

# **DISABILITY IN THE LEGAL PROFESSION**

**NEW YORK STATE BAR ASSOCIATION  
CONTINUING LEGAL EDUCATION**

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## **INTRODUCTION** \*

Disability is the last frontier of diversity in the legal profession. It is rarely included in the categories measured by diversity initiatives. Disability-related barriers to bar admission have quietly persisted for years, well under the radar screen of self-scrutiny of the bar. But these concerns have become both visible and timely. That is partly due to several significant events in 2014, including settlement of two impact cases brought by the U.S. Department of Justice, Office of Civil Rights, that affected various stages of gaining entrée to the practice of law.

The first of these cases addressed policies and practices by the entity that administers the LSAT of refusing or delaying accommodations for testing requested by potential lawyers with disabilities, and then “flagging” the score reports of test-takers who did receive accommodations.

The next issue that was highlighted in 2014 by settlement of a DOJ case was the extent to which state bar admission bodies can inquire into, and request information about, mental health diagnoses and treatment. That case concerned Louisiana’s application procedures for admission to its state bar. The Louisiana admissions body required applicants to answer intrusive and irrelevant questions about mental health treatment, and applied different factors for evaluating fitness to practice for applicants with mental, rather than physical, illnesses. A related but surprising development, also in 2014, was that New York State made some radical changes to its own bar admission application, adding broad queries about mental illnesses unrelated to whether those conditions would impair the current ability to practice law.

One other stage in the becoming-a-lawyer process that has vexed persons with difficulties, one which comes between the LSAT and the bar admissions questionnaire, is

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obtaining accommodations for state and multistate portions of the bar examination. Although no significant development on this issue occurred in 2014, and no settlement of class action litigation has provided anything near legal closure, we will examine in these materials several significant decisions that affirmed the right to receive the accommodation that “best ensures” that the test results accurately reflect the test-taker’s aptitude, rather than her disability.

Even after surmounting such obstacles at each step of the way, lawyers with disabilities (LWDs) still face informal barriers to becoming fully integrated members of the legal community. The employment rates and starting salaries of LWDs are significantly lower than those of even women and minorities. Studies of diversity in the profession rarely track disability as a category, nor are LWDs included in diversity initiatives and goals. They are isolated from networking events and bar association activities held at non-accessible locations. The limited data on LWDs that exists supports that employers need a better understanding of their abilities and what accommodations could make them successful in a position.

Finally, the anecdotal evidence suggests that the stereotypes and prejudices about disabilities persist in the legal profession, as lawyers are not any more insulated from discrimination than persons with disabilities in other fields.

## **I. FORMAL OBSTACLES TO ENTERING THE LEGAL PROFESSION**

### **A) TESTING ACCOMMODATIONS FOR THE LSAT**

On May 20, 2014 the U.S. Department of Justice, Office of Civil Rights (DOJ) announced the filing of a consent decree resolving a case against the Law School Admission Council (LSAC) for its discriminatory policies against persons with disabilities who requested accommodations to take the Law School Admission Test (LSAT). The suit was originally filed against LSAC by the California Department of Fair Employment and Housing (DFEH) on behalf of 17 named individuals and a proposed class; DOJ subsequently intervened as a plaintiff in the case, *DFEH v. LSAC*, Case No. CV 12-1830-EMC, U.S. District Court, Northern District of California, to assert federal claims under Title III of the ADA.

The DOJ complaint alleged, first, that LSAC had, over a multi-year period, systematically denied accommodations that would enable applicants with disabilities to take the LSAT. There were many instances of outright denials of accommodations that were clearly necessary to individuals with well-documented medical and cognitive impairments; for example, LSAC refused to supply one of the named plaintiffs, who is legally blind, with a large-print test booklet. LSAC, however, also utilized certain policies and practices to circumvent accommodation requests. One way was to refuse to give weight to past accommodations that applicants had received in similar testing situations (*e.g.*, GRE, SAT), or to histories of accommodations for test-taking throughout their K-12 and college education. Another was to require applicants to provide unreasonable and excessive documentation, or to deny accommodation requests for reasons that were so unclear or vague that the applicant was unable to determine how to correct any deficiencies in what had been submitted. LSAC also repeatedly failed to timely respond to requests for testing accommodation causing applicants to either miss

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acknowledged.

the exam date or take the test without accommodations and receive a low score that does not reflect their previous academic performance.

The second, equally important, basis for the suit was LSAC's policy of "flagging" the test scores of those examinees who received an accommodation of additional time. LSAC reported scores to law schools with a statement, that schools should "carefully evaluate LSAT scores earned under accommodated or nonstandard conditions," which appeared only on the score reports of test-takers who were accommodated with additional time. In addition, LSAC did not average scores of those receiving additional time with the other, non-accommodated scores for that testing date, which meant that they were reported to the schools without a percentile rank, unlike the scores of everyone else. These procedures clearly signaled to law schools that the applicant has a disability and effectively stigmatized them in the law school admissions process.

However, the consent decree in *DFEH v. LSAC* (which is included in the Appendix to these materials and can also be accessed at

[http://www.lsaconsentdecree.com/docs/Consent\\_Decree.pdf](http://www.lsaconsentdecree.com/docs/Consent_Decree.pdf)) ordered comprehensive change in LSAC's administration of the LSAT for test-takers with disabilities. A permanent injunction requires LSAC to "discontinue all forms of the practice of annotating score reports of candidates who receive the testing accommodation of extended test time due to disability" and to provide the same information on score reports for all candidates. LSAC was given certain time frames in which to adopt a new procedure for considering and responding to requests for accommodations. Some of the elements that must be included in the new procedure are that demands for documentation must be "reasonable" and limited in scope; that LSAC must accept, subject to verification, previous grants of accommodation for the LSAT, SAT, ACT, GED, GRE, GMAT, DAT and MCAT examinations; that LSAC must disseminate information as to what

documentation it requires to substantiate an accommodation request; and that LSAC must grant or reject a request, or request additional documentation, in a timely manner relative to examination dates.

After the consent decree was entered, LSAC completely overhauled LSAC's rules and procedures for obtaining accommodations to take the LSAT. The new policies are set forth in a website specifically dedicated to accommodations, <http://www.lsac.org/jd/lsat/accommodated-testing> and essentially implement the terms of the settlement.

## **B) TESTING ACCOMMODATIONS FOR THE BAR EXAMINATION**

While the LSAT is the major examination a prospective lawyer will take *before* s/he enters law school, further difficulties in seeking disability-related testing accommodations await upon graduation. Bar admission is contingent upon successful passage of several pieces of the "bar exam," and those pieces vary depending on the jurisdiction in which the application is seeking admission. Exams generally required for admittance to the bar might include:

the Multistate Bar Exam (MBE), state-specific essays and questions and, in some jurisdictions, the Multistate Performance Test (MPT). The National Conference of Bar Examiners (NCBE) has also developed a Uniform Bar Exam (UBE), which includes a Multistate Essay Examination (MEE), two Multistate Performance Tests (MPT), and the Multistate Bar Exam (MBE). The UBE has been widely adopted.<sup>1</sup> Some jurisdictions also require the passage of an ethics exam, the Multistate Professional Responsibility Exam (MPRE)<sup>2</sup>. The requirement to take the MPRE is another hurdle for persons with disabilities, as testing accommodations for the bar exam and the

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<sup>1</sup> National Conference of Bar Examiners. "Jurisdictions That Have Adopted the UBE."  
<http://ncbex.org/exams/ube/>

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MPRE are applied for separately, and grant of an accommodation on one is not a guarantee of an accommodation on the other.

In this section, we focus on the difficulties law school graduates with disabilities have had in receiving disability-related accommodations on these various exams, particularly the components of the bar exam and the legal battles that have been fought on that front. Since NCBE develops both the MPRE and the MBE, some of the cases involve requests for accommodations on both exams, of which the *Enyart* case is an example. *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153 (9<sup>th</sup> Cir. 2011), is widely considered to be the seminal case on reasonable accommodations on the bar exam and so our discussion begins there.

Stephanie Enyart is legally blind due to juvenile macular degeneration. She experiences a large blind spot in the center of her field of vision, and extreme sensitivity to light (“photophobia”). Her vision has worsened over time. She is a graduate of UCLA School of Law. In order to be admitted to practice law in California, Enyart had to pass both the MPRE and the California Bar Exam. The MBE is administered as part of the California Bar Exam. Enyart applied to take the March 2009 of the MPRE and the July 2009 administration of the California Bar Exam. Based on her disability, Enyart requested accommodations on both exams. In both cases, Enyart requested the use of a laptop equipped with JAWS and ZoomText. JAWS is a screen-reader program that reads aloud the text on a computer screen; ZoomText is a screen-magnification program that allows the user to adjust font, size, color, and contrast of text.

Enyart was denied the use of a laptop equipped with JAWS and ZoomText on the MPRE and the MBE because NCBE refused to provide those exams in an electronic format. ACT, with which NCBE contracts to administer the MPRE, offered other accommodations on the MPRE,

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<sup>2</sup> All jurisdictions besides Maryland and Puerto Rico currently require the MPRE. National

including a human reader, an audio CD of the test questions, a Braille version of the test, and/or a CCTV with a hard-copy version in large print with white-on-black text. Enyart cancelled her registration for both exams and applied to take the November 2009 administration of the MPRE. Her request to use a laptop with JAWS and ZoomText was again denied, and Enyart cancelled her registration for that exam.

After her requests for the use of assistive software technology as an accommodation were denied, Enyart brought suit against NCBE under the ADA and California human rights law and sought a preliminary injunction from the District Court that would require NCBE to allow her to use the assistive software on the February 2010 MBE and March 2010 MPRE. The court granted the injunction, ruling that Enyart was likely to prevail on the merits because the accommodations offered by NCBE would not render the test accessible to Enyart. The court stated that in the case of a progressive condition like Enyart's, the fact that Enyart had used different accommodations on previous exams than the ones she specifically requested was "beside the point." Most important, the court held that the question was "not whether Enyart would be able, despite extreme discomfort and disability-related disadvantage, to pass the relevant exams."

NCBE appealed the decision, and while the appeal was pending Enyart learned that she did not pass the March 2010 MPRE or the July 2009 Bar Exam. She moved for a second preliminary injunction, asking the court to order NCBE to provide her requested accommodations on any other administration to Enyart of the California Bar Exam, the MBE, and the MPRE. The court granted the injunction, again finding that the accommodations offered

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Conference of Bar Examiners. "Jurisdictions Requiring the MPRE." <http://ncbex.org/exams/mpre/>  
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by NCBE did not make the tests accessible to Enyart under the standard set by the ADA. The NCBE appealed to the Ninth Circuit.

In deciding in favor of Enyart, the Ninth Circuit made several key findings. First, it found that even though the preliminary injunctions were applied to exams that had come and gone, the case was not moot as Enyart's situation was "capable of repetition, yet evading review." Secondly, the Court of Appeals found that, in complying with the provisions of Title II of the ADA, which applies to professional licensing examinations, a testing entity like NCBE must administer exams "so as to best ensure' that [the test-taker's] results on the tests accurately reflect her aptitude, rather than her disability." This "best ensures" standard was originally articulated in U.S. Department of Justice regulations interpreting Title II of the ADA. The Ninth Circuit upheld the district court's preliminary injunctions. The NCBE further appealed to the Supreme Court, but the petition for writ of *certiorari* was denied. 132 S.Ct. 366 (2011)

The *Enyart* case is most notable for giving force to the "best ensures" standard in licensing exams.

### **C) MENTAL HEALTH INQUIRIES IN STATE BAR ADMISSIONS PROCESSES**

In 2014 DOJ also settled a second major case impacting admission to the practice of law by persons with disabilities, its administrative proceedings against the Louisiana Supreme Court, Committee on Bar Admissions and the Louisiana Office of Attorney Disciplinary Counsel regarding discriminatory practices against persons with disabilities by the state's attorney licensing system. DOJ alleged that the state had asked overly-intrusive questions about mental health diagnoses and treatment and used the responses in evaluating whether a bar applicant demonstrated sufficient "character and fitness" to be admitted to practice.

Although states have been examining the “character” of aspiring lawyers since the 1920s and the 1930s, it was not until the 1970s and 1980s that bar examiners began to focus on mental health as an area for scrutiny. While earlier inquiries asked only about in-patient hospitalization, for example, the questions then sought more detailed information, such as diagnoses, treatments, medications, and covering a longer period of time. Bauer, J., *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA Law Review 93 (2001).

One driver of that change was the advent of Character & Fitness Services, a screening entity run by the National Conference of Bar Examiners (NCBE) that offers state bar officials a standardized form collecting information that can be used to evaluate an applicant’s fitness for admission to the practice of law. As of 2012, approximately 21 states utilized the NCBE form, known as the Request for Preparation of a Character Report (RPCR), although a state can add, modify or decline to use any questions.

The RPCR contains questions about highly personal and confidential matters, such as bankruptcy and loan defaults, accusations of fraud or forgery, and arrests and convictions. The applicant must sign releases authorizing disclosure of all information regarding those matters to the bar admissions personnel. The RPCR form also contains questions regarding mental health conditions and treatment, the questions which were numbered 25-27 at the time. The DOJ-Louisiana case, and actions by the New York State admissions authorities in 2014, which are discussed in this section of the materials, concern RPCR Questions 25-27 or comparably-worded ones that inquire about mental illness.

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## **1) United States v. Louisiana Supreme Court**

In 2011 the Bazelon Center for Mental Health Law filed a complaint with DOJ on behalf of two Louisiana attorneys, alleging that the state’s attorney licensing system violated the ADA by discriminating against applicants with disabilities.

Unlike *DFEH v. LSAC*, which asserted claims under Title III that the LSAT was a “public accommodation, the Louisiana case addressed violations of Title II of the ADA, which prohibits public entities, including state and local governments, from discriminating against persons with disabilities by denying them equal access to services provided by the entity. Under the administrative enforcement mechanism for Title II, codified at 28 CFR § 35.172, DOJ must investigate the complaint and, if efforts at voluntary resolution are unsuccessful, issue a Letter of Findings, containing findings of fact and conclusions of law, setting forth the violations found, and specifying the measures that would be required to remediate each of them.

DOJ conducted a three-year investigation into the Bazelon complaint. A major focus of the investigation was Louisiana’s use of the RPCR and the infamous Questions 25-27 regarding mental illness, which prior to 2014 read as follows:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition . . . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral

disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding; or any proposed termination by an educational institution, employer, government agency, professional organization, or licensing authority?

Applicants who answer “yes” to Questions 25 and 26 must describe their condition and treatment, and provide an authorization for providers to release their medical records.

The information on the form is utilized to evaluate whether the applicant meets Louisiana’s requirements that applicants have demonstrated “sound mind, good moral character and fitness to practice law.” The term “fitness to practice law,” in turn, includes “the mental or emotional suitability of the applicant to practice law in this state.” Permissible bases for further investigation and inquiry include “evidence of mental or emotional instability.” Factors that are expressly impermissible for consideration of fitness to practice include “a physical disability of the applicant that does not prevent the applicant from performing the essential functions of an attorney.” However, as DOJ noted in its findings, “no similar exclusion is made for an applicant who has a disability affecting *mental* health that does not prevent the applicant from performing the essential functions of an attorney.” In addition to the discriminatory inquiries in Questions 25-27, DOJ found that these distinctions between factors for evaluating fitness were discriminatory as well.

In certain cases in which an applicant’s record reflects conduct that would otherwise cause the application to be denied, Louisiana does permit such applicants to obtain a “conditional admission,” subject to terms and conditions set forth in a consent agreement. Examples given of such conduct are “present or past substance misuse, abuse or dependency, physical, mental or emotional disability or instability, or neglect of financial responsibilities.” (Of the 21 states that have some form of conditional admission, most primarily utilize it in cases of substance abuse

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and mental illness. See Denzel, S., *Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories*, 43 Conn. L. Rev. 889, 912-14 (2011)). However, while the rule limits mandatory conditional admission to situations where *conduct* would warrant denial, DOJ discovered in the course of its investigation that in actual practice Louisiana's Admission Committee recommends conditional admission for applicants with mental health diagnoses even though they have not engaged in any conduct indicating that they are unfit to practice law.

As DOJ advised the Louisiana bar officials, using a private outsider contractor such as NCBE does not relieve the government entity from liability under Title II, particularly because a number of states that use the NCBE screening service, including Massachusetts, Pennsylvania and Illinois, expressly choose not to include the disputed mental health questions in their admissions process. According to DOJ, while 25 states as of January 2014 use one or more of Questions 25-27 of the RPCR form, some states do not ask any mental health questions at all and rely solely on conduct-based questions to determine fitness to practice law.

DOJ issued its 34-page Letter of Findings on February 5, 2014 (which is included in the Appendix to these materials and can also be accessed at <http://www.ada.gov/louisiana-bar-lof.pdf>). Among the conclusions reached by DOJ are that bar licensing entities may request mental disability information only as to its *current* effect on an applicant's fitness to practice law, or as a *voluntary* disclosure to explain conduct that would otherwise require denial of admission. Questions about applicants' mental health conditions, other than legitimate questions about conduct that are relevant to their fitness to practice law, are essentially unlawful questions about an applicant's status as a person with a disability; the applicant's diagnosis and treatment history, by virtue of their mere existence, are presumed by these questions to be appropriate

bases for further investigation because of “mere speculation, stereotypes, or generalizations about individuals with disabilities.”

In addition, attached to the Letter of Findings to Louisiana was an opinion letter issued by DOJ on January 21, 2014, in response to a request from the Vermont Human Rights Commission, in which DOJ expressly advised the VHRC that use of RPCR Questions 25-27 was not in compliance with the ADA. DOJ stated in this letter that “[w]e believe these questions are unnecessary, overbroad, and burdensome for applicants” and that in its view bar licensing entities may request mental disability information only as to its *current* effect on an applicant’s fitness to practice law.

DOJ also expressed a common concern about intrusive mental health questions on bar admissions forms, which is that questions such as the ones used by Louisiana and Vermont are “counterproductive to state interests” because they deter applicants from seeking diagnosis, counseling or treatment for mental health issues. Long before the RPCR came under scrutiny, a law professor and a law school dean had testified as expert witnesses that broad mental health questions on bar admission forms have a “strong negative effect” upon many law students, often discouraging them from seeking needed mental health counseling. *Clark v. Virginia Bd. of Bar Examiners*, 880 F.Supp. 430, 438-439 (E.D. Va. 1995).

As the court noted, the Board of Bar Examiners “tacitly acknowledges this danger” by placing a preamble before the mental health questions warning applicants that “your decision to seek counseling should not be colored by your bar application.” While the preamble may have been intended as reassuring, it is uncertain that applicants, already intimidated by the entire bar application process, would follow that advice. In addition, it was suggested that broad mental health questions may adversely affect the course of any treatment that the applicant may receive;

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knowing that your therapist might have to disclose diagnosis and treatment information down the road, an applicant may be less than totally candid with their therapist, which in turn impairs the therapist's ability to accurately diagnose and treat the patient. *Id.*

On August 15, 2014 DOJ entered into a comprehensive settlement agreement with the Louisiana Supreme Court and its related entities that resolved the administrative case. (The Settlement Agreement is included in the Appendix and can also be accessed at [http://www.ada.gov/louisiana-supreme-court\\_sa.htm](http://www.ada.gov/louisiana-supreme-court_sa.htm)). While Louisiana did not admit to having violated the ADA, DOJ was able to secure major changes in how applicants with disabilities would be handled during the bar admission process in Louisiana, including requirements that the state:

- Refrain from inquiries into mental health diagnosis or treatment unless (1) the applicant voluntarily discloses the information to explain conduct or behavior that may otherwise warrant denial of admission, or (2) the Committee learns from a third-party source that the applicant cited a mental health diagnosis or treatment as an explanation for similarly disqualifying conduct or behavior. However, any inquiries made under this provision must be “narrowly, reasonably, and individually tailored.”
- Refrain from recommending or imposing conditional admission solely on the basis of mental health diagnosis or treatment.
- Refrain from requiring applicants to answer Questions 25-26 on the RPCR that was in effect up until February 24, 2014.

In the interim between the Letter of Findings issued in February, 2014, and the settlement agreement signed in August, Louisiana had replaced the old Questions 25 and 26 with Questions 25 and 26 from the new RPCR form, which NCBE last revised on 3/20/2014. (The current sample RPCR is included in the Appendix and can also be accessed at 02/01/2016 [http://www.ncbex.org/assets/media\\_files/CandF/StandardNCBE.pdf](http://www.ncbex.org/assets/media_files/CandF/StandardNCBE.pdf)).

### **3) New York State 2014 Changes to Application for Admission Questionnaire**

In 1995, we know that New York's character and fitness application asked only one question related to mental health, on Attachment A: "(1) Do you have any physical, mental or emotional condition that could adversely effect your capability to practice law?" *See, Clark v. Virginia Bd. of Bar Examiners*, 880 F.Supp. 430, 440 fn 18 (E.D. Va. 1995).

Prior to this year, upon information and belief New York State's "Application for Admission to Practice as an Attorney" asked only if the applicant had any mental illness that would interfere with his or her ability to practice law -- a query that would be deemed acceptable by USDOJ , based on the Vermont HRC Opinion Letter. However, the New York application was quietly revised in January 2014, with so little fanfare that recent law school graduates only learned of the change when they signed on to begin their paperwork.

The revised questionnaire now included the particularly problematic Questions 34 and 35 on diagnosis or treatment of a mental illness:

34. Within the past ten years, have you been diagnosed with, treated for or hospitalized for any of the following: a psychotic disorder (such as schizophrenia, delusional disorder or paranoia); a severe mood or anxiety disorder (such as bipolar, major depressive mood disorder, or obsessive-compulsive disorder); alcohol, drug or substance abuse; an impulse control disorder (such as compulsive gambling); or a personality disorder (such as antisocial personality disorder, borderline personality disorder or paranoid personality disorder)?

35. Do you currently have any mental health condition or impairment including, but not limited to a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way impairs or limits, or if left untreated could impair or limit, your ability to practice law in a competent and professional manner?

If your answer [to either of these questions] is Yes, describe the nature of the disorder or condition, state whether you are currently in treatment, including whether you are taking medication, and provide the name of each provider who is treating or has treated you for the condition, including the names of all clinics or hospitals at which you have been treated:

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If your answer [to either of these questions] is Yes, the Committee on Character and Fitness may require that you provide an Authorization for the Release of Health Information Pursuant to HIPAA (OCA Official Form No. 960) for some or all of the providers of your treatment.

However, once word trickled out about the new mental health questions on the bar admission application, there was a quiet push back from various quarters, including a group of law professors. Just as quietly as the application had been revised as of last January, it was revised again in September. Now there is only one question, Question 34, in place of Questions 34 and 35 on the prior form:

34. Do you currently have any condition or impairment including, but not limited to a mental, emotional, psychiatric, nervous or behavioral disorder or condition, or an alcohol, drug or other substance abuse condition or impairment or gambling addiction, which in any way impairs or limits your ability to practice law?

If your answer is Yes, describe the nature of the condition or impairment:

If your answer is Yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?

The most recent revisions to the questions on mental health are completely ADA-compliant, in that the inquiry is limited to current disorders that affect the ability to practice law.

(The relevant pages from the rescinded January 2014 Application, and from the current

Application last revised in September 2014, are included in the Appendix to these materials).

## **II. INFORMAL OBSTACLES – OBTAINING LEGAL EMPLOYMENT**

### **A) The Data on Employment of Lawyers with Disabilities in the Profession**

There is near-uniform consensus on one issue regarding employment of lawyers with disabilities, that we don't have much information to look at, and what we do have is mostly outdated. The EEOC noted in its fact sheet on lawyers with disabilities that "there is little

reliable data on the representation of individuals with disabilities in the legal profession.” As the ABA reported in 2009, the “meager and incomplete” statistical information is a “major obstacle” to achieving disability diversity and employment of LWDs. *Report on the Second National Conference on the Employment of Lawyers with Disabilities*. While there is a strong sense that lawyers with disabilities have more difficulty obtaining and retaining employment than non-disabled lawyers, the contradictory and paucity of hard numbers is frustrating to many seeking to change that.

There are a number of hypotheses about the lack of data. One explanation is that it is only fairly recently that the existence and experience of LWDs has surfaced on some legal radar screens. A related reason, as we will discuss further, is that many studies of “diversity” in the legal profession omit the category of disability completely. The number of lawyers self-reporting as disabled is artificially depressed, for reasons we will also discuss further. Finally, the scientific validity of data on LWD employment is questionable, where the numbers on disability in some measures of attorney employment are so small that they are not statistically significant.

Employment of lawyers with disabilities is also subject to the same forces that have impacted employment of persons with disabilities in general, about which there is far more data and which has been tracked for approximately 30 years. Both academics and government agencies report document that, historically, employment of persons with disabilities declines in times of economic crisis. At each economic downturn, people with disabilities have often been the first fired and the last hired. *See, e.g., Trupin et. al., Trends in Labor Force Participation Among Persons with Disabilities 1983–94*, U.S. Department of Education, National Institute on Disability and Rehabilitation Research (1997). During the recession period of 2007-2009,

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employees and applicants with disabilities in the federal government and the private sector “faced disproportionately increasing rates of job termination and rejection upon application.” Kaye, H.S., *The Impact of the 2007–09 Recession on Workers with Disabilities*, Monthly Labor Review, October 2019, p.19, at 29–30. Ironically, it was around 2009 that increasing numbers of scholars and legal organizations began to study LWD employment on more than an anecdotal level.

The principal collectors of national data on LWD employment, which are also utilized by other researchers, are the American Bar Association (ABA) and the National Association of Law Placement (NALP). Each also looks to statistics from the U.S. Bureau of Labor Statistics. There are a few other sources that essentially analyze the same data, such as the The Institute for Inclusion in the Legal Profession (IILP), which issues an annual compendium of narrative articles and statistical studies on diversity in the field, most recently in 2012.

The hard numbers on diversity in the legal profession appear in the first article, Chambliss, E., *Demographic Summary*, IILP Review 2012: The State of Diversity and Inclusion in the Legal Profession, p. 15.

(<http://www.theiilp.com/Resources/Documents/IILPReview2012.pdf>). Her figures are attributed to a review of academic, government, professional and “popular” sources.

Chambliss notes, not surprisingly, that most of those sources focus on race, ethnicity and gender, although she included LGBT and disability data as available. As with most studies of legal diversity, however, the figures on LWDs in many of the measures she studied are so small as to be statistically insignificant and disability is not broken out as a category on those measures.

For example, while the tables accompanying the article give statistics for the numbers of

women and racial and ethnic minorities employed in various sectors of the legal profession (*e.g.*, corporate counsel, law faculty, judiciary, etc.), the study does not report disability statistics for this measure. Although there are statistics on women and minority attorneys in federal government employment, only the Department of Justice (including all of its bureaus) employed sufficient LWDs to even report – 3% of the 9,422 attorneys who work for all of DOJ have disabilities.

Chambliss also notes that there is no national data on the employment of lawyers with disabilities beyond initial employment (*i.e.*, promotion or retention). She cites data from the National Association of Law Placement (NALP) that show that the percentage of lawyers with disabilities in law firms, while “minuscule” at both the associate and partner levels, has increased slightly over the seven-year period for which data are available; Table 14 to the Chambliss report reflects that in 2004 lawyers with disabilities made up 0.16% percent of law firm partners, but that figure had increased to 0.23% by 2011. Associates with disabilities increased from 0.10% in 2004 to 0.17% in 2011, although those numbers are obviously too small to be well-validated.

The 2011 ABA Disabilities Statistics Report contains statistics culled from its own membership surveys, government agencies and NALP, and notes current trends in the employment of LWDs. The Bureau of Labor Statistics reported that of persons who were employed and had a disability in 2009, 0.9% were in the legal profession (which included titles other than lawyers, such as court reporters and paralegals), while the number of persons who worked in legal titles and did not have a disability was 1.2%. ABA’s Market Research Department collected statistics on LWDs for a survey in 2009, but did not ask about disability in 2010, because only three of 54 American jurisdictions licensing attorneys collected information on disability at the time.

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The National Association for Law Placement (NALP) conducted a study, entitled *Jobs & J.D.'s: Employment and Salaries of New Law Graduates—Class of 2007*, of the employment rates of law graduates by gender, minority, and disability. 86.1% of 638 law graduates with disabilities were employed, compared to about 92.4% of 28,715 non-minority (men and women) law graduates and 90.3% of 8,548 minority law graduates. In addition, 7.4% of disabled law graduates indicated that they were unemployed and seeking a job—almost a 3 percent increase from 2007—compared to 3.8 percent for all non-minority law graduates and 5.3% for all minority law graduates. Of the 321 salaries reported by graduates with disabilities, the mean salary was \$75,096 and the median salary was \$57,000. These salaries were considerably lower than the mean and median salaries computed by NALP for non-disabled men and woman graduates: \$83,425 and \$62,500 (11,162 salaries reported) for women, and \$89,060 and 70,000 (12,045 salaries reported) for men.

The December 2009 issue of the NALP Bulletin <http://www.nalp.org/dec09disabled?s=disability&print=Y> was headed “Reported Number of Lawyers with Disabilities Remains Small.” Of the approximately 110,000 lawyers for whom disability information was reported in the 2009-2010 *NALP Directory of Legal Employers*, just 255, or 0.23%, were identified as having a disability. The numbers reported were described as “very low” and the average percentage of LWDs from all firms, including both associates and partners, was 0.25%.

The lack of reliable data is frustrating when attempting to create an accurate picture of LWD employment, not only numbers but the settings in which LWDs are employed. A commonly-held belief about LWDs is that even those obtaining employment are disproportionately clustered (“ghetto-ized”) in positions with government agencies and non-

profit organizations (particularly those serving the disability community), as opposed to law firms. While there is much anecdotal evidence to support this view, the statistics are contradictory or inconclusive.

For example, a study of the law school class of 2007 by NALP noted that “disabled graduates were less likely to obtain jobs in private practice than the class as a whole—and more likely to obtain government and public interest positions.” A 2006 report from the ABA Commission on Mental and Physical Disability Law (discussed in Stone, D., *The Disabled Lawyers Have Arrived*, *Journal of Law and Inequality*, Winter 2009, 93 at 101), observed that “people with disabilities typically face the greatest levels of discrimination from private law firms.”

A 2007 survey by the Florida Bar of lawyers who self-identified themselves as having a disability showed that of the 84% currently holding a full-time positions, 65% work in private practice and 17% in government agencies. Of those in private practice, 42% were solo practitioners and 46% were employed in firms with five or less attorneys. The survey did not report employment in the non-profit sector, but it is unclear whether that question was not part of the survey or the numbers were too low to be statistically significant.

Table 10 of the Chambliss article, however, reports initial employment by LWDs in private practice in 2009 and 2010, respectively, as 55.0% and 48.1%; in business and industry, 11.6% and 16.1%; government, 12.9% and 12.3%; judicial clerkships, 9.8% and 10.8%; public interest, 8.0% and 8.9%; and academia, 2.3% and 2.4%.

Returning to the explanations offered for the lack of LWD data, it is clear that disability in the profession is nowhere near as well-tracked as race, gender, ethnicity and by now, sexual orientation. Many surveys of legal diversity do not even include disability as a category. This

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point was made by a panel convened at the New York City Bar Association in 2006, *see Forty-Fourth Street Notes*, January 2006, p. 2 [http://www2.nycbar.org/email/44StreetNotes/01\\_06.pdf](http://www2.nycbar.org/email/44StreetNotes/01_06.pdf)). However, the 2015 benchmark report from the City Bar's Office of Diversity still omits disability entirely from either its statistics on legal employment or the diversity statement of principles it encourages member firms to sign (*see* <http://www.nycbar.org/diversity/benchmarking-reports>); the only mention of disability as a diversity category is in a catchall paragraph about affinity groups in law firms and how these groups are a "foundational element in prioritizing diversity. One must conclude that there are lawyers with disabilities somewhere at the signatory employers if LWD affinity groups are numerous enough or have a large enough membership, to gain at least cursory examinationl

Another theory as to why the numbers are so low is under-reporting. When the number of attorneys reporting as having a disability in the ABA 2011 Disability Statistics Report ([http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314\\_aba\\_disability\\_statistics\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf)) appeared to be too low based on national statistics on the percentage of Americans with disabilities, the ABA's Commission on Mental and Physical Disability Law, which oversees the survey, hypothesized that many respondents declined to answer the question, "Do you have a disability?" because of confidentiality concerns.

Others might also have answered in the negative because they may not consider themselves as having a disability. (Researchers looking into postgraduate employment of persons with learning disabilities discovered that some young adults did not disclose their disability to their employer because they believed that learning disabilities were "no longer part of their lives" because they were no longer in school – even where they had the same difficulties with certain job functions as they did with schoolwork. *Employment Self-Disclosure of*

*Postsecondary Graduates with Learning Disabilities: Rates and Rationales*, Journal of Learning Disabilities, Vol. 35, Number 4, July/August 2002, pp. 364-369). This is not as strange as it may sound, given that 16% of LWDs surveyed in a 2007 Florida study (included in the Appendix to these materials and also available at

[http://www.floridabar.org/TFB/TFBResources.nsf/0/43978A94AFC940F9852573CA006E2526/\\$FILE/DIG%20Survey%20Report%20Final%2012%2007.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/43978A94AFC940F9852573CA006E2526/$FILE/DIG%20Survey%20Report%20Final%2012%2007.pdf?OpenElement)),

when asked whether their disability was visible or non-apparent responded that they “were not too sure.”

The NYSBA 2015 Report Card on Diversity (included in the Appendix to these materials and also available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=62160>) also supports the assumption that under-reporting precludes accurate numbers on LWDs in the profession. The 2015 report card, like the report card issued in 2013, reports that the percentage of members who decline to report disability status remains about 2½ times greater than those who decline to report their sexual orientation. In 2013, for example, the decline to answer rate for gender was 0.00%; ethnicity\race, 1.71%; sexual orientation 3.35%; and disability 8.48%. In 2015, the figures were gender, still 0%; ethnicity\race, 1.67%; sexual orientation, 3.25% and disability, 7.09%.

Under-reporting has unquestionably depressed the actual numbers of LWDs in the profession in recent years. The current employment numbers for LWDs are frequently analogized to the situation of gay and lesbian lawyers, even as recently as ten years ago, when divulging sexual orientation was thought to be damaging to career prospects and non-disclosure was almost always an option. Lawyers with so-called “invisible disabilities” (learning differences, mental illness and addiction and disorders under control at the time with medication

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or therapy, such as diabetes and epilepsy or non-symptomatic Multiple Sclerosis) can choose whether or not to disclose, but others obviously can not.

In this instance, the perception is the reality. Even if employers did not discriminate against lawyers with disabilities, those LWDs who perceived bias would be the most wary of self-disclosure. Responses to the aforementioned Florida study of LWDs indicated that those whose disabilities were not apparent believed that, based on the experience of others, they will be less successful in the employment arena if they self-disclosed. Those respondents were more likely to disclose their disability to co-workers (78%), employers or supervisors (70%), clients (66%), and judges, administrative personnel and other court personnel (56%). They are less likely to disclose their disability to opposing counsel (49%) or opposing parties (27%). “Florida Lawyers with Disabilities,” *supra*.

#### **B) Reasonable Accommodations for Lawyers with Disabilities**

One recognition of the increase of LWDs in the workforce is that the EEOC has issued its *Fact Sheet on Reasonable Accommodations for Attorneys with Disabilities* (included in the Appendix to these materials and also available at <http://www.eeoc.gov/facts/accommodations-attorneys.html>). The EEOC was as stymied by the lack of data as everyone else, but supports the view that anecdotal evidence shows formidable barriers to employment for LWDs. “To date, individuals with disabilities generally have not been a part of the discussion about diversity in the legal profession. While there is little reliable data on the representation of individuals with disabilities in the legal profession, anecdotal evidence suggests that lawyers with disabilities face many of the same barriers to employment that people with disabilities face in other jobs.”

According to the EEOC, the most common accommodations needed by LWDs are modified schedules and telecommuting. The Fact Sheet reassures employers that many LWDs

may never need accommodations, and those accommodations that might be needed can be provided at little cost. Large firms can easily assume the costs of expensive technology or an extra support staff member without hardship to accommodate attorneys with visual impairments, a disorder that prevents them from typing or writing, a hearing loss, etc. It is clear, however, that obtaining accommodations for cognitive and intellectual disabilities – such as learning disabilities, ADD, traumatic brain injury – is a much more challenging endeavor for attorneys than may be the case with less intellectually-rigorous and high-pressure fields of work. Any impairments that make it take longer to complete work will require creativity in enabling an LWD to work under time-sensitive conditions.

The 800-lb elephant in the accommodation room is billable hours.

On the one hand, the Fact Sheet states that employers are not required to lower or eliminate uniform production standards for LWDs. This not being a factory under discussion, the EEOC makes clear in the next sentence that “production standards” in law firms means billable hours. Not surprisingly, an employer is not obligated to completely exempt an attorney from that requirement; however, reasonable accommodations “may be needed to assist an attorney to meet the billable hours requirement.”

As far back as 2006, a past president of the ABA, Michael Greco, recognized that billable hours and deadline pressures were going to be major stumbling blocks to employment of LWDs. One suggestion was that law firms prorate billable hours or charge them to the firm. There are alternative accommodations that he felt should be considered if a firm is committed to diversifying, such as less-demanding or less time-sensitive cases. A lawyer with a disability could be treated like a recent law school graduate, in that both may require more time than a senior partner to complete tasks, but the junior associate likely does not face the same

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discrimination as the associate with the learning disability. Greco, M.S., *Forgotten Colleagues*, GPSOLO Magazine, April/May 2007 Issue (available at [http://www.americanbar.org/content/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/forgottencolleagues.html](http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/forgottencolleagues.html)). While Greco was one of the earliest bar leaders to confront the issue, his idealism and optimism may be misplaced, as when he posits that if a LWD brings other skills and talents to the firm, such as an ability to work well with a team, but less billable hours, a firm can choose to value those skills.

Finally, in one unique case, *Spinella v. Town of Paris Zoning Bd. of Appeals*, 194 Misc.2d 232, 752 N.Y.S.2d 795 (Supr. Ct., Oneida Cnty, 2002), a practicing attorney was granted an accommodation to his visual impairment by the judge hearing his client's case. Richard Spinella had been given 60 days in which to submit a proposed judgment to the court in an Article 78 matter in which he represented the Petitioner. When the deadline elapsed without submission of the proposed judgment, Respondents moved to dismiss the case as abandoned. In response to the motion, Spinella filed an affidavit attesting that he has a visual impairment that constitutes a disability under the ADA. He argued that he was in need of accommodation, because it takes him twice as long to write and read and absorb material as a non-disabled attorney, and that his need for accommodation constituted good cause for the court to extend the time limits. Other factors to which the court appeared to give considerable weight were Spinella's attestations that he was routinely given accommodations in law school in the form of multiple readers and transcribers; that he was given four days to take the Bar Exam instead of two and provided with two readers and one scribe to type his answers; and that other state courts, and federal district and appeals court, granted him twice the usual time for motion responses, orders, or any other documents subject to time requirements. The court ruled that, with

accommodation, Spinella can perform the essential functions of a lawyer by virtue of his skills, experience, and his license to practice law, that Spinella's disability was good cause for failure to meet the deadline, and that his default would be excused as an accommodation.

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