

DISABILITY-RELATED MISCONDUCT AND THE LEGAL  
PROFESSION: THE ROLE OF THE AMERICANS WITH  
DISABILITIES ACT

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I. INTRODUCTION

The issue of disability-related misconduct arises frequently in both employment cases and lawyer-discipline cases. Employees who are discharged for misconduct often argue that their misconduct was causally connected to a disability. Similarly, lawyers facing sanctions for violating professional responsibility rules often claim that their misconduct was disability-related. The Americans with Disabilities Act<sup>1</sup> (ADA), which prohibits discrimination because of disability, applies in both scenarios. Title I governs the employment context,<sup>2</sup> and Title II covers public services, which include state disciplinary proceedings against lawyers.<sup>3</sup>

Despite these similarities, while employees often rely on the ADA to challenge discharge from employment,<sup>4</sup> lawyers only infrequently cite the ADA in their disciplinary proceedings.<sup>5</sup> This Article explores the reasons behind the disuse of the ADA by lawyers and the implications of taking the ADA seriously in lawyer-discipline cases. Those implications include treating disability as a mandatory mitigating factor, focusing on the likelihood of the attorney committing future misconduct, and adopting a more sophisticated approach to causation, fault, and deterrence.

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. *Id.* §§ 12111-12117.

3. *Id.* §§ 12131-12165.

4. *See generally* Kelly Cahill Timmons, *Accommodating Misconduct Under the Americans with Disabilities Act*, 57 FLA. L. REV. 187 (2005).

5. *See infra* notes 11-12 and accompanying text.

## II. DISUSE OF THE ADA BY ATTORNEYS IN DISCIPLINARY PROCEEDINGS

To fall within the ADA's protected class, a lawyer must be a qualified individual with a disability, which the statute defines as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."<sup>6</sup> The statute defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual in question, "a record of such an impairment," or "being regarded as having such an impairment."<sup>7</sup> Whether a particular attorney's impairment satisfies the ADA's definition of disability is outside the scope of this Article.<sup>8</sup> Title II of the ADA prohibits discrimination by public entities against qualified individuals with disabilities,<sup>9</sup> and courts agree that it applies to lawyer discipline proceedings.<sup>10</sup>

Despite the consensus that the ADA is applicable to attorney disciplinary proceedings, the statute is seldom mentioned in the state court decisions of such proceedings. Recent searches revealed that since the ADA's effective date, less than four percent of decisions discussing both disability and misconduct also cited the ADA.<sup>11</sup> Most attorneys facing discipline for

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6. 42 U.S.C. § 12131(2) (2000).

7. *Id.* § 12102(2).

8. For a discussion of how particular impairments may satisfy the definition of disability and may manifest themselves in the form of workplace misconduct, see Timmons, *supra* note 4, at 205-10. Interestingly, courts discussing the ADA in lawyer-discipline cases typically assume that the lawyer has an ADA-defined disability. *See, e.g.*, Cincinnati Bar Ass'n v. Komarek, 702 N.E.2d 62, 67 (Ohio 1998) (considering attorney's ADA argument without analyzing whether his bipolar disorder is an ADA-qualifying disability); People v. Reynolds, 933 P.2d 1295, 1304-05 (Colo. 1997) (considering attorney's ADA argument without analyzing whether his depression is an ADA-qualifying disability).

9. 42 U.S.C. § 12132 (2000).

10. *See, e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114, 1118 (Okla. 1996) (noting that Title II of the ADA applies to public entities and holding that the ADA applies to the Oklahoma Bar Association, "an arm of this Court"); Florida Bar v. Clement, 662 So. 2d 690, 700 (Fla. 1995) (stating that the ADA applies to the Bar).

11. A Lexis search conducted on May 12, 2008, in the "Ethics Cases" "All States" database, using the terms "disability w/100 misconduct" resulted in 850 cases decided since 1991. Adding the phrase "Americans with disabilities" to the search resulted in only thirty-one cases decided during the same time period. A Westlaw search conducted on May 12, 2008, in the "Multistate Legal Ethics and Professional Responsibility Cases" database, using the terms "disability w/100 misconduct and da(aft 1991)" resulted in 1240 cases. Adding the phrase "Americans with disabilities" to the search resulted in only thirty-nine cases.

misconduct that may be causally connected to a disability do not make arguments based on the ADA.<sup>12</sup>

Why do so many lawyers with disabilities, when their ability to engage in their profession is in question, fail to assert the protections of the ADA? One explanation is that courts will often find an attorney's disability to be a factor mitigating the severity of a rule violation even without consideration of the ADA. The American Bar Association Standards for Imposing Lawyer Discipline (ABA Standards) include disability and chemical dependency as part of a list of circumstances that "may justify a reduction in the degree of discipline to be imposed."<sup>13</sup> According to the ABA Standards, mental disability or chemical dependency may be a mitigating circumstance, provided that four factors are met:

- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.<sup>14</sup>

Interestingly, physical disability is also listed as a mitigating circumstance but without the above limiting factors.<sup>15</sup>

Many state courts follow the ABA Standards—"the most frequently used standards for imposing lawyer sanctions"<sup>16</sup>—and expressly consider disability as a potential mitigating circumstance.<sup>17</sup> Other state courts, while not citing the ABA Standards, also treat disability as relevant to mitigation, generally using the same or similar limiting factors.<sup>18</sup> Because courts will typically

12. See, e.g., *In re Hasenbank*, 151 P.3d 1, 6 (Kan. 2007) (lacking reference to ADA where attorney claimed depression and bipolar disorder caused his misconduct); *In re Conduct of Coyner*, 149 P.3d 1118, 1123 (Or. 2006) (lacking reference to ADA where attorney claimed mental disability and alcoholism caused his misconduct); *In re Stoller*, 902 So. 2d 981, 984 (La. 2005) (lacking reference to ADA where attorney claimed Parkinson's Disease and depression contributed to his misconduct).

13. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.32 (1992) [hereinafter ABA STANDARDS].

14. *Id.* § 9.32(i).

15. *Id.* § 9.32(h); see also *In re Peasley*, 90 P.3d 764, 776 (Ariz. 2004) (stating that a sustained period of rehabilitation and the unlikelihood of recurrence are not relevant when an attorney claims physical disability as a mitigating factor, but only when he or she claims mental disability or chemical dependency).

16. Leslie C. Levin, *The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 33 (1998).

17. See, e.g., *In re Coyner*, 149 P.3d 1118, 1123 (Or. 2006) (citing ABA STANDARDS, *supra* note 13, § 9.32); *Lawyer Disciplinary Bd. v. Dues*, 624 S.E.2d 125, 133 (W. Va. 2005) ("Because we believe that the mitigating mental disability standard established by the ABA is sound, we adopt that standard.").

18. See, e.g., *In re Hasenbank*, 151 P.3d 1, 6 (Kan. 2007); *In re Disciplinary Proceedings Against*

consider disability as a potential mitigating factor as a matter of course, attorneys may see no need to assert their rights under the ADA in disciplinary proceedings.

In addition, citing the ADA in a disciplinary proceeding does not appear to have benefitted any lawyer. This fact is somewhat surprising, given that the first published attorney discipline case discussing the ADA contains reasoning that is potentially helpful to some attorneys with disabilities. The attorney in *Florida Bar v. Clement* claimed that sanctioning him for misappropriating the funds of two clients would violate the ADA due to his bipolar disorder.<sup>19</sup> The Florida Supreme Court first concluded that the ADA was not applicable because the attorney's misconduct was not a "direct result" of his bipolar disorder, finding an insufficient causal connection between the lawyer's disability and his misconduct.<sup>20</sup> Nonetheless, the court stated that even if the element of causation was satisfied, the ADA still would not prevent the court from imposing sanctions:

Clement is not "qualified" to be a member of the [b]ar because he committed serious misconduct, and no "reasonable modifications" are possible. Although Clement was under psychiatric care for his bipolar disorder when the incidents in this case occurred, Clement also said he could fool his doctor into believing that he was in control during some of the period in question. This suggests that nothing could prevent repetition of the egregious misconduct in this case.<sup>21</sup>

The last two sentences are crucial: If the lawyer was receiving treatment for his disability at the time he engaged in the misconduct, and if even his psychiatrist could not tell when he was significantly impaired by his disability, this suggests that the lawyer is likely to continue to commit similar misconduct in the future. The ability to avoid misappropriating client funds—one of the most serious ethical violations possible—is certainly one

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Jacobson, 690 N.W.2d 264, 275 (Wis. 2004); *In re Disciplinary Action Against Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983); see also STATE BAR OF CAL., STANDARDS FOR ATTORNEY SANCTIONS FOR PROF'L MISCONDUCT, Standard 1.2(e)(iv) (2007)

Circumstances which shall be considered mitigating are: . . . extreme emotional difficulties or physical disabilities suffered by the member at the time of the act of professional misconduct which expert testimony establishes was directly responsible for the misconduct; provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse; and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties or disabilities.

19. 662 So. 2d 690, 692 (Fla. 1995).

20. *Id.* at 700.

21. *Id.*

of the “essential eligibility requirements” for membership in a state bar. It is difficult to imagine what “reasonable modification” could enable someone with a propensity to steal client funds to avoid doing so.<sup>22</sup> Accordingly, the lawyer did not appear to be a “qualified individual with a disability,” and the court correctly found that the ADA did not prohibit his disbarment.

The *Clement* court’s forward-looking analysis of the ADA concepts of “qualified” and “reasonable modification” could assist some attorneys with disabilities in their disciplinary proceedings. This analysis suggests that if successful treatment or a restructuring of one’s practice has rendered an attorney unlikely to repeat her misconduct in the future, the attorney is a “qualified individual with a disability” who falls within the ADA’s protection. Subsequent courts, however, have ignored this aspect of *Clement*’s reasoning.

In *State ex rel. Oklahoma Bar Association v. Busch*,<sup>23</sup> for example, the Oklahoma Supreme Court extensively quoted language from the *Clement* decision, including the statement in *Clement* that the attorney was not qualified because he committed serious misconduct and no reasonable modifications were possible.<sup>24</sup> The *Busch* court did not include the language from *Clement* indicating that the attorney in that case was likely to continue his misconduct in the future. Rather, the *Busch* court stated that it saw “no ‘reasonable accommodation’ which can be made with regard to [r]espondent’s neglect of client matters and deceit in court which would accomplish the purpose of maintaining the integrity of the [b]ar and promoting the public’s confidence in the state’s many attorneys.”<sup>25</sup>

Unlike the reasoning in *Clement*, the *Busch* court’s discussion of the ADA focused entirely on the fact that the attorney had committed the misconduct in the past;<sup>26</sup> it contained no analysis of whether the attorney was likely to continue to commit misconduct in the future. This lack of analysis is surprising given that later in the opinion the court noted that the attorney’s Attention Deficit Disorder, which caused some of his misconduct, was “now under control.”<sup>27</sup> Thus, taking a forward-looking approach, perhaps the attorney in *Busch* was a qualified individual with a disability falling within the

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22. One possibility might be requiring the attorney to practice with another lawyer and to have no access to client funds. However, even that possibility may provide insufficient protection to clients. If an attorney has a propensity to misappropriate client funds—committing such a dramatic betrayal of the attorney-client relationship—the attorney may be likely to commit other misconduct as well.

23. 919 P.2d 1114 (Okla. 1996).

24. *Id.* at 1118.

25. *Id.* at 1119.

26. *See id.* at 1120 (discussing the attorney’s past misconduct).

27. *Id.*

protection of the ADA. However, instead of carefully applying the ADA's "qualified" and "reasonable modification" factors to the facts of the case, the court simply concluded, "As the Florida Supreme Court stated, the ADA does not prevent the discipline of attorneys with disabilities."<sup>28</sup>

Other courts have followed *Busch* and its misreading of *Clement*, holding that disabled attorneys who have committed misconduct are per se not "qualified" individuals within the meaning of the ADA.<sup>29</sup> Rather than engaging in careful analysis of whether the lawyer was likely to commit misconduct in the future, these courts rejected the relevance of the ADA with such statements as: "The purpose of disciplinary proceedings is the protection of the public and the need for protection is the same whether or not the attorney is mentally impaired."<sup>30</sup> Moreover, some courts' ADA analyses consist solely of citing *Busch* and *Clement* in support of the proposition that the ADA does not bar the discipline of attorneys with disabilities.<sup>31</sup> None of these courts considered the possibility that the ADA, while not mandating that attorneys who engage in disability-related misconduct receive no discipline, might be relevant in determining the extent of the discipline they should receive.<sup>32</sup>

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28. *Id.* at 1119-20. In fact, the Florida Supreme Court made a distinctly different statement: "Thus, while the ADA applies to the [b]ar, it does not prevent this Court from taking disciplinary action against Clement." Fla. Bar v. Clement, 662 So. 2d 690, 700 (Fla. 1995). There is a big difference between stating that the ADA does not bar the discipline of any attorneys with disabilities and stating that the ADA does not bar the discipline of a specific attorney with a disability, who appears likely to continue to misappropriate client funds.

29. *See, e.g., In re Marshall*, 762 A.2d 530, 539 (D.C. 2000) ("[A] lawyer who has misappropriated client funds and submitted fabricated documents to [b]ar [c]ounsel does not 'meet the essential eligibility requirements of membership' in our profession." (citing *Clement*, 662 So. 2d at 700; and *Busch*, 919 P.2d at 1116-18)); *Doe v. Attorney Discipline Bd.*, No. 95-1259, 1996 WL 78312, at \*3 (6th Cir. Feb. 22, 1996) (rejecting attorney's claim that the Michigan Attorney Discipline Board violated the ADA by disciplining him: "Since Doe's disability, if it indeed has caused his acts of misconduct, has precluded him from satisfying the most basic ethical requirements of his profession, he is not qualified under the provisions of the ADA"). Neither the *Marshall* nor the *Doe* court based its "qualified" analysis on whether the lawyer was likely to continue to commit misconduct in the future.

30. *Ligon v. Price*, 200 S.W.3d 417, 429 (Ark. 2004); *see also In re Disciplinary Action Against Milloy*, 571 N.W.2d 39, 46-47 (Minn. 1997). In its sole paragraph discussing the ADA, the court cited *Busch* and *Clement*, never mentioned "qualified" or "reasonable modification," and concluded, "We too have a duty to impose discipline when it is necessary to protect the public regardless of an attorney's disability." *Id.*

31. *See, e.g., Columbus Bar Ass'n v. Elsass*, 713 N.E.2d 421, 425 (Ohio 1999) (stating that the ADA "does not prevent the discipline of attorneys with disabilities"); *People v. Reynolds*, 933 P.2d 1295, 1305 (Colo. 1997) ("In accord with the Florida and Oklahoma supreme courts, we conclude that the ADA does not prevent us from disciplining the respondent.").

32. Notably, the Florida Supreme Court, despite the promise of its forward-looking approach to the meaning of the term "qualified" in *Clement*, gave short shrift to the ADA in a later case, *Florida Bar v.*

The lack of success experienced by any attorney who cited the ADA in a disciplinary proceeding helps explain why so few lawyers make ADA-based arguments. Moreover, many of the courts that have rejected the relevance of the ADA nonetheless considered the attorney's disability as a potential mitigating factor under their non-ADA-based standards.<sup>33</sup> Accordingly, reliance on the ADA may appear unnecessary as well as futile. Citing the ADA may even pose a risk of harming a lawyer's case. A judge in one case, dissenting from the majority's decision to impose a sanction of indefinite suspension, contended that the court should disbar the attorney in part due to his "effort to evade responsibility for his own conduct via a less than bona fide effort to invoke relief under the ADA."<sup>34</sup>

To date, the ADA has played no effective role in attorney discipline cases. Section III, below, explores some of the implications of taking the ADA seriously in the law of lawyer regulation.

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*Gross*, 896 So. 2d 742, 743 (Fla. 2005). In *Gross*, Lee Howard Gross committed numerous serious acts of misconduct, including misappropriating over \$100,000 in client funds and forging the signatures of both clients and a judge. *Id.* at 743. Gross presented substantial evidence regarding his addiction to drugs and alcohol and rehabilitation from that addiction; nonetheless, the court concluded that he should be disbarred for five years. *Id.* at 743, 747. Gross argued that, although the ADA did not dictate that he should receive no discipline for his misconduct, the statute indicated that he should receive a less severe sanction than a five-year disbarment. *Id.* at 747. In response to Gross's argument, the court noted only that he could seek readmission after five years and that "this [c]ourt has already rejected this same type of argument in *Florida Bar v. Clement*." *Id.*

33. See, e.g., *Elsass*, 713 N.E.2d at 425 (imposing an indefinite suspension, rather than the "normal" penalty of disbarment, on attorney who continued to practice law while under suspension, in part because of attorney's successful recovery from drug and alcohol abuse); State *ex rel.* Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114, 1120 (Okla. 1996) (stating that the court is "[t]aking [the attorney's] neurological deficit, now under control, into account as mitigation"); *In re Disciplinary Action Against Milloy*, 571 N.W.2d 39, 47 (Minn. 1997) (stating that the lawyer's diagnosis of ADD may serve as mitigating factor).

34. *Elsass*, 713 N.E.2d at 425 (Shaw, J., dissenting). Similarly, the District of Columbia Court of Appeals approved reasoning by the Board of Professional Responsibility which reflected incredulity and outrage at an attorney's ADA claim. The Board stated,

We cannot and do not believe that Congress intended the ADA to be a shield, much less a sword, to be wielded against appropriate discipline of lawyers who break disciplinary rules. We cannot and do not believe that Congress intended that a lawyer who misappropriates client funds and fabricates evidence to coverup [sic] his wrongdoing should be insulated by the ADA from the efforts of the public authorities of the District of Columbia to protect the public from him.

*Marshall*, 762 A.2d at 535.

### III. THE PROPER ROLE OF THE ADA IN ATTORNEY DISCIPLINARY PROCEEDINGS

A careful consideration of the ADA in lawyer disciplinary proceedings would lead to change in three main areas. First, the attorney's disability would be a required, rather than an optional, mitigating factor. Second, courts would pay more attention to the likelihood of the lawyer committing misconduct in the future and would emphasize client protection as the primary purpose of lawyer discipline. Third, courts would adopt a more sophisticated understanding of causation, fault, and deterrence. Significantly, under most circumstances, finding that an attorney's misconduct was caused by his or her disability would remain a mitigating factor rather than a complete excuse.

#### *A. Disability as a Required Mitigating Factor*

The ABA Standards provide suggested sanctions—disbarment, suspension, public reprimand, or private admonition—based on three factors.<sup>35</sup> The factors are the ethical duty violated (whether that duty was owed to a client, the public, the legal system, or the profession), the lawyer's mental state (intent, knowledge, or negligence), and the seriousness of the actual or potential harm caused by the lawyer's misconduct.<sup>36</sup> The standards then provide that aggravating or mitigating factors could affect the suggested sanction.<sup>37</sup>

The ABA Standards include disability as a potential, but not mandatory, mitigating factor. Mental disability and chemical dependency are included in a list of thirteen factors that “*may* justify a reduction in the degree of discipline to be imposed.”<sup>38</sup> The commentary to the provision on mitigating factors provides that the weight given to mental disability and chemical dependency should vary based on the closeness of the causal connection between the disability and the misconduct.<sup>39</sup> According to the commentary, if the disability is “a substantial contributing cause of the offense, it should be

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35. ABA STANDARDS, *supra* note 13, §§ 2.2-2.6. The standards also mention probation as a possible sanction but do not list probation as the proposed sanction for any offense. *Id.* § 2.7.

36. *Id.* § 3.0(a)-(c).

37. *Id.* intro. cmt. (“[A]fter making the initial determination as to the appropriate sanction, the court would then consider any relevant aggravating or mitigating factors”); *see also* § 3.0(d); § 9.22 (listing aggravating factors); § 9.32 (listing mitigating factors).

38. *Id.* § 9.32 (emphasis added).

39. *Id.* § 9.32 cmt.

given great weight.”<sup>40</sup> As noted by a critic of the standards, “It is unclear, however, whether the reference to weight refers to how this factor should be weighed against the initial determination or how to weigh this factor against other [aggravating or mitigating] factors.”<sup>41</sup>

In contrast to the optional approach taken by the ABA Standards, the ADA mandates consideration of disability as a mitigating factor provided that the attorney is a qualified individual with a disability. Some courts have misinterpreted this requirement of the ADA by focusing on Title II’s prohibition of “discrimination” by a public entity or exclusion from participation in the activities of a public entity “by reason of [] disability.”<sup>42</sup> These courts have reasoned that as long as they assign the same sanction to similarly situated disabled and non-disabled attorneys, they are not committing discrimination on the basis of disability.<sup>43</sup>

This reasoning reflects a fundamental misunderstanding of the scope of the obligations imposed by Title II of the ADA. Admittedly, this confusion is not surprising in light of differences in the language of Titles I and II. Title I expressly defines prohibited discrimination as including not only disparate treatment,<sup>44</sup> but also disparate impact<sup>45</sup> and failure to make reasonable

40. *Id.*

41. Levin, *supra* note 16, at 59 n.262.

42. 42 U.S.C. § 12132 (2000).

43. In *In re Marshall*, for example, the court approved the reasoning of the Board of Professional Responsibility:

With respect to the “discrimination” argument, respondent is not being disciplined because he is or was a cocaine addict. He is not being “discriminated” against “by reason of such disability.” He is being disciplined because he misappropriated client funds and fabricated evidence. This is not “discrimination” against a cocaine addict. Any lawyer not addicted to cocaine, who did the same thing, would be disciplined in the same way, for the same reasons.

Disciplining a lawyer for dishonesty is not “discriminating” against someone for a “disability.” 762 A.2d 530, 535-36 (D.C. 2000); *see also* *Doe v. Attorney Discipline Bd.*, No. 95-1259, 1996 WL 78312, at \*3 (6th Cir. Feb. 22, 1996) (“The defendants did not suspend Doe because he has a disability, but rather because he repeatedly breached the most basic duties of an attorney, i.e., made misrepresentations to clients, failed to abide by deadlines.”).

44. 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . [various] terms, conditions, and privileges of employment.”).

45. *Id.* §§ 12112(a), 12112(b)(3)(A) (defining prohibited discrimination as including “utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability”); §§ 12112(a), 12112(b)(6) (defining prohibited discrimination as including “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by [the employer], is shown to be job-related for the position in question and is consistent with business necessity”).

accommodations.<sup>46</sup> In this way, Title I makes evident that its concept of discrimination serves the goal of equal opportunity as well as that of equal treatment.<sup>47</sup> Under both the disparate impact theory and the reasonable accommodations theory, a Title I plaintiff contends that the employer's equal treatment of its employees operated to deny the plaintiff equal opportunity and that the employer must alter that treatment because of its effect on the plaintiff or on those in the plaintiff's protected class.<sup>48</sup> In other words, the plaintiff demands that the employer not treat his disability as irrelevant, but rather take the disability into account.

In contrast, the equal opportunity goal of Title II of the ADA—and the fact that the statute requires affirmative steps on the part of public entities—becomes apparent only after careful reading.<sup>49</sup> First, the statute defines “qualified individual with a disability,” the class protected from discrimination by Title II, as encompassing a duty to make reasonable modifications: “The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity.”<sup>50</sup> Moreover, the regulations issued by the Department of Justice implementing Title II clarify that the discrimination prohibited by the statute includes both disparate impact and failure to make reasonable modifications. Public entities are prohibited from

impos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and

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46. *Id.* § 12112(b)(5)(A) (defining prohibited discrimination as including “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]”).

47. *See* Timmons, *supra* note 4, at 198-201 (explaining equal treatment and equal opportunity in the context of the ADA).

48. *Id.* at 198.

49. *See* Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001), *abrogation on other grounds recognized in* Guttman v. Khalsa, 446 F.3d 1027 (10th Cir. 2006)

A cursory reading of the statutory language can leave the impression that Title II simply prohibits intentional exclusion against the disabled solely because of their status as “disabled.”

A more thorough review, however, reveals that, rather than preventing public entities from treating the disabled differently than the nondisabled, Title II requires that public entities make certain accommodations for the disabled in order to ensure their access to government programs.

*Id.* at 1028.

50. § 12131(2).

equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.<sup>51</sup>

They are required to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>52</sup> Courts agree that Title II serves the goal of equal opportunity, or “‘meaningful access’ to government programs and benefits,”<sup>53</sup> by imposing a duty to refrain from disparate impact discrimination and to make reasonable modifications.<sup>54</sup>

Title II’s duty of reasonable modification and prohibition of disparate impact discrimination dictate that disability is a mandatory mitigating factor in lawyer disciplinary proceedings, provided that the attorney is a qualified individual with a disability. The attorney’s disability status must be taken into account in determining the appropriate sanction. *In re Rubenstein*,<sup>55</sup> a case involving the request of an individual with a learning disability for additional time on the bar exam, provides a good analogy. Noting that “[t]he purpose of the ADA is to place those with disabilities on an equal footing and not to give them an unfair advantage,”<sup>56</sup> the court found that providing the plaintiff with extra time on the bar exam was a reasonable modification required by the statute.<sup>57</sup> Stating the same idea slightly differently, holding the learning-disabled plaintiff to the standard time limit for the bar exam would tend to screen her out from the benefit of admission to the bar, and the board of bar examiners could not show that the standard time limit was necessary. Equal

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51. 28 C.F.R. § 35.130(b)(8) (2007).

52. *Id.* § 35.130(b)(7).

53. *See, e.g.*, Theriault v. Flynn, 162 F.3d 46, 48 (1st Cir. 1998).

54. *See, e.g.*, Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448, 454 (5th Cir. 2005) (“[T]he ADA . . . impose[s] upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals”); McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) (“We have repeatedly recognized that facially neutral policies may violate the ADA when such policies unduly burden disabled persons, even when such policies are consistently enforced.”); Washington v. Ind. High Sch. Athletic Ass’n, 181 F.3d 840, 847 (7th Cir. 1999) (“[D]iscrimination under [the ADA] may be established by evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant’s rule disproportionately impacts disabled people.”); Ability Ctr. of Greater Toledo v. City of Sandusky, 181 F. Supp. 2d 797, 802 (N.D. Ohio 2001) (“Congress intended Title II of the ADA to cover disparate impact discrimination.”).

55. 637 A.2d 1131 (Del. 1994).

56. *Id.* at 1137 (internal quotation marks omitted).

57. *Id.* at 1139.

treatment of the learning-disabled plaintiff was not enough; extra time was required to provide her with equal opportunity.

Similarly, taking a lawyer's disability into account in a disciplinary proceeding when the disability causes the lawyer to engage in misconduct constitutes a reasonable modification of attorney discipline policies. The modification is required unless the state bar can demonstrate that making the modification would fundamentally alter the nature of its regulation of the practice of law. Treating the attorney's disability as irrelevant to the sanctioning decision—when the disability led to misconduct that the attorney found very difficult to control—would tend to automatically screen that person out from the benefit of practicing law and thus violates the ADA unless the state bar can show that such treatment is necessary.<sup>58</sup> The equal opportunity goal of Title II is not met by simply giving the attorney the same sanction that a non-disabled lawyer would receive.<sup>59</sup>

Moreover, the equal opportunity goal of Title II is not met when disciplining authorities have complete discretion regarding whether to treat disability as a mitigating factor. The ABA Standards do not indicate that disability should be afforded any more weight in mitigation than “personal or emotional problems,” despite the fact that disability is a protected trait under federal law.<sup>60</sup> In fact, it is arguably more difficult for lawyers to rely on disability as a mitigating factor because the lawyer must show a causal connection between the disability and the misconduct, recovery from the disability as evidenced by a sustained period of rehabilitation, and low likelihood of recurrence of the misconduct.<sup>61</sup> In contrast, the ABA Standards place no limits on the use of personal or emotional problems in mitigation. Other potential mitigating factors, like “character or reputation,”<sup>62</sup> often have

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58. Given that courts consider numerous mitigating factors in their sanctioning decisions, requiring them to consider disability seems unlikely to constitute a fundamental alteration, and ignoring this factor seems unlikely to be necessary.

59. *Cf.* Timmons, *supra* note 4, at 248 (“Just as workplaces that are not physically equipped to allow wheelchair access present obstacles to the employment opportunities of some disabled individuals, so too can workplace conduct policies that deem as disqualifying misconduct behavior that an individual with a disability may find impossible or nearly impossible to control.” (footnote omitted)).

60. *See* ABA STANDARDS, *supra* note 13, §§ 9.3, 9.32(c). Commentary to the standard provides only that “[c]ases concerning personal and emotional problems as mitigating factors include a wide range of difficulties, most often involving marital or financial problems.” *Id.*

61. *Id.* § 9.32(i).

62. *Id.* § 9.32(g).

little probative value,<sup>63</sup> yet under the ABA Standards courts are free to give them weight equal to, or even greater than, disability status.<sup>64</sup>

Some courts have adopted bright-line rules rejecting disability as a mitigating factor under certain circumstances, and such rules are also likely to run afoul of the ADA. For example, courts have held that where the lawyer engages in serious misconduct, such as misappropriation of funds, the lawyer's disability is irrelevant.<sup>65</sup> Other courts have held that where the attorney's disability is addiction to an illegal substance, the disability is not a mitigating factor.<sup>66</sup> These rules are consistent with the ADA only if they are "necessary" for the regulation of the practice of law or if modifying them would "fundamentally alter" the regulation of the practice of law. In light of the primary purpose of lawyer discipline—client protection—it is unlikely that either bright-line rule would satisfy the ADA.

63. Leslie Levin argues that character and reputation evidence is "the most misused of all the mitigating factors" because "[c]ourts often use such evidence to justify their decisions to treat well-connected lawyers leniently, without regard for whether the evidence provided is relevant to the misconduct or likely to predict a lawyer's future actions." Levin, *supra* note 16, at 54-55 (footnote omitted). According to Levin, courts should grant such evidence little to no weight in most discipline cases, because a good reputation is often due to the fact that attorney misconduct is hard to detect and the evidence is often provided by persons unfamiliar with the details of the attorney's practice or the alleged wrongdoing. *Id.* at 55.

64. *See id.* at 54 n.242 ("Character evidence is one of the variables predicting that a lawyer who converted client funds will not be disbarred"); *id.* at 54-55 ("Character and reputation evidence powerfully affects the sanctioning decision because the witnesses who provide it are often well-regarded members of the bench and bar.").

65. *See, e.g.,* *Disciplinary Counsel v. Hunter*, 835 N.E.2d 707, 713-14 (Ohio 2005). In *Hunter*, the lawyer's doctor testified that the lawyer's depression caused her misconduct and that he was confident that "she will have no debilitating recurrence of her former symptoms and can return to the competent and ethical practice of law." *Id.* at 713. The court nevertheless held that "[f]or theft and dishonesty of the magnitude committed in this case, the appropriate sanction is disbarment, even considering respondent's mental condition." *Id.* at 714; *see also In re Greenberg*, 714 A.2d 243, 254-55 (N.J. 1998) (applying jurisdiction's bright-line rule that misappropriation of funds mandated a sanction of disbarment to attorney whose depression caused his misconduct and who had undergone treatment such that he was unlikely to commit future misconduct); *In re Floyd*, 468 S.E.2d 302, 309-10 (S.C. 1996) ("While we have allowed evidence of depression to mitigate misconduct, we decline to do so here because of the serious nature of the misconduct, particularly regarding respondent's misappropriation of client funds and inducement of clients to borrow money from him." (citation omitted)).

66. *See, e.g., In re Marshall*, 762 A.2d 530, 537, 539 (D.C. 2000) (rejecting attorney's attempt to use cocaine addiction as a mitigating factor, given that his condition "was brought about, at least initially, by his own intentional violation of the law"); *In re Demergian*, 768 P.2d 1069, 1074 (Cal. 1989) ("[C]ocaine use is hardly a mitigating factor . . . [because the attorney] became addicted through voluntary use of an illicit drug."). One of the regulations interpreting Title II excludes from the statute's protection those currently using illegal drugs, but the regulation prohibits discrimination on the basis of illegal drug use against an individual who is not currently using illegal drugs and has been successfully rehabilitated or is participating in a supervised rehabilitation program. 28 C.F.R. § 35.131 (2007).

B. “*Qualified Individual with a Disability*” and the Purposes of Attorney Discipline

As discussed above, disability is a mandatory mitigating factor in lawyer disciplinary proceedings provided that the attorney is a qualified individual with a disability, because only such individuals fall within the protection of the ADA. An attorney is qualified if she meets the essential eligibility requirements for the practice of law, with or without reasonable modifications to the policies of the bar. According to some courts, the fact that an attorney committed misconduct in the past renders the attorney unqualified.<sup>67</sup> As recognized by the Florida Supreme Court in *Clement*, however, “qualified” is primarily a prospective inquiry.<sup>68</sup> The outcome of this inquiry should turn more on whether the lawyer is likely to commit misconduct in the future than on whether the lawyer committed misconduct in the past.

An examination of Title I cases involving employees discharged for disability-related misconduct supports the forward-looking nature of the qualified standard. In *Teahan v. Metro-North Commuter Railroad*,<sup>69</sup> the court remanded the case for consideration of whether “the likelihood of relapse and future absenteeism” by the plaintiff indicated that he was not qualified for his position.<sup>70</sup> The plaintiff’s past disability-caused absenteeism did not render him unqualified; what mattered was whether that absenteeism was likely to continue in the future. *Husowitz v. Runyon*<sup>71</sup> involved a postal worker who continued to make threats even after a year of therapy and soon after the postal service permitted him to return to work following a suspension for threatening his supervisor with physical violence.<sup>72</sup> Because it was likely that the postal worker’s threatening behavior would continue in the future, the court found him unqualified for his job.<sup>73</sup> The fact that courts must examine whether any

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67. See *supra* notes 23-32 and accompanying text.

68. See *supra* notes 21-22 and accompanying text.

69. 951 F.2d 511, 520 (2d Cir. 1991).

70. *Id.* at 520; see also *Hogarth v. Thornburgh*, 833 F. Supp. 1077, 1087 (S.D.N.Y. 1993) (“[T]he course of Mr. Hogarth’s illness after his termination from the FBI leaves no doubt that the possibility of further recurrence renders him unqualified to return to his former position.”).

71. 942 F. Supp. 822 (E.D.N.Y. 1996).

72. *Id.* at 834-35.

73. *Id.* at 835; see also *Hardy v. Sears, Roebuck & Co.*, No. 4:95-CV-0215-HLM, 1996 WL 735565, at \*7 (N.D. Ga. Aug. 28, 1996) (“Because of [p]laintiff’s unreliable history of taking his medication, and his inability to suppress entirely the potential manifestation of further manic episodes, [p]laintiff poses an ongoing risk of combative physical exchanges with his co-workers, and even potential physical harm to others.”).

reasonable accommodation would enable the individual to refrain from future misconduct reinforces the fact that the qualified inquiry is future-focused.<sup>74</sup>

The prospective nature of the qualified inquiry is also consistent with what most courts state is the primary purpose of lawyer discipline: protection of the public, rather than punishment of the attorney. As stated by the Minnesota Supreme Court, “The purpose of the attorney discipline system is not to punish the wrongdoer but to protect the public.”<sup>75</sup> In his article, *The Purposes of Lawyer Discipline*, Fred C. Zacharias agrees that “the role of retribution in lawyer discipline is questionable” and that a “reasonable view of discipline . . . is that its function is to assure competence rather than to lay blame.”<sup>76</sup> Given this function, Professor Zacharias asserts that disability and subsequent rehabilitation should lessen the sanction imposed on an alcoholic lawyer who stole client funds:

[I]f the lawyer truly is rehabilitated and the cause of his misconduct is eliminated, the disciplinary agency has no basis for finding the lawyer incompetent. Nor is the lawyer likely to commit similar misconduct in the future. Recognizing that rehabilitation will lessen or eliminate discipline may serve to encourage other alcoholic lawyers to seek treatment, which indirectly serves the interests of their future clients and the legal system generally.<sup>77</sup>

Some courts have stated that additional purposes of lawyer discipline are maintaining the integrity of the legal profession and public confidence in the bar. It could be argued that these purposes suggest that disability should not

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74. See, e.g., *Boldini v. Postmaster Gen. U.S. Postal Serv.*, 928 F. Supp. 125, 132 (D.N.H. 1995) (“[P]laintiff’s own treating counselor noted that if the management style were modified, as suggested by plaintiff, such a modification would not solve plaintiff’s problems with emotional outbursts. In short, it approaches the line of certainty that no reasonable accommodation would render [plaintiff] able or qualified to perform the essential functions of her job.”); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 228 (S.D.N.Y. 1994) (finding that plaintiff’s requested accommodation of being able to work at home would not enable her to perform the essential functions of her job because “[w]ork at home does not create total insulation from supervisors or coworkers,” and “[p]ersonal contact would still be required at critical junctures, triggering chances of recurrent outbursts”).

75. *In re Reinstatement of Jellinger*, 728 N.W.2d 917, 923 (Minn. 2007); see also *Attorney Grievance Comm’n v. Wingerter*, 929 A.2d 47, 59 (Md. 2007) (“This [c]ourt has made clear that the well settled purpose and goal of attorney discipline proceedings is to protect the public, not to punish the erring attorney.”); *Disciplinary Counsel v. O’Neill*, 815 N.E.2d 286, 297 (Ohio 2004) (“[I]n determining the appropriate length of the suspension and any attendant conditions, we must recognize that the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public.”).

76. Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 684 (2003). Professor Zacharias notes that “[w]hen punishment or vengeance are called for, they should be accomplished through parallel criminal or civil proceedings.” *Id.*

77. *Id.* at 681 (footnote omitted).

be a mitigating factor because “[t]reating [disabled] lawyers as persons deserving beneficent attention . . . negatively affects the image of lawyers as a whole and the public’s perception of disciplinary agencies’ willingness and ability to deal with subpar lawyers.”<sup>78</sup> It could also be argued that “[f]rom the standpoint of the victimized client, it makes no difference whether the . . . attorney is [disabled] or not.”<sup>79</sup> This reasoning, however, is inconsistent with the fact that courts typically consider numerous mitigating circumstances in determining a sanction; they do not automatically conclude that due to the need to maintain the integrity of the legal profession and public confidence in the bar a lawyer should receive the harshest possible sanction. Given that courts consider other mitigating factors, there can be no justification for them ignoring disability—the one factor required by federal law. If a victimized client is unlikely to care that her lawyer misappropriated funds because of a disability, the client is also unlikely to care that the misappropriating lawyer had personal problems or a great reputation in the legal community.

Similarly, while it is a valid concern of the bar to avoid the cynicism that will develop in the public if it believes that lawyers never face any discipline for their wrongdoing,<sup>80</sup> this goal should not be achieved on the backs of lawyers with disabilities. There are many problems with the public image of lawyers, including the public’s lack of trust in the effectiveness of the lawyer disciplinary system. The way to solve those problems is not to ignore the federally protected rights of attorneys with disabilities.

In cases involving disability-related misconduct, courts should focus on the goal of protecting the public and on the likelihood of the attorney committing future misconduct. Courts that have suggested that ignoring disability is necessary to protect the public—with statements like, “The purpose of disciplinary proceedings is the protection of the public and the need for protection is the same whether or not the attorney is mentally impaired”<sup>81</sup>—are misguided. If a lawyer committed misconduct because of a disability, and he has received treatment for the disability such that it is unlikely to manifest itself in the form of future misconduct, considering the disability as a mitigating factor poses little threat to the public. Unlike in many disciplinary proceedings, here there is an identifiable reason why the misconduct occurred and grounds for confidence that it will not recur. As

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78. *Id.* at 703.

79. *In re Marshall*, 762 A.2d 530, 537, 534 (D.C. 2000).

80. *See Zacharias, supra* note 76, at 728 (“[C]ourts should set a relatively high priority on assuring the public’s faith in the lawyer-regulatory process . . .”).

81. *Ligon v. Price*, 200 S.W.3d 417, 429 (Ark. 2004).

recognized by Professor Zacharias, rewarding treatment in this way is likely to encourage other lawyers with disabilities to seek treatment, which will benefit their clients.<sup>82</sup>

The ABA Standards properly focus on the likelihood of the disabled attorney committing future misconduct, but they may take too strict an approach. Under the ABA Standards, disability may be a mitigating circumstance only if the lawyer has been completely rehabilitated for a sustained period.<sup>83</sup> This policy choice has its merits: how can one be confident that an attorney's disability-related misconduct will not recur if the attorney has not demonstrated a sustained, as opposed to brief, period of rehabilitation?<sup>84</sup> Given the prospective nature of the qualified inquiry, however, perhaps disability should be a mitigating factor even if full rehabilitation has not yet occurred. If the lawyer is undergoing treatment for the disability, but the treatment is not complete at the time of the court's decision, the court could take the disability into account and order an indefinite suspension. The attorney then would be allowed to petition for reinstatement once treatment is completed and a sufficient recovery period has passed. Using the terms of the ADA, an attorney is qualified if reasonable modification of a policy would enable her to meet the essential eligibility requirements for the practice of law. More time for treatment and recovery could be a reasonable modification that could enable the lawyer to meet the essential eligibility requirement of being unlikely to commit disciplinary violations in the future.<sup>85</sup> This approach is preferable to that taken by the ABA Standards, under which if the attorney is not fully recovered at the time of the court's decision, the fact that the disability caused the attorney's misconduct is irrelevant.<sup>86</sup>

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82. See Zacharias, *supra* note 76, at 681.

83. ABA STANDARDS, *supra* note 13, § 9.32(i)(3).

84. See, e.g., *State ex rel. Okla. Bar Ass'n v. Wright*, 957 P.2d 1174, 1180 (Okla. 1997) (noting that lawyer's depression had only been stabilized on his current medication for two weeks prior to his disciplinary hearing, and lawyer had "a history of initial success with medication that later proves ineffective").

85. Without referencing the ADA, the Ohio Supreme Court took this approach in *Columbus Bar Association v. Winkfield*, 839 N.E.2d 924 (2006). The lawyer in *Winkfield* demonstrated a causal connection between his personality disorder and his misconduct but "continued to show signs of illness that . . . preclude[d] his competent and ethical practice of law." *Id.* at 932, 933. Because the lawyer's social worker reported significant improvement that was likely to continue, the court ordered an indefinite suspension rather than disbarment, to give the lawyer "the chance to prove himself in the future." *Id.* at 933.

86. See, e.g., *In re Conduct of Coyner*, 149 P.3d 1118, 1123 (Or. 2006) ("[T]he accused has made significant strides. But those strides are too recent and too incomplete to satisfy us that the accused has

Another potential problem with the ABA Standards is their suggestion that a lawyer's disability can be a mitigating factor only if the disability has been cured. The standards provide not only that recurrent misconduct must be unlikely, but also that "the respondent's *recovery* from the chemical dependency or mental disability [must be] demonstrated by a meaningful and sustained period of successful rehabilitation."<sup>87</sup> The use of the word "recovery" indicates that the drafters of the standards contemplated a mentally disabled lawyer receiving medication or therapy such that he is cured. The drafters failed to acknowledge other means by which an attorney could show that he is unlikely to commit future misconduct, such as restructuring his practice to avoid the limitations caused by the disability. Depending on the nature of the disability and the misconduct, possibilities include no longer being a sole practitioner, hiring support personnel, limiting one's practice to a particular practice area, or reducing the number of cases one handles.<sup>88</sup>

The ABA Standards' focus on recovery from disability as the only means of proving low likelihood of recurrent misconduct is consistent with the oft-criticized medical model of disability.<sup>89</sup> The medical model of disability treats disability as the result of limitations inherent in an individual's body or mind and as something to be cured.<sup>90</sup> In contrast, the social model of disability,

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achieved remission. Given that assessment of the record, the accused has failed to show that the mitigating factor of chemical dependency is present."); *People v. Goldstein*, 887 P.2d 634, 641-42, 644 (Colo. 1994) ("[T]he respondent had not recovered from his disability, but rather . . . was only in the initial phases of meaningful treatment, treatment that realistically would take several years. Thus, it has not been demonstrated that the respondent has recovered from the mental disability or that the recurrence of the conduct that forms the basis for this proceeding is unlikely").

87. ABA STANDARDS, *supra* note 13, § 9.32(i) (emphasis added).

88. See, e.g., *In re Hasenbank*, 151 P.3d 1, 7 (Kan. 2007) ("[T]he [r]espondent [shall] be placed on probation . . . [and] shall limit his practice to criminal prosecutions as an assistant county attorney in a county attorney's office in which the county attorney has a minimum of 10 years of experience as the county attorney."); *Lawyer Disciplinary Bd. v. Dues*, 624 S.E.2d 125, 133-34 (W. Va. 2005) ("As a result of the direct connection between Mr. Dues' mental disability and the misconduct in this case, we are of the opinion that limiting his practice [to work as a mental hygiene commissioner], as opposed to suspending his license, serves as an effective deterrent to other members of the Bar and maintains the public confidence in the ethical standards of the legal profession."); *Cuyahoga County Bar Ass'n v. Freedman*, 836 N.E.2d 559, 561 (Ohio 2005) ("[The attorney] has also relied on the services of a professional management consultant to help him set up more effective procedures in his law office."); *Sheridan's Case*, 813 A.2d 449, 454 (N.H. 2002) ("The [attorney] claims that he can overcome his lawyering deficiencies caused by his mental disorder through the structure and organization provided by a secretary.").

89. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 427 (2000) (stating that "virtually the entire ideology of the modern disability rights movement can be seen as a reaction to [the] 'medical/pathological paradigm' of disability," which "focused on medical treatment, physical rehabilitation, charity, and public assistance").

90. See *id.* at 427 (noting that the medical model treats disability "as an inherent personal

which underlies the ADA, views disability as “the interaction between societal barriers (both physical and otherwise) and the impairment.”<sup>91</sup> In determining whether an attorney meets the essential requirement of being unlikely to commit future misconduct and is thus qualified, the social model of disability requires consideration of possible changes to the attorney’s work environment. Such consideration is particularly important in the context of mental disabilities, which “can be greatly exacerbated or greatly ameliorated by the quality of interpersonal contact and the nature of the environment.”<sup>92</sup>

The forward-looking approach to disability-related misconduct might suggest that the only factor relevant to the sanctioning decision is whether the attorney is likely to commit misconduct in the future. In fact, some commentators have argued that if an attorney’s disability caused her to commit misconduct, she should receive no discipline at all.<sup>93</sup> Under most circumstances, though, the disability-related nature of a lawyer’s misconduct does not justify completely excusing the misconduct.

### C. Causation, Fault, and Deterrence

According to some commentators, if an attorney’s disability causes his misconduct, imposing any discipline on the attorney constitutes unfair

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characteristic that should ideally be fixed”); see also Wendy F. Hensel, *Interacting with Others: A Major Life Activity under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1144 (“[Under the medical model of disability,] social policy centers on ‘curing’ the medical problems that cause disability and rehabilitating the disabled to enable them to function as closely to ‘normal’ people as possible.”).

91. Bagenstos, *supra* note 89, at 428. Professor Bagenstos provides the example of a person with paralysis who will be unable to work if workplace entrances are too narrow to accommodate a wheelchair or accessible only by stairs. *Id.* at 429. He notes that, although the person’s paralysis is real, “it is not her physical impairment that has disabled her: What has disabled her is the set of social choices that has created a built environment that confines wheelchair users to their homes.” *Id.* at 429; see also Hensel, *supra* note 90, at 1145 (describing an individual confined to a wheelchair as disabled only “as a result of the design and construction of the facility rather than any inherent biological problem”).

92. SUSAN STEFAN, *HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES* 100 (2002).

93. See Christopher D. Kravotil, Note, *Separating Disability from Discipline: The ADA and Bar Discipline*, 78 TEX. L. REV. 993, 1005 (2000) (“While protecting the public and the integrity of the bar is certainly a worthy policy goal, it does not justify punishing disabled attorneys for conduct over which they had no control.”); Stephen M. Hines, Note, *Attorneys: The Hypocrisy of the Anointed: The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731, 744 (1996) (“Some courts have argued that they already account for the disciplined attorney’s disability because the disability may mitigate any disciplinary action. However, in the overwhelming majority of these instances, the attorney still faces punishment for misconduct he may have had no control over.” (footnote omitted)).

punishment for behavior over which the attorney has no control.<sup>94</sup> Such discipline, in fact, amounts to punishing the attorney for having a disability.<sup>95</sup> If the lawyer has received successful treatment for the disability and the misconduct is unlikely to recur, courts should completely excuse the misconduct.<sup>96</sup> If the lawyer has not yet recovered, courts should place him on disability-inactive status, allowing the attorney to return to practice once recovery has occurred, with no sanction for the past misconduct.<sup>97</sup>

These commentators display a lack of understanding of the complicated nature of causation. Just because there is a causal connection between an attorney's disability and her misconduct (in the words of one commentator, because the disability "triggered" or "precipitate[d]" the misconduct)<sup>98</sup> does not mean that the attorney had no ability to control her behavior. Causation does not require compulsion.<sup>99</sup> In fact, courts that have adopted such a strict definition of causation—finding a causal connection between disability and misconduct only if the disability "result[s] in an attorney's utter inability to conform his or her conduct in accordance with the law and the [rules of professional conduct]"<sup>100</sup>—rarely find causation satisfied.<sup>101</sup> Under this view

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94. See sources cited *supra* note 93.

95. See Kravotil, *supra* note 93, at 1008-09 ("The key point that every court taking on a disabled attorney misconduct case must bear in mind is that while the public must be protected, the ADA requires that the attorney not be subject to discipline merely because of the impairment.")

96. See *id.* at 1010 (asserting that courts should balance "the likelihood that the disability-induced misconduct will recur [and] the severity of the harm that would stem from such a recurrence . . . against the hardship that would fall on the disabled attorney by removing him from the practice of law," and that "when the hardship to the disabled attorney is greater than the danger from allowing him to continue practicing, he should be allowed to continue practicing"); Hines, *supra* note 93, at 747 ("A policy that punishes attorneys for misconduct that arose from a disability now under control, cured, or in remission does not serve [a legitimate] purpose. If the attorney has sought proper treatment and been ruled competent to practice law, then the attorney does not threaten the integrity of the bar.")

97. See Kravotil, *supra* note 93, at 1011-12 (arguing that non-rehabilitated attorneys "should be given a 'disability suspension'" and be allowed to return to active enrollment immediately upon proof that harm to the attorney outweighs the likelihood of recurrence of the misconduct and probable severity of the resulting harm); Hines, *supra* note 93, at 747 (asserting that attorneys should be placed on "disability inactive" status "until the disability no longer interferes with the attorney's ability to practice law" and that misconduct hearings suspended during the disability period should not be pursued when the attorney seeks reinstatement).

98. Kravotil, *supra* note 93, at 1010.

99. See Timmons, *supra* note 4, at 257 (noting that an "insist[ence] on evidence that the plaintiff's disability compelled her misconduct . . . is inconsistent with the reality of most mental disabilities" because conduct resulting from such disabilities "depend[s] greatly on the individual's environment"); STEFAN, *supra* note 92, at 58 ("[Mental disabilities] can be greatly exacerbated or greatly ameliorated by the quality of interpersonal contact and the nature of the environment.")

100. Attorney Grievance Comm'n of Md. v. Vanderlinde, 773 A.2d 463, 485 (Md. 2001).

101. See *id.* (finding the causation standard not met); see also *In re Disciplinary Action Against*

of causation, only a small percentage of lawyers with disabilities that manifest themselves in the form of conduct would receive any consideration of their disability in the sanctioning decision.

Moreover, arguing that a disability compels particular misconduct may ultimately be more harmful than helpful to individuals with disabilities. As explained by Susan Stefan, “The view that people with psychiatric disabilities have no control over their behavior, which equates the behavior with the disability, may perpetuate the very stereotypes that the ADA was intended to eliminate.”<sup>102</sup> In the specific context of lawyer regulation, asserting that a particular disability compels certain rule violations might make bar authorities more resistant to allowing individuals with a record of that disability to have a license to practice law in the first place.

A better approach, one that reflects the reality of most mental disabilities,<sup>103</sup> is to find causation satisfied if the attorney’s disability makes it substantially more difficult for her to comply with the professional responsibility rule at issue. This standard is consistent with the disparate impact theory of discrimination, which recognizes that “policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered ‘discriminatory.’”<sup>104</sup> If it is substantially more difficult (although not impossible) for an attorney to comply with a professional responsibility rule due to limitations caused by his disability, ordering the ordinary sanction for violation of the rule imposes significantly harsher burdens on the disabled attorney than on the lawyer population in general. Unless that precise sanction is “necessary,” failing to consider the attorney’s disability in mitigation is discriminatory.<sup>105</sup>

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Jellinger, 655 N.W.2d 312, 315 (Minn. 2002) (finding that attorney could not establish that his depression caused his misconduct because he still had the ability to direct his actions and to know right from wrong).

102. STEFAN, *supra* note 92, at 65.

103. *See supra* note 99.

104. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993).

105. Although it is inappropriate to adopt too strict a standard for causation, there are also negative implications from adopting too broad a standard. If disability is a mitigating factor when the disability limits only slightly an attorney’s ability to comply with a professional responsibility rule, this “could send the message that individuals with disabilities are less accountable for their behavior than are those without disabilities.” Timmons, *supra* note 4, at 258. “[E]mphasizing the lack of accountability of individuals with disabilities is likely to entrench exclusionary and paternalistic stereotypes,” *id.*, and such stereotypes can be quite damaging when persons with disabilities seek entry into the legal profession, *see* Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147, 147 (1994) (“In deciding issues of

Notably, although evidence that a lawyer's disability made it substantially more difficult for her to comply with a professional responsibility rule is sufficient to satisfy causation, courts should assign the disability more weight in mitigation if there is a stronger causal connection. If an attorney's disability made compliance impossible, courts should give the disability greater weight as a mitigating factor.<sup>106</sup>

On a related note, courts should refrain from automatically concluding that evidence that a lawyer successfully handled some aspects of his practice during the period of the misconduct is fatal to causation. According to some courts, if an "attorney was able to maintain and represent other clients during the period when she purportedly suffered from" a disability, this indicates that the attorney's disability did not cause the misconduct.<sup>107</sup> Expert testimony could assist courts in determining whether a lawyer properly representing some clients during the relevant period suggests that the lawyer's disability played less of a role in the misconduct than did a conscious choice by the lawyer.<sup>108</sup> In contrast, expert testimony could indicate that the lawyer's competent performance in some areas of his practice was consistent with an individual fighting to work through the effects of his disability and succeeding in some matters but not in others. Under such circumstances, the lawyer's

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character and fitness to practice, professional licensing boards, including state bar examiners, ask applicants about history of or treatment for mental illness and substance abuse. . . . [T]hese questions merely perpetuate prejudice against the mentally ill."). Moreover, if an attorney with a disability could assert her disability as a factor mitigating her violation of a particular professional responsibility rule, even when she could comply with that rule with reasonable effort, her incentive to attempt compliance is reduced, to the detriment of her clients.

106. See, e.g., *Toledo Bar Ass'n v. Lowden*, 826 N.E.2d 836, 839-40 (Ohio 2005) (lawyer's bipolar disorder manifested itself in the form of paranoid delusions, such that "his disability did not merely impede his performance on his clients' behalf, it effectively prevented him from functioning at all in accordance with his professional oath").

107. *In re Disciplinary Proceedings Against Jacobson*, 690 N.W.2d 264, 277 (Wis. 2004); see also *Attorney Grievance Comm'n of Md. v. Zakroff*, 876 A.2d 664, 691 (Md. 2005) (finding attorney unable to establish a sufficient causal connection between disability and misconduct because he "maintained a successful law practice" during the relevant period of time); *In re Stoller*, 902 So. 2d 981, 985 (La. 2005) (noting that hearing committee relied on the fact that attorney "had demonstrated no other problems in satisfying the obligations of his law practice" in concluding that his Parkinson's Disease and depression did not cause his misconduct).

108. See, e.g., *Stoller*, 902 So. 2d at 988 ("[The attorney's] repeated and deliberate actions over [a one-year] period of time belie his contention that his misconduct was an aberration. Indeed, [the attorney's] own treating psychiatrist conceded that it would be a 'stretch' to attribute all of these actions to [his] medical condition."); *State ex rel. Okla. Bar Ass'n v. Wright*, 957 P.2d 1174, 1179 (Okla. 1997) ("The fact that Wright has managed to channel time and effort into new [client solicitation] seminars, while nine unanswered [bar] complaints were pending is evidence that Wright, at least at times, was more capable than the protestations about his illness would indicate.").

disability could make his compliance with a professional responsibility rule substantially more difficult.<sup>109</sup> It seems questionable as a policy matter that more misconduct, potentially harming more clients, could lead a court to find causation and thus allow the attorney's disability to mitigate, while less misconduct could lead the court to reject causation.

Even if a lawyer's disability causes her misconduct, such causation does not necessarily indicate a lack of any fault by the lawyer and an absence of any possibility of deterrence. Disciplining an attorney for disability-related misconduct can serve a purpose other than retribution: deterrence of the attorney and others like her in furtherance of the goal of client protection. Courts have recognized that "deterrence of commission of similar acts in the future by the offending lawyer and other members of the bar" is a goal of lawyer discipline.<sup>110</sup>

As discussed above, the position of some commentators is that if there is a causal connection between a lawyer's disability and misconduct, courts should impose no discipline for the misconduct. If the attorney has been rehabilitated and future misconduct is unlikely, courts have no role; if complete rehabilitation has not yet occurred, courts should impose a non-disciplinary suspension until rehabilitation is complete.<sup>111</sup> The problem with this approach is that it does not create enough of an incentive for lawyers with disabilities to seek treatment and to stop engaging in misconduct as soon as possible.<sup>112</sup> Instead, it suggests that lawyers should maintain the status quo

109. See SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT xiii (2001) ("A person may be simultaneously severely impaired and brilliantly productive. . . . Psychiatric disability is about people who struggle, and the law, with its rigid categories, is extraordinarily unreceptive to the process of struggle.").

110. *State ex rel. Okla. Bar Ass'n v. Burns*, 145 P.3d 1088, 1094 (Okla. 2006); see also *In re Scanio*, 919 A.2d 1137, 1144 (D.C. 2007) ("The discipline we impose should . . . deter other attorneys from engaging in similar misconduct." (quoting *In re Reback*, 513 A.2d 226, 231 (D.C. 1986))); *Fla. Bar v. Gross*, 896 So. 2d 742, 745 (Fla. 2005) ("[T]he judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." (quoting *Fla. Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983))).

111. *Cf. Attorney Grievance Comm'n of Md. v. Zakroff*, 876 A.2d 664, 689 (Md. 2005). The attorney, who repeatedly withdrew money from his trust account and had a pattern of long delays between his deposit of settlement checks and his payments to clients and their medical providers, argued that he should receive only a thirty-day suspension because he "ha[d] been able to control his depression and related disabilities through the assistance of medication and ha[d] been a productive member of the [b]ar." *Id.*

112. See *Lawyer Disciplinary Bd. v. Dues*, 624 S.E.2d 125, 135 (W. Va. 2005) (Benjamin, J., dissenting) ("[O]ur compassion for the person inflicted should not include condoning harm to innocent persons arising from a failure or refusal to get appropriate help for a mental illness, such as depression. By enforcing appropriate consequences for acts and/or omissions which harm their clients, we encourage attorneys to seek help at the earliest possible moment.").

until they get caught because there are no consequences from the bar<sup>113</sup> for anything they do that is disability-related. The Title I case of *Brohm v. JH Properties, Inc.* presents a good analogy.<sup>114</sup> An anesthesiologist had sleep apnea, which caused him to fall asleep during surgical procedures, endangering the lives of his patients.<sup>115</sup> After he was discharged from his employment, Dr. Brohm received treatment for his disability such that the misconduct was unlikely to recur.<sup>116</sup> If the rule was “no discipline for disability-related misconduct,” where the only relevant factor is the likelihood of future misconduct, Dr. Brohm’s employer should have reinstated him. Doing so, however, would ignore all the evidence of Dr. Brohm’s fault and would reward his dangerous and irresponsible behavior. Upon being told that he was falling asleep during surgical procedures, Dr. Brohm did not take immediate steps to determine the nature of the problem and to fix it.<sup>117</sup> Rather, he offered the weak excuse that “he had a sinus problem and that clearing his sinuses could be interpreted as snoring.”<sup>118</sup> He did not see a physician about his condition until the week after his discharge.<sup>119</sup> Completely excusing Dr. Brohm’s misconduct on the ground that it was caused by his disability would create no incentive for other disabled physicians to seek treatment without delay.

Similarly, courts should examine lawyer-discipline cases for evidence of fault by the attorney once he had notice of a physical or mental condition affecting his practice. Forms of notice could include missed deadlines, complaints from clients, or statements by supervisors, coworkers, or support staff pointing out a change in the lawyer’s behavior or problems with the practice. A particularly strong form of notice is a bar investigation of one’s conduct. Fault could take the form of failing to seek diagnosis and treatment of one’s disability, to reduce or adjust one’s workload, to seek help from a lawyer-assistance program, or to take disability leave within a reasonable time after receiving notice.<sup>120</sup> Another form of fault might be failing to take

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113. Depending on the misconduct, even in the absence of professional discipline, there could be criminal consequences or civil consequences like a malpractice suit.

114. 947 F. Supp. 299 (W.D. Ky. 1996), *aff’d*, 149 F.3d 517 (6th Cir. 1998).

115. *Brohm*, 149 F.3d at 519.

116. *Id.* at 520.

117. The hospital CEO first informed Dr. Brohm of reports that he was sleeping during surgical procedures in late June and did not discharge him until early September. *Id.* at 519.

118. *Brohm*, 947 F. Supp. at 300.

119. *Brohm*, 149 F.3d at 520.

120. *See, e.g.*, *Disciplinary Counsel v. Bowman*, 854 N.E.2d 480 (Ohio 2006). In *Bowman*, the court sanctioned a lawyer with depression who “intentionally damaged his clients by lying, forging their

prescribed medication or otherwise to follow the advice of one's physician. Relevant both to what constitutes notice and what is a reasonable time is the nature of the lawyer's disability, given that denial and unclear thinking are associated with many mental disabilities. Evidence of significant fault on the part of the attorney should reduce the mitigating effect of the attorney's disability; minimal evidence of fault should increase the mitigating effect.

Should disability ever constitute a complete excuse in a lawyer disciplinary proceeding, barring the attorney from receiving any sanction? The best arguments for such a possibility would arise in a case where there is a strong causal connection between the disability and the misconduct and little evidence of fault by the attorney. In *Toledo Bar Association v. Lowden*,<sup>121</sup> for example, at the time of his misconduct, the attorney's bipolar disorder manifested itself in the form of paranoid delusions which "effectively prevented him from functioning at all in accordance with his professional oath."<sup>122</sup> Before he was charged with violating professional conduct rules, the attorney, "at the urging of friends, family, and colleagues who were not convinced that he was able to effectively represent clients, . . . closed his law practice and sought psychiatric help from Veterans Administration clinics."<sup>123</sup>

Even in that scenario, however, one could argue that the lawyer should still receive the lowest possible sanction—a private admonition. Imposing a private admonition would not interrupt the lawyer's practice or expose him to public shame. It would, however, create a record that the attorney had been sanctioned, which could be important in the event that he commits misconduct in the future. Repeated misconduct, after a previous sanction for disability-related misconduct, should increase the lawyer's level of fault and lead to greater scrutiny by the court as to whether the lawyer truly meets the essential eligibility requirement of being unlikely to commit future violations of the disciplinary rules.

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signatures, neglecting their legal matters, dismissing their cases, and fostering the retraction of an offer to pay a client's attorney fees." *Id.* at 484. The lawyer began to neglect cases in 2002 and lost his ability to concentrate in early 2003, but did not seek diagnosis until late 2004 and violated his mental health contract with the Ohio Lawyers Assistance Program by not making contact with them for a nine-month period in 2005. *Id.* at 485-86. See also *Columbus Bar Association v. Ginther*, 840 N.E.2d 628 (Ohio 2006), in which the court imposed an indefinite suspension on lawyer who was first treated for depression and alcoholism in 1997 but committed significant misconduct in 2003. *Id.* at 632-33. The court noted that "the misconduct in these seven grievances [involving neglect of cases] occurred after the first disciplinary complaint had been filed and much of it occurred while respondent was serving the stayed six-month suspension [for neglecting a case] imposed in March 2003." *Id.* at 634.

121. 826 N.E.2d 836 (Ohio 2005).

122. *Id.* at 840.

123. *Id.* at 838-39.

#### IV. CONCLUSION

More than fifteen years since its enactment, the role of the ADA in lawyer-discipline cases has been negligible. During their disciplinary proceedings, most disabled attorneys, despite claiming that their disability caused their misconduct, do not assert their rights under the ADA. This disuse of the ADA by lawyers is likely due to a combination of two factors. First, courts generally consider disability as an optional mitigating circumstance as a matter of course. Second, application of the ADA does not appear to have benefited the attorney in any case in which it was discussed. No court has declined to impose any sanction or reduced the severity of a sanction based on the ADA. In light of that fact, reliance on the ADA may appear useless at best and counterproductive at worst.

Despite its unimpressive history thus far, a careful consideration of the ADA in attorney disciplinary proceedings would benefit some lawyers with disabilities while still furthering the public protection goal of lawyer discipline. First, consistent with the ADA's duty of reasonable accommodation and prohibition of disparate impact discrimination, disability should be treated as a mandatory mitigating factor, not an optional one that courts may choose to disregard. Second, courts should emphasize that the primary purpose of attorney discipline is to protect the public and acknowledge that an attorney is "qualified," and thus protected by the ADA, if the attorney is unlikely to commit future misconduct. Courts should not find an attorney unqualified and unprotected by the statute based solely on past misconduct. Moreover, courts should not suggest that other goals of lawyer discipline, like maintaining the integrity of the legal profession and public confidence in the bar, may be achieved by ignoring disability—the one mitigating factor required by federal law.

Finally, taking the ADA seriously in lawyer-discipline cases would change courts' understanding of causation, fault, and deterrence. Courts should find that an attorney's disability caused his misconduct if the disability made it substantially more difficult for the attorney to comply with the relevant professional responsibility rule. Contrary to the opinion of some commentators, however, the existence of a causal connection between disability and misconduct does not preclude a finding of fault on the part of the lawyer or the possibility of deterrence. In order to create an incentive for attorneys with disabilities to seek treatment and to stop engaging in misconduct as soon as possible, in deciding how much weight to give disability in mitigation, courts should consider evidence of fault by the

attorney after he had notice that a physical or mental impairment was affecting his practice. After receiving such notice, a long delay by the lawyer before seeking diagnosis or treatment of the disability should reduce the mitigating effect of the disability. In contrast, where there is a strong causal connection between the disability and the misconduct and little evidence of fault by the attorney, it is arguable that disability should completely excuse the misconduct, rather than just serving as a mitigating factor.