁸ See Perlin, *supra* note 27, at 595 (noting the tendency of bar discipline cases to reject mitigation arguments); Anita Bernstein, *Lawyers with Disabilities: L'Handicape*

Questions on bar applications concerning mental health and mental health counseling have also provoked widespread concerns over the stigmatization of mental health issues within the profession.²⁹ Prior to a 2014 Department of Justice consent decree, it was not uncommon for bar applications to include questions as to whether an applicant had recently sought treatment for mental health issues.³⁰ Numerous critics charged these types of open-ended and invasive questions had the perverse effect of discouraging law students from seeking help for depression, anxiety, alcohol, and related issues.³¹ Indeed, a 2016 study of law students found that the perceived threat to an applicant's chances for bar admission was the factor most likely to deter law students from seeking help for substance abuse issues and one of the factors most likely to deter students from seeking help for mental health issues.³² The National Conference on Bar Examiners has revised its questions on the subject, but the questions still remain the target of criticism concerning their potentially stigmatizing effect.³³ And individual applicants with histories of mental health issues still sometimes confront recalcitrant bar examiners, including one recent instance in which a federal judge - frustrated by a state bar association's refusal to admit an applicant with a history of bipolar disorder over a three-year period - referred to the bar as having "a medieval approach to mental health that is as cruel as it is counterproductive."³⁴

III. A PROFESSION IN CRISIS?

There is increasingly a perception among lawyers that the profession has a serious problem when it comes to the issue of lawyer well-being. Articles referencing a well-being crisis within the legal profession abound.³⁵

C'es Nous, 69 U. PITT. L. REV. 389, 392 (2008) (stating that "[r]egulators will cut mentally disabled lawyers little slack");

²⁹ See Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 195-96 (2001).

³⁰ See Dragnich, *supra* note 13, at 688-99 (discussing prior court decisions involving these types of questions).

³¹ See *id.* at 683-84; Bauer, *supra* note 29, at 150.

³² Organ et al., *supra* note 2, at 141.

³³ See Note, Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifice the "Others" in the Name of "Protection,"* 2018 U. ILL. L. REV. 345, 370-71 (2018) (describing the amendment process and noting the criticism); Dragnich, *supra* note 13, at 684 (noting the embarrassment of applicants who must answer these questions).

³⁴ *Doe v. Supreme Court of Kentucky*, 482 F. Supp. 3d 571, 575 (W.D. Ky Aug. 28, 2020).

³⁵ See, e.g., Jarrod F. Reich, *Capitalizing on Healthy Lawyers: The Business Case for*

Various studies report higher rates of alcoholism and depression among lawyers than in the general population.³⁶ There are similarly alarming numbers when it comes to suicide within the legal profession. According to one study, the suicide rate among lawyers is greater than the rate among military veterans,³⁷ a cohort commonly identified as facing an epidemic in terms of its suicide rate.³⁸ Suicide is the third-leading cause of death among lawyers, and the CDC reports that between 1999 and 2007, lawyers were 54% more likely to die by suicide than members of other professions.³⁹ It is also important to note that the concerns over well-being extend not just to practicing lawyers but also to law students, who experience heightened rates of depression, anxiety, suicide attempts, and drinking.⁴⁰

There is some dispute concerning the extent to which lawyers experience greater mental health issues than other professions.⁴¹ Regardless, there is certainly a perception that a well-being crisis exists and that the profession has been slow to respond to it.⁴² Even if there is no “crisis,” lawyers should, as a matter of common sense, strive to promote

Law Firms to Promote and Prioritize Lawyer Well-Being, 65 VILL. L. REV. 361, 367-74 (2020); Cheryl Ann Krause & Jane Chong, *Lawyer Wellbeing as a Crisis of the Profession*, 71 S.C. L. REV. 203, 204 (2019).

³⁶ ABA Formal Op. No. 03-431 n.1 (2003) (citing George Edward Bailly, *Impairment, The Profession and Your Law Partner*, 11 No. 1 PROF. LAW. 2 (1999)); Louis M. Clothier, *Lawyer, Depression and Suicide: What to Look for – What You Can Do*, 88 J. KAN. BAR ASS'N 21, 22 (2019); Dina Roth Port, *Lawyers Weigh In: Why is there a Depression Epidemic in the Profession?*, ABA JOURNAL, May 11, 2018, available at https://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession; Tyger Latham, *The Depressed Lawyer: Why are so many lawyers so unhappy?*, PSYCHOLOGY TODAY (May 2, 2011), <https://www.psychologytoday.com/us/blog/therapy-matters/201105/the-depressed-lawyer> ; NATIONAL TASK FORCE, *supra* note 1, at 7.

³⁷ See Robert Herbst, *The Case for Attorney Wellness*, 92 N.Y. STATE B.J. 40, 40 (2020).

³⁸ See Matthew Ivey, *The Broken Promises of an All-Voluntary Military*, 86 TEMP. L. REV. 525, 556 (2014) (“Suicide is epidemic among service members and veterans.”).

³⁹ See Krause & Chong, *supra* note 35, at 207 (citing statistics).

⁴⁰ Organ et al., *supra* note 2, at 129, 136-39.

⁴¹ Yair Listokin & Raymond Noonan, *Measuring Lawyer Well-Being Systematically: Evidence from the National Health Interview Survey*, 18 J. EMPIRICAL LEGAL STU. _____, *2 (2020),

https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3667322&download=yes ; Nicholas D. Lawson, “To Be a Good Lawyer, One Has to Be a Healthy Lawyer”: *Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J.L. ETHICS 65, 76 (2020) (noting conflicting studies).

⁴² See Perlin, *supra* note 27, at 589 (writing in 2008 that “[t]he legal profession has notoriously ignored the reality that a significant number of its members exhibit signs of serious mental illness (and become addicted or habituated to drugs or alcohol at levels that are statistically significantly elevated from levels of the public at large).”)

happiness, job satisfaction, and overall well-being within the legal profession, if not for themselves than for the clients they represent. Therefore, the Essay focuses on the steps the legal profession is currently taking to encourage this goal, regardless of whether the steps are in response to a real or merely perceived well-being crisis.

IV. THE STIGMATIZING EFFECT OF THE NATIONAL TASK FORCE ON LAWYER WELL-BEING'S REPORT

Over the past several years, the organized bar has increasingly focused on the issue of well-being. There have been numerous bar journal articles, continuing legal education classes, and bar committee reports on the topic.⁴³ Perhaps the best example of the lawyer well-being movement is the National Task Force on Lawyer Well-Being's report, *The Path to Well-Being: Practical Recommendations for Positive Change*, published in 2017.

A. An Overview of the Task Force Report

Citing the statistics signaling “an elevated risk in the legal community for mental health and substance use disorders,” the Report urges leaders within the legal profession to take steps to improve lawyer well-being.⁴⁴ The Report identifies several themes or goals for improving the well-being of the profession.⁴⁵ For purposes of this Essay, the most noteworthy is the need to eliminate “the stigma associated with help-seeking behaviors.”⁴⁶ The Report identifies numerous factors that deter individuals from seeking help for mental health issues, many of which involve concerns over the perceptions of others. These include society's negative attitudes toward mental health conditions, fear of adverse reactions by others, feeling ashamed, viewing help-seeking as a sign of weakness, having fear of career repercussions, and concerns about confidentiality.⁴⁷ Many of the specific

⁴³ See *supra* note 6 and accompanying text (referencing bar journal articles); Committee on Lawyer Well-Being of the Supreme Court of Virginia, *A Profession at Risk* 1 (2018) (“[A]n alarming number of lawyers, judges and law students are experiencing a ‘wellness’ crisis.”), http://www.courts.state.va.us/programs/concluded/clw/2018_0921_final_report.pdf [hereinafter *A Profession at Risk*]; *Staying Nimble, How the State Bar of Nevada Adapted to Serve Members in 2020*, at 30 (Dec. 2020) (noting CLE programs devoted to lawyer well-being).

⁴⁴ *Id.* at 7, 10.

⁴⁵ *Id.* at 10-11.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 13.

recommendations the Task Force offers – whether it be encouraging states to adopt conditional admission rules or law schools to provide onsite counseling for distressed law students – are designed, in part, to minimize stigma associated with seeking help.⁴⁸

The Report also recommends that states amend their rules of professional conduct to define “competence” to include the “mental, emotional, and physical ability reasonably necessary” for the representation.⁴⁹ A related recommendation involves amending the comments to Rule 1.1 to provide that professional competence requires an ability to comply with all of a jurisdiction’s essential eligibility requirements,⁵⁰ such as the ability to exercise good judgment in conducting one’s professional business and the ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, and others.⁵¹

The Report emphasizes that a lawyer should not be subject to professional discipline simply for the lawyer’s failure to satisfy the well-being requirement or the essential eligibility requirements.⁵² Instead, discipline is only appropriate where the lawyer’s conduct in the representation of a client actually amounts to incompetence under Rule 1.1.⁵³ In keeping with this overall theme, the Report recommends that states adopt diversion programs to deal with minor lawyer misconduct stemming from mental health or substance disorders.⁵⁴ On the theory that “discipline does not make an ill lawyer well,” the Report suggests that by requiring lawyers to seek treatment for underlying disorders that led to minor misconduct, the bar can help create a path toward better well-being and better client representation.⁵⁵

B. The Stigmatizing Effect of the Task Force Report

⁴⁸ *Id.* at 28, 32, 39

⁴⁹ *Id.* at 26. As the report notes, California currently takes this approach. NATIONAL *Id.* at 26 (citing California’s Rule of Professional Conduct 3-110).

⁵⁰ *Id.* at 26. According to the Report, at least fourteen states list such requirements. *Id.* at 26 n. 105

⁵¹ See Ohio Supreme Court, *Definitions of Essential Eligibility Requirements for the Practice of Law*, available at http://www.supremecourt.ohio.gov/AttySvcs/admissions/pdf/ESSENTIAL_ELIGIBILITY_REQUIREMENTS.pdf.

⁵² NATIONAL TASK FORCE, *supra* note 1, at 26.

⁵³ See *id.* (“Enforcement should proceed only in the case of actionable misconduct in the client representation or in connection with disability proceedings under Rule 23 of the ABA Model Rules for Disciplinary Enforcement.”).

⁵⁴ *Id.* at 29.

⁵⁵ *Id.* at 29, 30.

While the National Task Force Report deserves considerable praise for helping to bring the issue of lawyer well-being to the forefront of discussion within the legal profession, there are aspects of the Report that merit concern. The authors suggest that the proposed amendment to the rules of professional conduct linking well-being with the ethical duty of competence is designed “to reduce stigma associated with mental health disorders, and to encourage preventive strategies and self-care.”⁵⁶ In reality, several aspects of the Report actually contribute to the stigma concerning disability, most notably the stigma associated with mental health disorders.

The Report’s very first page announces, “To be a good lawyer, one has to be a healthy lawyer.”⁵⁷ Variations on this theme appear throughout the Report, such as the idea that “[f]reedom from substance use and mental health disorders [is] an *indispensable predicate* to fitness to practice.”⁵⁸ In support of this idea, the Report cites a study asserting that “40 to 70 percent of disciplinary proceedings and malpractice claims against lawyers involve substance use or depression, and often both.”⁵⁹ Even where lawyers who experience well-being issues are able to maintain to minimum competence, the Report suggests that they may struggle to “live up to the aspirational goal articulated in the Preamble to the ABA’s Model Rules of Professional Conduct, which calls lawyers to ‘strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.’”⁶⁰

There are several problems with the report’s premises and proposals. The Report explains that its suggestion that Rule 1.1 be amended to explicitly link competence with well-being is designed “to reduce stigma associated with mental health disorders.”⁶¹ Yet, in the same breath, the National Task Force tells lawyers with mental health disorders (as well as other members of the profession) that the absence of a mental health disorder is a predicate to fitness to practice law.⁶² In other words, one cannot be a good lawyer if one has some type of mental health disorder. It is difficult to imagine a more stigmatizing comment in a document intended to help reduce the stigma concerning mental health disorders.

Not only is the notion that freedom from substance use and mental health disorders is an indispensable predicate to fitness to practice stigmatizing, it is simply wrong. To be sure, we want everyone - including

⁵⁶ *Id.* at 26.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 17 (emphasis added).

⁵⁹ *Id.* at 8 (citing D. B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments*, in *STRESS MANAGEMENT FOR LAWYERS* 104-130 (Amiram Elwork ed., 2d ed., 1997).

⁶⁰ NATIONAL TASK FORCE, *supra* note 1, at 8.

⁶¹ *Id.* at 26.

⁶² *See supra* note 58 and accompanying text.

lawyers - to be from substance abuse and mental health disorders. And the fact that a lawyer is, for example, actively abusing alcohol or experiencing depression undoubtedly makes it more likely on average that these conditions may adversely impact client representation. But it should be equally obvious that there are many lawyers who are actively abusing alcohol or actively experiencing depression who are not only competent but outstanding lawyers.⁶³

Indeed, there is little empirical evidence that the existence of a mental impairment places a lawyer at a significantly greater risk of legal malpractice, incompetence, or other rule violations or is even significantly predictive of such conduct.⁶⁴ In several instances, individual plaintiffs have challenged the legality of questions in the professional licensing context related to mental health and treatment.⁶⁵ When challenged in some instances on the issue of whether past mental health treatment was a reliable predictor of future professional misbehavior, states were unable offer credible evidence in support of this position.⁶⁶ The ABA itself has previously noted that “[r]esearch in the health field and clinical experience demonstrate that neither diagnosis nor the fact of having undergone treatment support any inferences about a person's ability to carry out professional responsibilities or to act with integrity, competence, or honor.”⁶⁷

Of course, a lawyer who is *presently* experiencing the debilitating effects of depression or untreated bipolar disorder would logically be more likely to have difficulty providing competent representation than a lawyer not experiencing these conditions. It might even be true that these types of conditions – if not properly treated – are more likely to result in incompetent representation of clients than many physical impairments. But if one of the primary goals of the National Task Force Report is to end the stigma that discourages lawyers from seeking help, it is counterproductive

⁶³ See generally Dragnich, *supra* note 13, at 707-08 (noting successful lawyers with a history of mental illness).

⁶⁴ See Bauer, *supra* note 29 at 141 (“There is simply no empirical evidence that [bar] applicants' mental health histories are significantly predictive of future misconduct or malpractice as an attorney.”).

⁶⁵ See *Doe v. Judicial Nominating Com'n for Fifteenth Judicial Circuit of Florida*, 906 F. Supp. 1534, 1543-44 (S.D. Fla. 1995) (summarizing cases). In 2014, the Department of Justice advised the Louisiana Supreme Court that its state's bar application process violated the ADA, leading the state to change some of the questions it asks concerning mental health. See Dragnich, *supra* note 13, at 700-02.

⁶⁶ See Dragnich, *supra* note 13, at 694-95, 697 (discussing cases).

⁶⁷ American Bar Association Commission on Mental and Physical Disability Law Section of Individual Rights and Responsibilities Judicial Division, *Recommendation to the House of Delegates*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 266, 267 (1998).

for the Report to make sweeping generalizations about the fitness of a lawyer based merely on the diagnosis or existence of a mental impairment.

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

Ethics opinions on the subject of mental health within the legal profession tend to suffer from similar shortcomings. To date, ABA and state ethics opinions concerning ethical issues involving lawyer with mental impairments have tended to focus on three subjects: (1) the ethical obligation of a lawyer under Model Rule 8.3(a) to report the serious misconduct of another lawyer to disciplinary authorities when the other lawyer's misconduct stems from a mental impairment or substance abuse issue;⁶⁸ (2) the ethical obligation of a lawyer within a law firm to inform the clients or potential clients of a lawyer with a mental impairment of facts related to the impairment when the other lawyer leaves the firm;⁶⁹ and (3) the ethical obligations of law firm partners and supervisors where there is a concern that another lawyer in the firm may have a mental impairment or have a problem with alcohol or drugs that impacts the lawyer's ability to competently represent clients.⁷⁰

Like the National Task Force Report, these ethics opinion typically fail to distinguish between the mere existence of a mental impairment and a mental impairment that is currently limiting the ability of a lawyer to practice in a competent manner. Instead, the opinions speak broadly in terms of "mental impairments" and "impaired lawyers."⁷¹ In the process, the opinions often further a stigmatizing view of mental impairments.

For example, several opinions take the position that a firm lawyer has an obligation to notify clients of the fact that a departing attorney has a mental impairment where the client has not yet decided whether to remain

⁶⁸ ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-431 (2003) [hereinafter ABA Formal Opinion]; ABA Formal Opinion 03-429; DC Bar Ethics Opinion 377 (2019); Virginia Legal Ethics Opinion 1887 (2017); North Carolina State Bar 2003 Formal Ethics Opinion 2; North Carolina Legal Ethics Opinion 2013-8 (2014); Kansas Bar Association Legal Ethics Opinion No. 14-01 (2014); South Carolina Bar Ethics Advisory Opinion 02-13 (2002); West Virginia Legal Ethics Opinion 92-04 (1992); New York State Bar Association Opinion 822 (2008).

⁶⁹ ABA Formal 03-429; DC Bar Ethics Opinion 377 (2019); South Carolina Bar Ethics Advisory Opinion 02-13; Philadelphia Bar Association Opinion 2000-12 (2000).

⁷⁰ ABA Formal 03-429; DC Bar Ethics Opinion 377; North Carolina Legal Ethics Opinion 2013-8; Virginia Legal Ethics Opinion 1886; Pennsylvania Ethics Opinion 2020-400.

⁷¹ One exception to this trend is Virginia Legal Ethics Opinion 1886, which focuses on ethical issues raised when a lawyer has a "significant impairment."

represented by the firm or to follow the departing lawyer.⁷² These opinions raise several questions. For instance, why do the opinions single out lawyers with mental impairments? If the underlying principle is that a lawyer's duty of communication requires the lawyer to provide clients with information necessary to make informed decisions about the representation, surely a lawyer has an ethical obligation to disclose *any* information that is necessary to accomplish this goal. This could include the fact that the departing lawyer has a *physical* impairment that impacts the lawyer's representation, the fact that the departing lawyer has been distracted at work due to personal problems, or the fact that the departing lawyer has sometimes missed deadlines or demonstrated incompetence for reasons having nothing to do with a mental impairment.⁷³ If the goal of these opinions is to provide guidance about how the ethical duty to keep a client reasonably informed applies when a lawyer departs a firm, there is no particular reason to devote the entire opinion to the situation involving a lawyer with a mental impairment. Doing so simply perpetuates unhealthy stereotypes concerning mental health.

The same is true of the opinions concerning the ethical obligation of a lawyer to report the misconduct of another lawyer who has a mental impairment and the obligation of a firm lawyer with respect to another lawyer in the firm who has a mental impairment. Model Rule 8.3(a) leaves little room for interpretation regarding a lawyer's ethical obligation to report another lawyer's violation of the rules of professional conduct, regardless of the identity of the other lawyer or the underlying causes of the misconduct.⁷⁴ Therefore, it is unclear why there needs to be an entire ethics opinion that focuses on the obligation as it applies to misconduct involving a lawyer with a mental impairment. If ethics committees viewed the opinions as an opportunity to encourage lawyers to offer assistance to other lawyers in need of mental health care, encourage lawyers with mental health issue to seek help, or encourage disciplinary authorities to consider alternatives to traditional professional discipline in such cases, the opinions might serve an important purpose. But there is little discussion of these sorts of issues in the opinions.⁷⁵

Likewise, the opinions discussing the ethical obligations of law firm

⁷² ABA Formal 03-429; DC Bar Ethics Opinion 377 (2019); Pennsylvania Ethics Opinion 2020-400.

⁷³ See Jacobi, *supra* note 9, at 573 (questioning "why there is a formal opinion on the supervision of lawyers with mental impairments and not, say, lawyers with visual or mobility impairments").

⁷⁴ MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (Am. Bar. Ass'n 2021).

⁷⁵ *But see* ABA Formal Op. 03-431 (suggesting that lawyer report conduct of impaired lawyer to an approved lawyers assistance program even if lawyer has no ethical obligation to report such conduct to disciplinary authorities).

partners and supervisors where there is a concern that another lawyer in the firm may have a mental impairment also contribute to the stigma concerning lawyers with mental impairments. Model Rule 5.1 requires that law firm partners and those with similar managerial authority make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.⁷⁶ The rule also requires a lawyer with supervisory authority over another lawyer in a firm to reasonably supervise the subordinate lawyer.⁷⁷

The supervisory duties contained in Rule 5.1 are in no way limited to lawyers with mental impairments. The rule is generally underenforced, so lawyers would certainly benefit from the sort of clarification that an ethics opinion might provide.⁷⁸ Ethics opinions discussing Rule 5.1 could also use the situation of a lawyer with a mental impairment to help illustrate the duties imposed by the rule. Yet, the exclusive focus of the opinions on the issue of lawyers with mental impairments suggests that bar committees tend to view the mere presence of a lawyer with a mental impairment within a firm as triggering some sort of heightened ethical responsibility. The opinions explain that when a law firm partner or supervising lawyer knows that another lawyer has a mental impairment, “close scrutiny is warranted because of the risk that the impairment will result in violations.”⁷⁹ One opinion suggests that even if a partner or supervising merely *suspects* that another lawyer has a mental impairment, the partner or supervising lawyer must “closely supervise the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules.”⁸⁰ Some opinions suggest that a firm should have a policy in place encouraging anonymous reporting of the fact that a lawyer has a mental impairment.⁸¹

These types of opinions contribute to the perception that mental impairments are somehow dangerous or particularly alarming. As Professor John Jacobi has argued, perpetuating these kinds of stereotypes through ethics opinions designed to provide guidance to attorneys “gives free rein to the pervasive bias against people with mental illness and will likely lead to discrimination against mentally impaired lawyers.”⁸²

⁷⁶ MODEL RULES OF PROF'L CONDUCT r. 5.1(a) (Am. Bar. Ass'n 2021).

⁷⁷ *Id.* r. 5.1(b).

⁷⁸ See Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 126 (2005) (describing Rule 5.1(a) as a “disciplinary ‘dead letter’” due to its lack of enforcement).

⁷⁹ ABA Formal 03-429.

⁸⁰ North Carolina Legal Ethics Opinion 2013-8.

⁸¹ Pennsylvania Ethics Opinion 2020-400.

⁸² Jacobi, *supra* note 9, at 576.

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

Ultimately, what is perhaps most noteworthy about the National Task Force Report and the ethics opinions involving lawyers with mental impairment is how little the ADA seems to have influenced them. The ADA is unquestionably the single most important statute on the subject of disability in general and disability discrimination in particular. Yet, there is not a single mention of the law in the entire 72 pages of the National Task Force report. While a few ethics opinions reference the ADA, they typically do so only in passing or with the observation that a fuller discussion of the law is beyond the scope of the opinion.⁸³ Yet, it is impossible to discuss issues related to the employment of individuals with mental impairments in any sort of meaningful way without taking the ADA into consideration. Therefore, the failure of the Report or the ethics opinions to do so is quite remarkable. The following sections discuss the various ways that consideration of the underlying policies and specifics of the ADA might better inform the lawyer well-being movement.

A. *Underlying Policies of the ADA*

The ADA defines the concept of “disability” in terms of a physical or mental impairment that substantially limits a major life activity.⁸⁴ One also has a disability for purposes of the Act where one has a record of such an impairment or where a defendant takes a prohibited action against an individual based on the perception that the individual has a physical or mental impairment.⁸⁵ The decision to define the concept of disability in terms of impairments that are actually substantially limiting or that cause an employer to subject an individual to adverse treatment is significant.

The definition reflects a deliberate shift from the so-called “medical model” of disability. The medical model tended to reduce the idea of disability to an individual’s underlying medical conditions, rather than involving societal responses to these conditions.⁸⁶ Defining disability in terms of underlying medical conditions tended to prevent any inquiry into

⁸³ See, e.g., ABA Formal 03-429 n.5 (noting that the opinion does not deal with issues of reasonable accommodation arising under the ADA).

⁸⁴ 42 U.S.C. § 12102(1)(A).

⁸⁵ *Id.* § 12102(1)(B)(C); *id.* § 12102(3).

⁸⁶ See Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649 (1999) (“The defining characteristic of the medical model is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remediating that disability.”).

an individual's actual abilities.⁸⁷ As one author put it, this view of disability treated disability "as a medically determined category that is inconsistent with work."⁸⁸ Under this view, the existence of a physical or mental impairment was inherently limiting, and the individual "afflicted" with the impairment was in need of a medical cure.⁸⁹ The effect was to label and stigmatize and label the individual "with a status of physiological inferiority."⁹⁰

The ADA took a different approach. The ADA's multi-pronged definition of disability recognizes that not all physical or mental impairments are substantially limiting and that sometimes the limitation may stem from others' reactions to an impairment. In short, the ADA recognizes that stereotypical assumptions about what an individual can or cannot do based simply on a medical diagnosis can be as limiting as an impairments itself.⁹¹

In the employment context, the ultimate inquiry under the ADA is not whether an individual has a physical or mental impairment but whether the individual with a disability is qualified for the position in question. This requires an individualized assessment. An individual with a disability is qualified for a position where the individual can perform the essential functions of a position with or without a reasonable accommodation.⁹² In addition to recognizing that not all impairments are disqualifying, the ADA recognizes that some individuals with physical or mental impairments are perfectly capable of performing the essential functions of their jobs with relatively inexpensive or minor adjustments to the way the job is normally performed.

The ADA has helped reshape the way individuals, employers, and courts think of disability. Yet, the National Task Force Report never

⁸⁷ See Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefits Programs*, 76 TEX. L. REV. 1003, 1058 (1998) (noting that the focus on medical conditions often prevents any inquiry into the ability of an individual to perform the essential functions of a job).

⁸⁸ *Id.* at 1059.

⁸⁹ Nathaniel Counts, *Accommodating One Another: Law and the Social Model of Mental Health*, 25 KAN. J. L. & PUB. POLICY 1, 6 (2015) (explaining that under the medical model, "the difference of disability is inherently limiting and that it is endogenous to the individual - there is something wrong with them and they alone need treatment").

⁹⁰ Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1349 (1993).

⁹¹ See *supra* note 17 and accompanying text. In contrast, "[t]he medical model views the physiological condition itself as the problem." Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 186 (2008).

⁹² 42 U.S.C. § 12111(8).

references the Act, and the term “disability” appears only infrequently. Instead, the authors employ a medical model of disability that largely views the fact of a mental impairment or mental health issues as disqualifying. The report regularly discusses “impairments” and the steps other lawyers should take to prevent a lawyer with an impairment from causing harm. But rarely is there any suggestion that not all impairments pose a significant risk of harm to a client or are even always significantly limiting.

The ethics opinions on the subject of lawyers with mental impairments take a similar approach. The opinions tend to dwell not on the issues raised when a lawyer has a mental impairment that substantially limits the ability of the lawyer to competently represent clients but on the supposed issues raised by the mere fact that a lawyer has a mental impairment.⁹³ As a result, the opinions usually bypass any discussion of the fact that a lawyer with a mental impairment may be perfectly qualified to perform the essential functions of a lawyer.

If ethics committees truly wish to reduce the stigma associated with mental impairments, the opinions could begin by incorporating the ADA’s terminology and concepts. Rather than treating mental impairments as inherently limiting, ethics opinions should instead discuss impairments in terms of whether they are substantially limiting for a particular attorney, *i.e.*, whether they amount to disabilities. Rather than promoting the stereotype contained in the National Task Force Report that a lawyer with a mental impairment cannot be a good lawyer, ethics opinions should focus on whether an individual lawyer with a disability can perform the essential functions of a position, with or without a reasonable accommodation.

In doing so, leaders in the legal profession may come to find that the rules of professional conduct and legal rules of the ADA may co-exist quite nicely. For example, the ADA defines the essential functions of a job as the fundamental duties an employee must be able to perform.⁹⁴ EEOC guidance on the issue of lawyers with disabilities has listed several duties that are essential functions for many attorney positions, including conducting legal research, writing motions and briefs, counseling clients, drafting opinion letters, presenting an argument before an appellate court, and conducting depositions and trials.⁹⁵ Of course, the essential functions of a tax lawyer position are likely to be different than the essential functions of a public defender position. But the rules of professional conduct make clear that whatever specific function a lawyer must perform, the lawyer

⁹³ See *supra* note 71 and accompanying text.

⁹⁴ 29 C.F.R. § 1630.2(n)(1).

⁹⁵ EEOC, Reasonable Accommodations for Lawyers with Disabilities (2006), <https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities>.

must be able to do so competently and diligently.⁹⁶ In short, a lawyer who cannot perform the essential functions of a job in a manner that complies with the rules of professional conduct is not qualified for the position in question.

Ethics opinions may also look to the ADA's reasonable accommodation requirement when discussing a lawyer's supervisory duties under Rule 5.1. ABA Formal Opinion 03-429 is one of the only ethics opinion to address the ADA's requirement when considering a lawyer's ethical obligations under Rule 5.1. When discussing the obligation of a partner or lawyer with similar managerial authority to make reasonable efforts to adopt measures to prevent an impaired lawyer from violating the rules of professional conduct, the opinion observes that "[s]ome impairments may be accommodated."⁹⁷ The opinion suggests that if, due to an impairment, a lawyer is unable to perform the essential functions of a job as the job is currently constituted, a supervisory lawyer may be able to satisfy the lawyer's obligations under Rule 5.1 by seeking to alter the manner in which those duties are performed or perhaps by reassigning the lawyer to a position involving duties the lawyer can perform.⁹⁸ In doing so, the supervisory lawyer may fulfill the lawyer's legal obligations under the ADA as well as the lawyer's ethical obligations under Rule 5.1.

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

One of the other shortcomings of the National Task Force Report and the ethics opinions on the subject of lawyers with mental impairments is that they include suggestions that at least come close to violating specific restrictions contained in the ADA. For example, some of the opinions that discuss the ethical responsibilities of a supervisory lawyer who believes that another lawyer in the firm has a mental impairment suggest that the supervisory lawyer must take reasonable steps to address the issue. As part of the reasonable steps a supervisory lawyer might take, the opinions recommend that the supervisory "confront the impaired lawyer with the facts of his impairment" and "forcefully urge," "insist," or "require" that the lawyer seek "seek appropriate assistance, counseling, therapy, or treatment."⁹⁹ Putting aside the question of the therapeutic value in

⁹⁶ MODEL RULES OF PROF'L CONDUCT r. 1.1 (Am. Bar. Ass'n 2021); *id.* r. 1.3.

⁹⁷ ABA Formal Op. 03-429 at 4.

⁹⁸ *Id.*

⁹⁹ ABA Formal 03-429; Virginia Legal Ethics Opinion 1886; DC Bar Ethics Opinion 377. At least one opinion does suggest some other, less confrontational actions, including referring the lawyer with the impairment to a lawyer assistance program, providing the

“confronting” a lawyer with the facts of the lawyer’s impairment, there are at least two legal concerns arising under the ADA with taking such action.

1. Disability-Related Inquiries Under the ADA

First is the fact that the ADA places limits on the ability of employers to inquire into the medical history of their prospective and current employees.¹⁰⁰ In the case of a current employee, an employer is only permitted to make a “disability-related inquiry” – a question that is likely to elicit information about a disability - when the inquiry is job-related and consistent with business necessity.¹⁰¹ In order for a disability-related inquiry to be job-related and consistent with business necessity, the employer must have a reasonable belief based on objective evidence that an employee will be unable to perform the essential functions his or her job because of a medical condition or poses a direct threat to the safety of others.¹⁰² Judicial decisions have emphasized that “[t]he business necessity standard is quite high, and is not [to be] confused with mere expediency.”¹⁰³ The standard is only met where there is “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.”¹⁰⁴

The EEOC has explained that an employer’s reasonable belief “requires an assessment of the employee and his/her position and cannot be based on general assumptions.”¹⁰⁵ One of the examples the EEOC provides makes clear that the mere fact that an employee has an impairment does not justify an employer making a disability-related inquiry absent objective evidence that the impairment is likely to actually impact the employee’s ability to perform the job.¹⁰⁶ Judicial decisions take a similar approach, often noting that frequent absences or past work-related problems stemming from a known disability may be the type of evidence sufficient to provide an employer with the sort of legitimate reasons “to doubt the employee’s

lawyer with information about possible counseling services, or “consult[ing] with mental-health or medical professionals about the lawyer, prior to engaging in any remedial activities.” DC Bar Ethics Opinion 377.

¹⁰⁰ 42 U.S.C. §12112(d).

¹⁰¹ *Id.* §12112(d)(4).

¹⁰² EEOC, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>. For further discussion of this concept, see Stephen F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. 377 (2018).

¹⁰³ *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir.2001).

¹⁰⁴ *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir.1999).

¹⁰⁵ See EEOC, *supra* note 102.

¹⁰⁶ *Id.*

capacity to perform his or her duties.”¹⁰⁷ But there must be significant evidence of some kind to justify making such an inquiry.

When the ethics opinions addressing a supervisor’s ethical responsibilities in terms of another lawyer who may have a mental impairment advise supervisory lawyers to confront the other lawyer about the impairment, the opinions are providing legally suspect advice. By confronting an employee about an impairment, the supervisor is likely making a disability-related inquiry or at least engaging in conduct that is likely to lead to such an inquiry. The mere fact that an employee happens to have some type of mental impairment will not necessarily provide a supervisor with legitimate reasons to doubt the other lawyer’s ability to perform the duties of a job. In the process, the opinions tend to encourage the type of stigmatization and stereotyping that the ADA’s prohibition on disability-related inquiries was intended to prevent.¹⁰⁸

In addition, the ADA prohibits an employer from requiring an employee to undergo a medical examination unless, again, the examination is job-related and consistent with business necessity.¹⁰⁹ A medical examination is a procedure or test that seeks information about an individual’s physical or mental impairments or health.¹¹⁰ Therefore, an employer who requires an employee to undergo psychological counseling, therapy, or other mental health treatment as a condition of employment may have to justify such a requirement by pointing to specific evidence that would cause a reasonable person to question an employee’s ability to perform the job.¹¹¹ As is the case with judicial decisions involving disability-related inquiries, courts

¹⁰⁷ *Conroy v. New York State Dept. of Correctional Services*, 333 F.3d 88, 98 (2d Cir. 2003).

¹⁰⁸ See S. Rep. No. 101–116, at 39 (1989) (“An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability.”); *id.* (stating that “the actual performance on the job is, of course, the best measure of ability to do the job”); EEOC, *supra* note 102 (“The ADA’s provisions concerning disability-related inquiries and medical examinations reflect Congress’s intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs.”).

¹⁰⁹ 42 U.S.C. § 12112(b)(4).

¹¹⁰ EEOC, *supra* note 102.

¹¹¹ See *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1312 (11th Cir. 2013) (treating a psychiatric/psychological fitness-for-duty evaluation as a medical examination); *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 820 (6th Cir. 2012) (denying summary judgment to employer on the grounds that a genuine issue of fact existed as to whether psychological counseling qualified as a medical examination); *Painter v. Illinois Department of Transportation*, 715 Fed. Appx. 538, 539 (7th Cir. 2017) (finding employer’s requirement that employee receive treatment from mental health specialist was job-related and consistent with business necessity).

have made clear that an employer must have some objectively reasonable basis to require an employee to undergo a medical examination.¹¹² Therefore, requiring an employee to seek treatment for a mental impairment as some ethics opinions suggest could potentially violate the ADA in this respect absent some individualized and objectively reasonable reason to question a lawyer's ability to perform the duties of the lawyer's job.¹¹³

2. *The ADA's Interactive Process*

The second practical problem with advising supervisory lawyers to confront another lawyer with the facts of the lawyer's mental impairment is that the advice may also run afoul of the interactive process required by the ADA. Most courts have held that the ADA requires employers to participate in an interactive process with an employee in order to determine an appropriate reasonable accommodation as necessary.¹¹⁴ The interactive process is supposed to be an informal, cooperative, and non-confrontational process designed to help the parties exchange information in an effort to determine an appropriate accommodation.¹¹⁵ As the Sixth Circuit Court of Appeals has explained, the interactive process "ensures that employers do not disqualify ... employees based on stereotypes and generalizations about a disability" but instead bases its decision "on the actual disability and the effect that disability has on the particular individual's ability to perform the job."¹¹⁶ If legal employers truly wish to understand the facts surrounding a lawyer's impairment, they should approach the lawyer as a part of a "cooperative dialogue" to determine the appropriate course of conduct.¹¹⁷

In assessing whether the two sides have met their obligations when the

¹¹² See Befort, *supra* note 102, at 393-94 (discussing cases).

¹¹³ To the extent an employer insists that an employee participate in a company-sponsored wellness program, this action might potentially violate the ADA's provisions concerning wellness programs. Such programs are permissible only where, *inter alia*, they are voluntary in nature. 42 U.S.C. § 12112(d)(4)(B); see Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 WM. & MARY L. REV. 1663, 1684-89 (2020) (discussing confusion surrounding the voluntariness requirement).

¹¹⁴ See *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir.2000) (stating that "the vast majority" of courts have held that the process is mandatory).

¹¹⁵ See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 658 (2004) ("This interactive process is intended to be a cooperative, informational exchange rather than a confrontational process.").

¹¹⁶ *Rorrer v. City of Stow*, 743 F.3d 1025, 1040 (6th Cir. 2014).

¹¹⁷ New York City's Human Rights Law uses the term "cooperative dialogue" in place of "interactive process." See *Coronado v. Weill Cornell Medical College*, 114 N.Y.S.3d 193, 199 (N.Y. Sup. Ct. 2019).

process breaks down, courts look at whether the parties have participated in the process in good faith.¹¹⁸ Once again, confronting a lawyer with the facts of his impairment as the opinions suggest hardly seems like the first step a supervisory lawyer should ordinarily take when seeking to initiate a cooperative, non-confrontational, interactive process. Such action potentially calls into question whether the firm was acting in good faith in an attempt to determine the appropriate accommodation that might enable the lawyer to perform the essential functions of the position. If legal employers truly wish to understand the facts surrounding a lawyer's impairment, they should approach the lawyer as a part of a "cooperative dialogue" to determine the appropriate course of conduct.¹¹⁹ Such an approach would be far more in keeping with the goals of ensuring compliance with the rules of professional conduct and reasonable supervision established in Rule 5.1 than a confrontational approach containing threats of discharge.

CONCLUSION

As one of the chief Senate sponsors of the ADA noted, the "chief thesis" of the ADA is that "people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have."¹²⁰ The National Task Force on Lawyer Well-Being's *The Path to Well-Being: Practical Recommendations for Positive Change* deserves praise for bringing increased attention to the issue of well-being in the legal profession and for some of its recommendations. But the fact that the report fails to incorporate the basic principles and substance of the ADA represents a glaring shortcoming. As a result, the report perpetuates some of the unfounded fear, prejudice, ignorance, and mythologies the ADA was designed to combat. The ethics opinions dealing with ethical issues concerning lawyers with mental impairments largely suffer from the same flaws. In the process, the opinions provide advice that might create the risk of legal liability.

¹¹⁸ See *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary.").

¹¹⁹ New York City's Human Rights Law uses the term "cooperative dialogue" in place of "interactive process." See *Coronado v. Weill Cornell Medical College*, 114 N.Y.S.3d 193, 199 (N.Y. Sup. Ct. 2019).

¹²⁰ *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir.1998) (quoting Sen. Tom Harkin 136 Cong. Rec. S 7422-03, 7347 (daily ed. June 6, 1990) (alteration in original)).

If and when there is a second edition of the National Task Force report, the authors should strive to communicate the basic thesis of the ADA when addressing the issue of lawyer well-being. Currently, the words “Americans with Disabilities Act” do not even appear in the report, and the term “disability” itself is mentioned only in passing. The report provides an opportunity to help educate lawyers about the nature of disability as it applies to well-being. The only way the authors can truly educate lawyers on the subject is by articulating the values of the ADA. The authors of ethics opinions have a similar opportunity to explain to lawyers how their ethical obligations are consistent with their legal obligations under the ADA.