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# Supporting Attorney Well-Being in a World of Unprecedented Challenges

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Push notifications, late night client emails, and constant legal updates make it difficult for attorneys to take the physical and mental breathers they need. In May 2020, Americans' well-being plummeted to a 12-year low amid the COVID-19

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outbreak. This drop was almost double what was seen during the 2008 financial crisis.<sup>1</sup> And with the killing of George Floyd recorded on a cellphone camera and issues of racism and police brutality in America, stress is at an all-time high while well-being is on a steep decline.

In 2019, 94% of U.S. workers felt stressed at work, with over half of workers reporting that stress negatively affected their home life and caused them to lose sleep.<sup>2</sup> While many attorneys, and others outside the legal industry, believe that individuals perform better in a high-pressure work environment, several respondents of a 2019 Wrike survey found that was not the case;<sup>3</sup> over 25% of survey participants reported a decline in the quality of their work due to stress. “We’re under the misguided presumption that more work leads to more productivity when the opposite is actually true—chronic stress eats away at any chance for a productive workplace, or high employee engagement,” says Dr. Leah Weiss, author and professor at Stanford University. It also “undermines culture and leads to fatigue, anxiety, and confusion about priorities.”<sup>4</sup>

High stress environments lead to employee burnout at a shocking rate. A 2018 Gallup study found that nearly two-thirds of full-time workers reported feeling burned out at work all, or at least some, of the time.<sup>5</sup> In 2013, Gallup estimated that disengaged employees cost the U.S. \$450–\$550 billion in lost productivity every year.<sup>6</sup> Moreover, disengaged employees are more likely to leave their places of employment

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<sup>1</sup> Dan Witters & Jim Harter, *Worry and Stress Fuel Record Drop in U.S. Life Satisfaction*, GALLUP (May 8, 2020), <https://news.gallup.com/poll/310250/worry-stress-fuel-record-drop-life-satisfaction.aspx>.

<sup>2</sup> Brianna Hansen, *Crash and Burnout: Is Workplace Stress the New Normal*, WRIKE (Sept. 6, 2018), <https://www.wrike.com/blog/stress-epidemic-report-announcement/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Ben Wigert & Sangeeta Agrawal, *Employee Burnout, Part 1: The 5 Main Causes*, GALLUP (July 12, 2018), <https://www.gallup.com/workplace/237059/employee-burnout-part-main-causes.aspx>.

<sup>6</sup> Susan Sorenson & Keri Garman, *How to Tackle U.S. Employees' Stagnating Engagement*, GALLUP (June 11, 2013), <https://news.gallup.com/businessjournal/162953/tackle-employees-stagnating-engagement.aspx>.

for a new one. A 2016 survey by Law360 found that over 40% of lawyers reported that they were unsatisfied at work and were likely or very likely to leave their current firms in the next year.<sup>7</sup> This high turnover rate for law firms is expensive and costs larger firms approximately \$25 million every year.<sup>8</sup>

## **The Consequences of Stress on Attorneys**

The practice of law remains one of the most stressful and psychologically challenging professions. Despite the longstanding belief that attorneys experience substance use disorders and other mental health concerns at a higher than average rate, few studies have been concerned with investigating or remedying these issues. In 1990, the International Journal of Law and Psychiatry conducted a study of roughly 1,200 attorneys in Washington State. The study found that 18% of the participants were problem drinkers, almost twice the prevalence of alcohol abuse among Americans at that time.<sup>9</sup> The 1990 study also found that attorneys suffered from depression at more than twice the rate of other individuals in western countries, while a separate study by Johns Hopkins University of more than 100 professions revealed that lawyers are 3.6 times as likely to be depressed as people with other jobs.<sup>10</sup>

There were no in-depth studies of substance abuse or mental health issues in the legal profession until 2016, when Patrick R. Krill, JD, joined forces with the Hazelden

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<sup>7</sup> Cristina Violante, *Law360's 2016 Lawyer Satisfaction Survey: By the Numbers*, LAW360 (Sept. 2, 2016), <https://www.law360.com/articles/833246/law360-s-2016-lawyer-satisfactionsurvey-by-the-numbers>

<sup>8</sup> Mark Levin & Bruce MacEwen, *Assessing Lawyer Traits & Finding a Fit for Success: Introducing the Sheffield Legal Assessment* (2014) (Unpublished), <https://attorneyassessment.com/wp-content/uploads/2020/04/Attorney-Trait-Assessment-Study-Whitepaper.pdf>.

<sup>9</sup> G. Andrew Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse among United States Lawyers*, 13 INT. J. LAW PSYCHIATRY 233 (1990), <https://www.sciencedirect.com/science/article/abs/pii/016025279090019Y?via%3Dihub>.

<sup>10</sup> Eaton William W. et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUP. MED. 1079 (1990), [https://journals.lww.com/joem/Abstract/1990/11000/Occupations\\_and\\_the\\_Prevalence\\_of\\_Major\\_Depressive.6.aspx](https://journals.lww.com/joem/Abstract/1990/11000/Occupations_and_the_Prevalence_of_Major_Depressive.6.aspx).

Betty Ford Foundation and the American Bar Association to conduct a study of attorneys for the Journal of Addiction Medicine. Over 12,000 attorneys across the United States participated.<sup>11</sup> The study found that 26% of the attorneys had depression—an 8% increase from the aforementioned 1990 study—and had rates of anxiety and stress at 19% and 23% respectively. The list of disorders that can affect attorney impairment is long and many often go unrecognized. For many attorneys, work is the most important aspect of their lives, and they may tie their self-worth to their abilities and status as a lawyer. Because many attorneys channel their focus towards their jobs, symptoms of substance abuse and mental health problems will often appear last in the workplace.<sup>12</sup> However, once these symptoms appear at work, it can cause huge losses for attorneys and their employers.

## The Financial Cost of Poor Attorney Well-Being

Legal employers spend, on average, \$5,000 per attorney for malpractice insurance every year.<sup>13</sup> An ABA survey found that in 2018 there were approximately 1,338,678 attorneys licensed to practice law in the United States.<sup>14</sup> This means that legal employers spend roughly six billion dollars a year on legal malpractice insurance. Despite the amount legal employers are paying towards malpractice insurance, large

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<sup>11</sup> Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4736291/>.

<sup>12</sup> George H. Hettrick, *Addiction to Alcohol and Other Drugs: Recognizing the Signs of Lawyer Impairment*, THE BAR EXAMINER (1999), <https://www.huntonak.com/images/content/3/0/v3/3079/justhettrick.pdf>

<sup>13</sup> Lee Norcross, *What is the Average Cost of Lawyer's Malpractice Insurance?*, L2 INSURANCE AGENCY BLOG (May 9, 2016), <https://www.l2insuranceagency.com/blog/what-is-the-average-cost-of-lawyers-malpractice-insurance.aspx>.

<sup>14</sup> *New ABA Data Reveals Rise in Number of U.S. Lawyers*, ABA, (May 11, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new\\_aba\\_data\\_reveals/#:~:text=May%2011%2C%202018-,New%20ABA%20data%20reveals%20rise%20in%20number%20of%20U.S.%20lawyers,attorneys%20in%20the%20United%20States.](https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/#:~:text=May%2011%2C%202018-,New%20ABA%20data%20reveals%20rise%20in%20number%20of%20U.S.%20lawyers,attorneys%20in%20the%20United%20States.)

insurers are not seeing a slowdown in claims arising from attorney impairment.<sup>15</sup> At ALAS, an insurer to many Am Law 200 firms, at least 3% of claims are tied to impairment issues, such as alcoholism, substance abuse or mental health, said Dan Donnelly, who oversees claims at ALAS.<sup>16</sup> He added that the real rate of related claims could be higher, but the insurer never learns of the impairment underlying the malpractice claim. Christopher Newbold, an executive vice president at ALPS, an insurer of solo practitioners and small firms, said that he estimates at least 10% of malpractice claims arise from attorney impairment.<sup>17</sup>

Attorney impairment is not only detrimental to attorneys' physical and mental well-being, but it also hurts the legal employers and their insurers' pockets. Every four years the ABA's Standing Committee on Lawyers' Professional Liability reports on trends in legal malpractice claims. In 2016, it found that payouts of \$50,000 to \$200,000 nearly doubled between 2011 and 2015; payments of \$500,000 to \$1 million rose almost fivefold during the same time period; the number of \$1 million to \$2 million payouts increased from 49 in 2011 to 444 in 2015; and payments over \$2 million rose more than threefold.<sup>18</sup>

In today's landscape, stress from work and world events can severely impact an attorney's well-being and work performance. Employers should endeavor to ensure all attorneys have the tools they need to deal with mental health and substance abuse issues as well as the time and correct environment necessary to appropriately use those tools. This article provides an overview of mental health and substance abuse issues that plague attorneys today and the steps legal employers can take to help attorneys cope.

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<sup>15</sup> Christine Simmons, *Law Firms Face Malpractice Risk over Substance Abuse, Poor Mental Health*, NU PROPERTY CASUALTY360 (Dec. 4, 2018), <https://www.propertycasualty360.com/2018/12/04/another-hazard-of-poor-attorney-mental-health-malp/?slreturn=20200610123103>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Legal Malpractice Claims Costing More, Settling Sooner, Research Shows*, MORGAN & MORGAN: BUSINESS TRIAL GROUP (Oct. 27, 2016), <https://www.businesstrialgroup.com/news/legal-malpractice-claims-costing-more-settling-sooner-research-shows/>.

Part I provides a brief overview of what attorney impairment is and how it might manifest in the professional or private life of an attorney. Part II gives a brief analysis of the possible causes of attorney impairment. Part III sheds light on some of the added stress that Black and other attorneys of color feel at work. Part IV discusses how employers should best accommodate impaired attorneys. Part V discusses best practices for employers that want to create an environment that properly accommodates attorneys and their well-being. Part VI discusses what additional steps legal employers can take to better promote attorney well-being and support mental health.

## **Part I: What is Attorney Impairment?**

Impairment can take on many different forms in an attorney's work or personal life. It is important that attorneys take the time to self-reflect and attempt to address the issues they face before more serious problems manifest with disastrous results.

Some signs of attorney impairment that may become apparent in attendance: routinely arriving late and/or leaving early; regularly returning late or failing to return from lunch; canceling scheduled appointments; and/or failing to appear at depositions or court hearings.<sup>19</sup>

Some signs of attorney impairment that may display in job performance: procrastination; a pattern of missed deadlines; failing to timely return client calls or emails; showing a decline in productivity; exhibiting a drop (often gradual) in the overall quality of work; overreacting to criticism or shifting blame to others; failing to get along with and/or withdraw from fellow lawyers and other staff; and/or performance falls throughout the day.<sup>20</sup>

Impairment can also manifest in an attorney's personal life. Symptoms of impairment in an attorney's personal life can look like: gradual deterioration of personal appearance/hygiene/health; loss of control at social gatherings, even where professional decorum is expected; distorting the truth or dishonest behavior; poor management of personal finances; withdrawing from friends and associates; pattern of family crises or marital infidelity; frequent mood swings; changes in appetite, such as a decreased appetite and associated weight loss; bloodshot eyes, poor skin tone, and appearing tired

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<sup>19</sup> Hettrick, *supra* note 12.

<sup>20</sup> *Id.*

or run down; and/or arrests for driving under the influence, drunkenness in public, or possession of an illegal drug.<sup>21</sup>

These are just examples of possible signs of impairment. It is common knowledge that there is a high level of stress in the work we do and the timeframe we do it in. The realization that a few of these examples apply to an individual should not cause that person additional stress. However, discovering that many or all of these are relevant most of the time should motivate that individual to seek resources that can help him or her cope with the problem.

## **Part II: Causes of Attorney Impairment**

Anxiety and depression plague the vast majority of attorneys practicing today. "Attorneys develop an overdeveloped sense of control, so if things don't go as planned, they blame themselves. They think they didn't work hard enough or they were careless," explained Tyger Latham, a Washington, D.C.-based psychologist who treats many lawyers and law students. Latham went on to say: "The atmosphere of law offers minimal support amidst the high pressure," contributing to a profound sense of isolation for lawyers. As a result, "without a doubt, every lawyer [he] see[s] has anxiety greater than the average population."<sup>22</sup> Latham's observations remain true far outside of the attorneys he treats in his D.C. practice.

There are many possible causes of attorney impairment, which can be different for every individual. Untreated mental illness, cognitive decline, and substance abuse can, and often do, lead to the inability to manage caseloads or provide competent representation, and, in more serious cases, can cause significant harm to clients. Mental illness and substance abuse problems often occur in combination with each other. For example, an attorney suffering from anxiety or depression may develop a substance use

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<sup>21</sup> Marisa Crane, B.S., *How to Tell if Someone Is on Drugs: Opiates, Marijuana, and More*, AMERICAN ADDICTION CENTERS (Mar. 23, 2020), <https://americanaddictioncenters.org/adult-addiction-treatment-programs/know-is-someone-on-drugs>.

<sup>22</sup> Leslie A. Gordon, *How Lawyers Can Avoid Burnout and Debilitating Anxiety*, ABA JOURNAL, (July 1, 2015), [https://www.abajournal.com/magazine/article/how\\_lawyers\\_can\\_avoid\\_burnout\\_and\\_debilitating\\_anxiety](https://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety).

disorder as a way to cope or self-medicate; or, conversely, a substance abuse problem may lead to depression and anxiety.<sup>23</sup>

The Hazelden/ABA study found that this was the case. The study discovered that around 21% of the participating attorneys had issues with problematic drinking, almost double the percentage reported in a study of highly educated individuals in other fields.<sup>24</sup> The study also found a higher percentage of problem drinkers in private firms (23.4%) and those still in the first ten years of their practice (28.9%).<sup>25</sup>

Sixty-one percent of attorneys surveyed in the Hazelden/ABA study reported concerns about their anxiety at some point during their careers, with 46% self-identifying as having issues with depression. The study found that there were significantly higher levels of depression, anxiety, and stress among those attorneys that screened positive for problematic alcohol use, and that men had a higher rate of depression while women had a higher rate of anxiety.

Attorney Patrick R. Krill, lead author of the Hazelden/ABA study and a recognized authority of addiction and mental health issues in the legal profession, says the data “paints the picture of an unsustainable professional culture that’s harming too many people.”<sup>26</sup> This unrelenting pressure, Krill notes, puts lawyers at odds with the types of things one does to support mental health, such as resting (actual sleep or downtime for recharging), exercising, and engaging with quality social connections.<sup>27</sup> The tendency to prioritize winning and achievement over well-being and happiness also compromises mental health. According to Whitney Hawkins, a licensed psychotherapist in Miami, the majority of lawyers continue to feel isolated and shameful when they are unable to measure up to unreachable standards in the legal

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<sup>23</sup> Dr. Alex Yufik, *Evaluating an Impaired Attorney’s Fitness to Practice*, LAW PRACTICE TODAY (Sept. 14, 2018), <https://www.lawpracticetoday.org/article/evaluating-impaired-attorneys/>.

<sup>24</sup> Krill, *supra* note 11.

<sup>25</sup> *Id.*

<sup>26</sup> Kristin Johnson, *Investigative Report: Mental Health Issues and Substance Abuse Threaten the Legal Profession*, ROCKET MATTER: LEGAL PRODUCTIVITY BLOG (Mar. 12, 2018), <https://www.rocketmatter.com/attorney-wellness/investigative-report-mental-health-substance-abuse-threaten-legal-profession/>.

<sup>27</sup> *Id.*



community. “Lawyers are fearful that if they share they’re struggling with anxiety, depression, or substance abuse they will be seen as incompetent or unable to complete their duties at work,” she says.<sup>28</sup>

Krill and Dr. Hawkins’ sentiments are mirrored in the Hazelden/ABA participants’ responses. When the attorneys in the study were asked about what barriers impacted their ability to obtain treatment for their substance abuse issues, the majority indicated that they did not want others to find out they needed help and that they had concerns regarding privacy or confidentiality.<sup>29</sup>

### **Part III: Added Stress on Attorneys of Color**

Information about the mental health issues of Black and other attorneys of color is still extremely limited. While the Hazelden/ABA study is the most extensive of its kind ever conducted, with participants from nineteen states and ranging in age from under 30 to over 71, the vast majority of participants, over 91%, still identified as Caucasian/White. The full scope of anxiety, depression, and other mental health and substance abuse issues plaguing attorneys of color is still unknown. In a study conducted by leadership consulting firm Nextions about unconscious bias in the workplace, sixty partners from twenty-two law firms received copies of the same legal memo.<sup>30</sup> Nextions inserted 22 errors in the memo consisting of minor spelling or grammar errors, substantive technical writing errors, and errors of fact. Roughly half of the partners were told that the author of the memo was Black while the other half were told the author was White. The partners gave the memo an average rating of 4.1 out of 5 when it was supposedly written by a White attorney, and an average rating of 3.2 when it was supposedly written by a Black attorney. The White author was praised for his potential and good analytical skills, while the Black author was criticized as average at best and needing a lot of work. Quite notably, the partners found roughly double the spelling and grammatical errors in the supposedly Black author’s work than they did the supposedly White author’s work.

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<sup>28</sup> *Id.*

<sup>29</sup> Krill, *supra* note 11.

<sup>30</sup> Dr. Arin N. Reeves, *Written in Black & White Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS (Apr. 4, 2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

Non-diverse work settings (such as in large law firms) and the experience of being the “only one” in the workplace are linked to the decline of physical and mental health in employees of color as well as a reduction of productivity.<sup>31</sup> Generally, when employees feel they have a human workplace that fosters recognition, appreciation, and empowerment, and provides a clear purpose aligned with achievable goals, they are two times as likely to feel like they can grow within the organization; 41% are more likely to feel their work has meaning, and 78% are more likely to trust their managers.<sup>32</sup> However, “[s]eventy percent of female minority lawyers report leaving or considering leaving the legal profession,” according to a report by the ABA.<sup>33</sup> “Women of color have the highest rate of attrition from law firms as they continue to face firm cultures where their efforts and contributions are neither sufficiently recognized nor rewarded,” according to the ABA report.<sup>34</sup> In fact, issues of inclusion made it difficult to research this demographic. The ABA researchers had planned to study women in practice for more than twenty years, but the report found the search for participants “was analogous to finding women of color who are equity partners in law firms.”<sup>35</sup> Black attorneys generally accounted for less than 2% of partners among the firms surveyed by the National Association of Law Placement (NALP), while Black women accounted for less than 1%.<sup>36</sup>

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<sup>31</sup> Morra Aarons-Mele, *The Anxiety of Being the “Only,”* HARVARD BUS. REV. (Apr. 10, 2020), <https://hbr.org/podcast/2019/10/the-anxiety-of-being-the-only>.

<sup>32</sup> Lynette P. Silva, *How Recognition Makes Work Human*, SHRM BLOG (June 22, 2016), <https://blog.shrm.org/blog/how-recognition-makes-workhuman>.

<sup>33</sup> Debra Cassens Weiss, *Majority of Minority Female Lawyers Consider Leaving Law; ABA Study Explains Why*, ABA JOURNAL (June 22, 2020), <https://www.abajournal.com/news/article/most-minority-female-lawyers-consider-leaving-law-aba-study-explains-why>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Meghan Tribe, *Law Firms Call for Social Justice, Despite Own Diversity Issues*, BLOOMBERG LAW, (June 4, 2020), <https://news.bloomberglaw.com/us-law-week/law-firms-call-for-social-justice-despite-own-diversity-issues>

Black and other attorneys of color also face increased barriers to finding and connecting with mentors that help with their career confidence and progress.<sup>37</sup> According to Major Lindsey & Africa's 2019 Millennial Attorney Survey, 29% of respondents said that a formal mentor played a significant or crucial role in their career.<sup>38</sup> Research further shows there is a positive correlation between strong mentoring programs and women's advancement in law firms.<sup>39</sup> The absence of formal mentors can add to the feeling of isolation and the experience of feeling alone at work. According to the American Lawyer's 2020 Diversity Scorecard, "the past decade has seen a steady, at times sluggish, advancement of minority attorneys in the legal industry" across all key diversity dimensions.<sup>40</sup> The number of lawyers identifying as Black, Asian, Hawaiian/Pacific Islander, Hispanic/Latinx, and Native American has been essentially flat, with less than one percentage point change for each group. Since 2010, attorneys of color have collectively seen a 3.9% increase in representation among the country's largest firms.<sup>41</sup>

There is little information on the full scope of mental health issues in Black and other attorneys of color. However, considering only the study done by Nextions, amidst the well-known, reported hurdles to access and success for attorneys of color, it is likely that their work is judged more harshly than that of their White counterparts. The

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<sup>37</sup> Tiye Foley & Kristine Roberts, *How We Built a Mentoring Program That Actually Works*, JD SUPRA, (Aug. 15, 2018), <https://www.jdsupra.com/legalnews/how-we-built-a-mentoring-program-that-51981/>.

<sup>38</sup> *Id.*

<sup>39</sup> Kate Reder Sheikh, *Law Firms Can Do Better With Their Mentoring Programs*, Major, Lindsey & Africa (June 12, 2019), <https://www.mlaglobal.com/en/knowledge-library/articles/law-firms-can-do-better-with-their-mentoring-programs>.

<sup>40</sup> Dylan Jackson, *The 2020 Diversity Scorecard Shows Progress, but It's More Precarious Than Ever*, THE AMERICAN LAWYER, (May 26, 2020), <https://www.law.com/americanlawyer/2020/05/26/the-2020-diversity-scorecard-shows-progress-but-its-more-precarious-than-ever/>.

<sup>41</sup> Dev Stahlkopf, *Why Diversity Matters in the Selection and Engagement of Outside Counsel: An In-House Counsel's Perspective*, ABA, (May 6, 2020), [https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2019-20/spring/why-diversity-matters-the-selection-and-engagement-outside-counsel-inhouse-counsels-perspective/).

added criticism, in an already highly critical environment, and feelings of isolation likely further increase stress-related mental health conditions in attorneys of color.

## Part IV: Accommodating an Impaired Attorney

The Model Rules of Professional Conduct and New York Rules of Professional conduct, prohibit a lawyer from representing or continuing to represent a client where “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.”<sup>42</sup> In Formal Opinion 03-429, the ABA Standing Committee on Ethics and Professional Responsibility determined that “impaired lawyers have the same obligations under the Model Rules as other lawyers.”<sup>43</sup> The Committee wrote, “Simply stated, mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation.” The opinion also provides some advice on how legal employers should handle attorney impairment: “[W]hen considering what must be done when confronted with evidence of a lawyer’s apparent mental disorder or substance abuse, it may be helpful for partners or supervising lawyers to consult with an experienced psychiatrist, psychologist, or other appropriately trained mental health professional.” However, the opinion notes that it does contemplate a firm’s responsibilities to accommodate an impaired attorney under the Americans with Disabilities Act (ADA) of 1990 or state law equivalent, as those laws are generally not applicable to equity partners in law firms.<sup>44</sup>

The ADA prohibits discrimination against individuals with disabilities in all areas of public life.<sup>45</sup> The ADA Amendments Act of 2008 (ADAAA) expanded the

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<sup>42</sup> Model Rules of Prof'l Conduct R. 1.6 (a)(2); *see also* New York Rules of Prof'l Conduct (22 NYCRR §1200.00) R. 1.6 (b)(2).

<sup>43</sup> ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_03\\_429.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_03_429.pdf).

<sup>44</sup> *Id.* (citing *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996), cert. denied, 520 U.S. 1248 (1997)) (partners not protected as employees under federal antidiscrimination laws).

<sup>45</sup> Americans with Disabilities Act, Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12 213 (2000)).

definition of “disability” and made other changes to the ADA.<sup>46</sup> With more individuals successfully claiming disability status, there should be a larger focus on providing individuals with the accommodations they seek. The ADA generally requires applicants and employees with disabilities to request a reasonable accommodation, rather than requiring employers to ask if an accommodation is needed.<sup>47</sup> The accommodation language in the ADA enacts an affirmative duty on the part of employers to make changes to their workplaces, practices, and procedures to allow individuals with disabilities to perform the essential functions of a position.<sup>48</sup> As such, a failure to provide attorneys with a reasonable accommodation violates the ADA.<sup>49</sup> The Equal Employment Opportunity Commission (EEOC) has explained that the requirement is best understood “as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.”<sup>50</sup>

To request a reasonable accommodation, an attorney must let the employer know that, because of a medical condition, they need a change to the application process, the job, or a benefit of employment. An attorney does not have to mention the ADA, the Rehabilitation Act of 1973, 29 U.S.C. Section 701, or “reasonable accommodation,” and does not have to provide evidence that the condition is a “disability” at the time the request is made. The attorney simply has to make a “plain English” request for a change due to a medical condition. In some instances, a request for reasonable accommodation may come from a third party, for example a doctor's note outlining work restrictions.<sup>51</sup>

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<sup>46</sup> Americans with Disabilities Act Amendments Act, Pub. L. No. 101-325 § 1, 122 Stat. 3553 (2008) (codified as amended at 42 U.S.C. § 12132 (2012)).

<sup>47</sup> See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004); Estades-Negrón v. Associates Corp. of N. Am., 377 F.3d 58 (1st Cir. 2004); Russell v. TG Mo. Corp., 340 F.3d 735 (8th Cir. 2003).

<sup>48</sup> ADA, *supra* note 45.

<sup>49</sup> 29 C.F.R. Appx. § 1630.9 (2011).

<sup>50</sup> *Id.*

<sup>51</sup> EEOC, *Reasonable Accommodations for Attorneys with Disabilities* (May 23, 2006), <https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities>.

In its 2018 report, the NALP found that only 1%-2% percent of law school graduates, and 0.52% of law firm partners, reported having a disability.<sup>52</sup> This percentage stands apart from the 26% of Americans that the CDC reports as having a disability.<sup>53</sup> As the Hazelden/ABA study found, many attorneys may be reluctant to request an accommodation when they need one out of fear that their employer will perceive them as less competent. It may be the case that an attorney can handle the stress of work and dealing with the underlying issues surrounding their impairment; but if they cannot, they may develop long-term mental health issues and are leaving themselves and their firms open to liability if things go wrong.

In the wake of the Hazelden/ABA study, in February 2017, the American Bar Association House of Delegates adopted the Model Rule of Minimum Continuing Legal Education (“MCLE Model Rule”).<sup>54</sup> The MCLE Model Rule requires attorneys to obtain credit hours on mental health and substance use disorders.<sup>55</sup> This additional requirement was put into place based on research indicating that lawyers hesitate to attend such programs on their own due to fear of potential stigma.<sup>56</sup> The MCLE Model Rule suggests that requiring lawyers to attend programming on mental health may greatly reduce this concern.<sup>57</sup> Currently, only three states—California, North Carolina, and Nevada—have CLE requirements for attorneys to attend programming on mental health and substance abuse.<sup>58</sup> In June 2020, The New York City Bar Association Lawyers Assistance Program Committee and Mental Health Law Committee wrote a report urging the state’s licensing and regulatory authorities to

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<sup>52</sup> Stahlkopf, *supra* note 41.

<sup>53</sup> *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 9, 2019), <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>.

<sup>54</sup> *Model Rule of Minimum Continuing Legal Educ.*, AM. BAR ASS'N (2017), <https://www.americanbar.org/events-cle/mcle/modelrule/>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *CLE & MCLE Requirements by State*, TALKS ON LAW, <https://www.talksonlaw.com/cle-requirement>, (last visited June 23, 2020).

include, as a separate required credit, programs regarding mental health, substance use and well-being in the legal profession.<sup>59</sup>

The EEOC generated a list of ideas to help legal employers create a climate in which attorneys will feel comfortable requesting a needed accommodation. The EEOC suggests employers:

- “adopt policies and procedures on how requests for accommodation will be handled and ensure that these policies are well publicized and implemented.”
- “make sure that both employees and managers know that company policy supports full compliance with the ADA and the provision of reasonable accommodation.”
- “require adequate training of supervisors, managers, and human resources professionals on handling requests for accommodation and other requirements of the ADA.”<sup>60</sup>

However, merely accommodating attorneys under the law may not be enough to allow attorneys to truly overcome the mental health or substance abuse issues afflicting them.

## **Part V: Best Practices for Legal Employers Providing Accommodations to Impaired Attorneys**

This section will discuss how to best provide accommodations to impaired attorneys. A reasonable accommodation may enable a lawyer with a disability to satisfy their ethical obligations towards a client as well as the expectations of the attorney’s employer. However, there are some instances where legal employers may be reluctant to provide necessary accommodations because they are outside the employer’s normal practices. For instance, the ADA lists part-time or modified work schedules as examples of reasonable accommodations, but law firms may not be amenable to such a request.<sup>61</sup> In 2011, a former litigation associate at Bingham McCutchen, Hartwell

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<sup>59</sup> N.Y.C. Bar Ass’n, *Report in Support of Mental Health, Substance Use and Lawyer Well-Being CLE Requirement for NY Attorneys* (June 2020),

[https://s3.amazonaws.com/documents.nycbar.org/files/2020700-Mental\\_Health\\_CLE.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/2020700-Mental_Health_CLE.pdf).

<sup>60</sup> EEOC, *Reasonable Accommodations for Attorneys with Disabilities*,

<https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities>.

<sup>61</sup> *See* 42 U.S.C. § 12111(9)(B) (2012).

Harris filed suit against the firm alleging that it failed to accommodate her disability.<sup>62</sup> Specifically, Ms. Harris claimed to have a sleep disorder and requested that the firm accommodate her by permitting flexible start times and telecommuting, but said that the firm refused her doctor's proposed accommodations.<sup>63</sup> The Complaint alleged causes of action for employment discrimination, failure to accommodate disability, and interference with, and retaliation for, exercising rights under the Family Employment and Housing Act and California Family Rights Act and defamation.<sup>64</sup>

As discussed above, an attorney's request for accommodation is the first step in an interactive dialogue between the employer and the attorney and should be used as an opportunity to facilitate a healthy employer-employee relationship to prevent situations where the attorney feels the need to file a lawsuit against their employer.<sup>65</sup> This process should focus on two key issues: whether the attorney has a "disability" under the ADA or ADAAA and *why* the requested accommodation is necessary.<sup>66</sup>

If necessary, an employer can also seek reasonable documentation from a healthcare professional about the attorney's disability and functional limitations.<sup>67</sup> Employers should avoid legal terminology when requesting information and instead focus on the condition for which the attorney is requesting an accommodation and the job-related barriers they are facing. For example, an employer might ask "Does Mark's depression affect his ability to fall asleep or to wake up?" An employer might also ask, "For all activities affected by Mark's anxiety please indicate: 1) under what specific conditions could Mark have a panic attack that will result in difficulty breathing or chest pains? and 2) what is the frequency with which these panic attacks could occur?" An employer should be clear about the purpose for asking such questions. Furthermore, the questions should be designed to elicit information that enables the employer to determine if the attorney has a "disability" under the ADA.<sup>68</sup> An employer

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<sup>62</sup> Complaint, *Harris v. Bingham McCutchen LLP et al.*, No. BC474009 (Cal. Super. Nov. 21, 2011) Dkt. No. 1.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> EEOC, *supra* note 47.

<sup>66</sup> EEOC, *supra* note 51.

<sup>67</sup> *Id.* (citing *Templeton v. Neodata Serv., Inc.*, 162 F.3d 617 (10th Cir. 1998)).

<sup>68</sup> *Id.*



must first understand the nature of the problem an attorney is facing, how it is connected to their disability, and how a suggested accommodation would resolve the problem before determining what possible accommodations might be appropriate.<sup>69</sup>

After receiving a request for a reasonable accommodation, an employer should respond as quickly as practicable and seek any additional information that is necessary to make a determination. Any unnecessary delay in responding to a request for a reasonable accommodation could result in a violation of the ADA.<sup>70</sup> In some situations, time may not be as important, but it is always best to prioritize responding to an attorney's request. While attorneys wait to hear back, employers should keep them informed of developments and explain any delays in processing the requests.

Deciding what possible accommodations are reasonable in a particular circumstance depends on the employer, the attorney, and the disability. Possible reasonable accommodations include:

- restructuring job responsibilities;
- modifying work schedules;
- acquiring or modifying equipment (e.g. lamps that help with seasonal affective disorder);
- helping attorneys find mental health counselors and allowing attorneys to meet with them during the workday;
- modifying workplace policies;
- permitting telework; or
- changing methods of supervision (e.g. supervising partner provides associate with critiques of their work through e-mail rather than face-to-face meetings).<sup>71</sup>

In some situations, more than one accommodation may be necessary to meet the needs of the attorney with the disability, while some circumstances will dictate that the employer choose between multiple, effective accommodations. In either case, the ADA

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

requires that the chosen accommodation be reasonable and effective in eliminating the workplace barrier.<sup>72</sup> Employers should endeavor to give serious consideration to a specific accommodation requested by an attorney. However, employers are free to choose a less expensive or less burdensome alternative as long as it still effectively meets the attorney's needs. Engaging in an interactive process is beneficial for identifying the options available, discussing the merits of each, and obtaining the attorney's input before rendering a final decision.

It is important to note that the need for an accommodation may change over time. If an attorney requests more than one reasonable accommodation or a change to a current accommodation, an employer should again engage in the interactive process. Generally, an employer should not ask for additional information to establish that the attorney has an ADA "disability" unless previous information suggested that the disability or its limitations would be of limited duration.<sup>73</sup> Employers should consult with the requesting attorney after providing a reasonable accommodation to ensure that it is working as expected, and should also consult with attorneys that have disabilities before making any major changes in the work environment that would affect all employees.

A reasonable accommodation does not require lowering standards or removing essential functions of the job.<sup>74</sup> Employers should be careful to distinguish between essential and marginal functions. Legal employers, especially law firms, may unnecessarily focus on marginal functions of the job, such as making sure associates arrive to the office before partners. While essential functions, like effective client representation, never have to be removed as a reasonable accommodation, marginal functions can be lifted.<sup>75</sup> Employers should make their expectations for productivity and time standards clear. If problems arise in any of these areas, supervisors should

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<sup>72</sup> See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

<sup>73</sup> EEOC, *supra* note 51.

<sup>74</sup> *Bolstein v. Reich*, 1995 U.S. Dist. LEXIS 731, 3 Am. Disabilities Cas. (BNA) 1761 (D.D.C. 1995) (attorney with chronic depression and severe personality disturbance was not a qualified individual with a disability because his requested accommodations of more supervision, less complex assignments, and the exclusion of appellate work would free him of the very duties that justified his GS-14 grade), motion for summary affirmance granted, 1995 U.S. App. LEXIS 32536 (D.C. Cir. 2002).

<sup>75</sup> EEOC, *supra* note 51.

immediately discuss them with the attorney with a disability just as they would with any other attorney. However, if an attorney recognizes that a workplace problem is connected to a disability, the attorney should raise the issue of reasonable accommodation to correct the problem, thus enabling the attorney to meet the employer's expectations.<sup>76</sup>

## **Part VI: Best Practices for Legal Employers to Promote Attorney Well-Being**

While many legal employers technically have policies about attorney mental health, ADA accommodations, and trainings, they are often lumped at the end of handbooks or quickly skimmed over in PowerPoint presentations. It is important that employers endeavor to create an environment in which attorneys have access to resources and feel that they can take advantage of the available resources. The legal community, bar associations, law firms, governmental agencies, and other legal employers could be doing much more to support attorney well-being. An employer that truly wants to promote attorney well-being might do the following:

- Demonstrate a clear buy-in from senior attorneys and leadership that attorney mental health is important;
- Organize speaking engagements and provide materials about wellness and balance;
- Offer lunch-and-learn programs covering facts about mental health;
- Encourage attorneys to take a short, work-free break during the day;
- Provide education to all employees about stress, depression, anxiety, alcoholism, and burnout;
- Host events that are nonalcoholic;
- Establish an Employee Assistance Program (EAP) that provides counseling and mental health support, and make sure the organization's employees know about it and how to use it;

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<sup>76</sup> *Id.*

- Host retreats where participants focus on learning stress reduction, relaxation, meditation, and team building;
- Set a maximum for billable hours and lower the minimum;
- Enact specific policies that will allow employees to seek treatment for addiction or mental health issues without fear of losing their positions or status at work;
- Create and enforce a back-to-work policy that will keep employees accountable throughout their recovery;<sup>77</sup>
- Train senior attorneys on how to spot signs of stress, fatigue, anxiety, or depression;
- Have an open-door policy for employees to share when they are going through a difficult time at home or are feeling overwhelmed;
- Work with senior managers on how to help other attorneys balance their workloads and embrace a healthy work-life balance;
- Include information on how to deal with mental illness in the workplace in the organization's employee handbook.<sup>78</sup>

This is just a list of examples, and legal employers should take the time to look into what resources and practices are right for them and their employees. In 2017, the National Task Force on Lawyer Well-Being created a 72-page report that outlines recommendations around what needs to be done in order to address and improve lawyers' well-being. The report's recommendations focus on the following five central themes:

Identifying stakeholders and the role each can play in reducing the toxicity in the legal profession; eliminating the stigma associated with help-seeking behaviors; emphasizing that well-being is an indispensable part of a lawyer's duty of

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<sup>77</sup> Thomas E. Schimmerling, *Addressing Impaired Attorneys*, ABA (May 1, 2019), [https://www.americanbar.org/groups/law\\_practice/publications/law\\_practice\\_magazine/2019/MJ2019/MJ19Schimmerling/](https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/MJ2019/MJ19Schimmerling/).

<sup>78</sup> Keith Mishler, *Mental Health at Work: The Laws and Best Practices*, INSPERITY, <https://www.insperity.com/blog/mental-health-at-work/>.

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competence; educating lawyers, judges, and law students on lawyer well-being issues; and taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.<sup>79</sup>

The well-being report suggested legal employers form a well-being committee or hire a well-being advocate. The report also said:

Without dedicated personnel, real progress on well-being strategies will be difficult to implement and sustain. The well-being advocate or committee should be responsible for evaluating the work environment, identifying and addressing policies that create the greatest mental distress among employees, identifying how best to promote a positive state of well-being and tracking the progress of well-being strategies.<sup>80</sup>

The Task Force also recommends that legal employers consider continually assessing the state of well-being among lawyers and staff and whether workplace cultures support overall well-being. This process might include creating an anonymous survey to measure lawyer and staff attitudes and beliefs about well-being, stressors in the firm that significantly affect well-being, and organizational support for improving the workplace. Legal employers should collect information to ascertain information, such as whether attorneys perceive that their employers value and support their well-being; or whether they view firm leaders as role models for healthy behaviors and as empathetic to attorneys who may be struggling. Surveys can also be conducted to measure specific issues plaguing attorneys like depression, substance use, burnout, work engagement, and psychological well-being. Programs in the medical profession have recommended a bi-annual distribution of the Maslach Burnout Inventory, the most widely used burnout assessment.<sup>81</sup> If attorneys understand that the organization will

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<sup>79</sup> David R. Brink, *The Path to Lawyer Well-Being Practical Recommendations for Positive Change*, NATIONAL TASK FORCE ON LAWYER WELL-BEING, (Aug. 14, 2017), available at <http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (citing J. Eckleberry-Hunt, A. Van Dyke, D. Lick, & J. Tucciarone, *Changing the Conversation from Burnout to Wellness: Physician Well-being in Residency Training Programs*, 1 J. GRADUATE MED. EDUC. 225 (2009)).

reasonably accommodate health conditions, including recovery for mental health disorders and addiction, they will feel more comfortable seeking help, taking time off, or taking other steps to improve their situations.

In addition to acquiring feedback from employees, the well-being report further advises legal employers to conduct in-depth and honest evaluations of their current policies and practices relating to attorney well-being. The evaluation should seek input from all lawyers and staff in a safe and confidential manner.<sup>82</sup>

Legal employers should also monitor for signs of work addiction and poor self-care. Numerous health and relationship problems, including depression, anger, anxiety, sleep problems, weight gain, high blood pressure, low self-esteem, low life satisfaction, work burnout, and family conflict can develop from work addiction. Legal employers should expressly encourage lawyers to make time to care for themselves and attend to other personal obligations. They may also want to consider promoting physical activity, to aid health and cognitive functioning, or encouraging the office to take time together out of the office to play friendly games or engage in other non-work activity.

Legal employers should also provide education and training on well-being related topics and recruit experts to help them do so. The report recommends orientation programs for new lawyers that incorporate attorney well-being education and training in order to emphasize its importance to new hires. All staff members should be made aware of the programs that the employer offers.

## Part VII: Conclusion

In order to achieve positive change, legal employers will need to set standards, align incentives, and give feedback about progress on attorney well-being topics.<sup>83</sup> Few legal employers currently have structural supports for lawyer well-being.<sup>84</sup> Many have limited formal leader development programs, lack standards for leadership skills and competencies, and are missing criteria for evaluating leaders' overall performance and commitment to attorney well-being. In law firms especially, most incentives are aligned

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<sup>82</sup> See *id.* at Appendix D (task force attached an example evaluation).

<sup>83</sup> *Id.* (citing R. A. Noe, *Employee Training and Development*, MCGRAW-HILL (2013)).

<sup>84</sup> Grace Maral Burnett et al., *Analysis: Lawyer Well-Being Critical During Pandemic*, BLOOMBERG LAW, (March 25, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lawyer-well-being-critical-during-pandemic>.

entirely toward billable hours and client acquisition, and any feedback related to attorney well-being is likely dismissed. In order for there to be real, positive change in attorney mental health, legal employers have to put forth the time and expense to really check in on their employees to determine how they are feeling at work. Employers need to create an environment where attorneys have access to programs and resources that can help their well-being. Perhaps most importantly, legal employers need to do everything they can to ensure attorneys feel they can actually take advantage of the resources offered to them.

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