

THE DISABILITY DILEMMA: A SKEPTICAL BENCH & BAR

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The legal profession is no stranger to the bias and prejudice present in American society. Members of the bar have been shown to engage in both conscious and subconscious sexism and racism, posing challenges to the profession as the profile of those practicing law has changed over the last several decades to admit increasing numbers of women and minorities.¹ Nevertheless, it is notable that few, if any, members of the bar today would question openly whether women or people of color have the ability to be successful, productive members of the profession. Instead, the conventional wisdom is that the greatest obstacles to their success will come in the form of external barriers and institutional policies based on preconceived norms that do not acknowledge the divergent challenges faced by these group members.²

The same wisdom does not always extend to attorneys and would-be attorneys with physical and mental disabilities, whom some have identified as “the forgotten diversity group.”³ Many members of the bar continue to believe that the greatest challenges these attorneys face are their own internal medical

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1. See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 781 (1998) (“A large and growing number of states and the District of Columbia have recently produced task force reports on racial, ethnic and gender bias in the administration of justice. These reports have consistently found evidence of a wide range of discriminatory conduct by lawyers directed toward witnesses, other lawyers and court personnel.” (footnote omitted)). Scholars have also identified the presence of ageism among members of the bar. See Linda S. Whitton, *Re-examining Elder Law Practice: Reflections on Ageism*, 12 PROB. & PROP., Jan.-Feb. 1998, at 8, 10-11 (describing evidence of ageism in the legal profession).

2. See, e.g., DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE* 38-44 (2000) (describing institutional barriers to women and minorities in the legal profession).

3. NEW YORK CITY BAR ASS'N, *LAW FIRM DIVERSITY BENCHMARKING REPORT: 2006 REPORT TO SIGNATORIES OF THE STATEMENT OF DIVERSITY PRINCIPLES 6* (2006), available at <http://www.nycbar.org/Diversity/FirmBenchmarking06.pdf>; see also EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *REASONABLE ACCOMMODATION FOR ATTORNEYS WITH DISABILITIES* (2006), available at <http://www.eeoc.gov/facts/accommodations-attorneys.html> (“To date, individuals with disabilities generally have not been a part of the discussion about diversity in the legal profession.”).

limitations rather than any external bias in the profession.⁴ Discrimination against this group, unlike racism and sexism, is largely invisible, normalized, and unquestioned. As a result, individuals with impairments continue to face significant challenges both to entry into the profession and to achieving success once admitted thereto.

These challenges are distinct from those encountered by other minorities in the law in part because disability is a social construction defined by statute rather than an immutable characteristic such as race or gender. The hazy and controversial definition of “disability” adopted in the Americans with Disabilities Act (ADA)⁵ has made it difficult for any individual, let alone an attorney, to secure the protection promised by the statute.⁶ The ADA requires each litigant to establish that he or she has an actual disability, a record of disability, or is regarded as having a disability in order to fall within the law’s coverage.⁷ All three approaches require the litigant to demonstrate a physical or mental impairment “that substantially limits . . . [a] major life activit[y].”⁸ Over time, the courts have made clear that an individual must demonstrate relatively severe limitations in a major life activity in order to satisfy the “substantially limiting” requirement.⁹ Any improvement in functioning achieved by medication or other mitigating measures is construed against the individual and used as evidence that no substantially limiting impairment exists.¹⁰ As a result of this exacting definition, individuals with mental

4. See *infra* Part I.C.

5. 42 U.S.C. §§ 12101-12213 (2000).

6. See, e.g., Wendy F. Hensel, *Interacting With Others: A Major Life Activity Under the Americans with Disabilities Act?*, 2002 WIS. L. REV. 1139, 1139 (“[t]he impact of the ADA has been significantly diminished in the employment arena by the increasingly narrow approach taken by courts at all levels in defining key terms under the ADA, particularly as to the threshold ‘disability’ determination.”); Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7-12 (2000) (discussing progressive backlash against ADA in years after its passage).

7. 42 U.S.C. § 12102(2)(A)-(C).

8. *Id.* § 12102(2)(A).

9. See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002) (“We . . . hold that to be substantially limited in performing manual tasks, an individual must have an impairment that *prevents or severely restricts* the individual from doing activities that are of central importance to most people’s daily lives.” (emphasis added)); see also Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC’s “Disability” Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 203-09 (2004) (detailing how lower courts have applied the Supreme Court’s heightened “severity” standard since *Williams*).

10. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999).

retardation, diabetes, epilepsy, and cancer all have been deemed insufficiently impaired to be disabled within the meaning of the Act.¹¹

This bleak picture of disability has created serious challenges for attorneys and would-be attorneys seeking to apply the ADA to the legal profession. In order to establish coverage in the protected class, litigants must demonstrate not only the presence of a disability, but also that they are qualified for the position in question, or capable of performing the essential functions of the position with or without reasonable accommodation.¹² Because impairments must now be quite severe in order to satisfy the requisite threshold, the two components are in serious tension with each other. This is reflected in case law involving the bar, which at times reflects skepticism that an attorney can be both sufficiently disabled to qualify for legal protection and still qualified to engage in the exacting practice of law.¹³ Convinced of the correctness of this approach, the bar has spent considerable resources fighting claims of class membership and requests for accommodation by applicants and attorneys rather than evaluating the neutrality of its institutional policies and procedures, particularly when faced with claims of intangible impairments.¹⁴ Members of the profession have had a difficult time viewing disability as a fluid concept that is shaped not only by the individual's internal medical limitations, but also by societal attitudes and beliefs that treat disability as synonymous with failure and incompetence.

The legal profession's failure to understand the social component of disability and its skepticism towards impairments is not unique, but does have unique implications. Attorneys draft the laws protecting individuals with impairments, prosecute and defend claims of disability discrimination by society, and define the scope of protection through judicial decisions.¹⁵

11. See, e.g., *Littleton v. Wal-Mart Stores, Inc.*, No. 05-12770, 2007 WL 1379986, at *2 (11th Cir. May 11, 2007) (mental retardation); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002) (diabetes); *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 184-85 (D.N.H. 2002) (cancer); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448, 452-54 (S.D. Tex. 1999) (epilepsy).

12. 42 U.S.C. § 12112.

13. See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at *37 (S.D.N.Y. Aug. 15, 2001); cf. John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary Students: The Quandary Resulting from the ADA's Disability Definition*, 11 PSYCHOL. PUB. POL'Y & L. 83, 91 (2005) (noting that when law students seek accommodations on the bar examination, "the testing organization might express concern that if the student claims disability at a severity that prevents a major life activity such as concentration or reading, can the student truly perform the essential features of the profession?").

14. See, e.g., *Bartlett*, 2001 WL 930792, at *2-3 (litigation spanning more than four years); *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217 (W.D.N.Y. 1993); see also *infra* Part I.C.

15. See, e.g., RHODE, *supra* note 2, at 2 ("Given the centrality of law and lawyers in American life,

Understanding how and why the bar has resisted applying an expansive concept of disability to its internal regulations and employment sheds light on the steps necessary to eradicate barriers within the legal profession and to shift attitudes in society to achieve the integration of all individuals with disabilities. Part I of this Article begins with an exploration of two of the dominant paradigms of disability in society, providing the foundation for the bench and bar's attitudes toward the legal protection of disability. It briefly explores the following three settings reflecting the bar's medical understanding of disability: (1) requests for accommodation on law school examinations and the bar examination, (2) questions regarding mental illness on fitness applications, and (3) the hiring process for attorneys with disabilities. Part II then evaluates the aspects of legal education and the practice of law that encourage many attorneys to endorse a medical model of disability and apply a general skepticism toward all claims of impairment and accommodation. Finally, Part III ends with a brief discussion of ways in which the bar could potentially improve both its treatment of individuals with impairments and the inclusiveness of the legal profession.

I. FACING THE SKEPTICS: THE DOMINANT PARADIGMS OF DISABILITY

To understand lawyers' current attitudes toward disability, it is necessary to begin first with a brief review of two of the dominant paradigms of thought regarding disability over the last several decades.¹⁶ This in turn provides the groundwork for evaluating whether lawyers, as a group, are more susceptible to internalizing a narrow, "medicalized" view of disability that makes it difficult for attorneys with impairments to make inroads into the profession.

A. *The Medical Model of Disability*

For most of history, the medical model has dominated public thinking about impairment and disability.¹⁷ In this paradigm, disability springs from

the problems of legal practice become problems for us all.").

16. It is worth noting that a number of scholars have identified a third model of disability, the civil rights model, which is a close companion to the social model in that it recognizes that the experience of disability is largely shaped by external discrimination rather than internal limitations. See, e.g., Hensel, *supra* note 6, at 1145 (discussing civil rights model of disability). It differs from the social model, however, in that it encourages individuals with disabilities to see themselves as a minority group entitled to civil rights like other minority groups in society. See *id.*

17. See Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1086-87 (2004) (discussing the pervasiveness of the medical model of disability in American jurisprudence); Mary

internally generated medical limitations that serve as personal traits of the afflicted. Institutional arrangements and social policies are considered neutral and irrelevant to the individual's experience of impairment.¹⁸ Because disability is a "personal, biological" inferiority problem inherent in the individual, society has no obligation to address or remedy any difficulties arising out of disabilities.¹⁹ To the extent that the individual is unable to conform to society's standards, society may justifiably exclude the individual from participation. If it chooses to intervene, it does so from charitable benevolence rather than from any sense of responsibility or participation in the barriers encountered.²⁰ The focus of public policy, therefore, is appropriately placed on rehabilitation and services that may restore the individual with disabilities to as close to "normal" functioning as is possible.²¹

B. *The Social Model of Disability*

In the late 1960s, a new, more progressive paradigm of disability gained momentum. In this world view, generally referred to as the social model of disability, disability is regarded at least in part as a social construction that is influenced and shaped by the physical environments, institutional arrangements, and social policies that form the invisible background of day-to-day life.²² The greatest challenge faced by an individual in a wheel chair, for example, may not be his physiological limitations, but instead a world designed strictly for the ambulatory that does not contemplate universal access. Unlike the medical model, which focuses on changing the individual, the social model focuses on changing society by eradicating the discriminatory attitudes and physical barriers that preclude full participation in the community.²³ In some contexts, this requires not only passively refraining

Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 652-53 (1999) ("This medical model of disability, while it has been increasingly challenged by disability theorists and disability-rights activists, persists in popular understanding of disability, as well as in the legal commentary on disability.").

18. See, e.g., Deborah Kaplan, *The Definition of Disability: Perspective of the Disability Community*, 3 J. HEALTH CARE L. & POL'Y 352, 353 (2000) ("Society has no underlying responsibility to make a 'place' for persons with disabilities, since they live in an outsider role waiting to be cured.").

19. See Crossley, *supra* note 17, at 651-53.

20. *Id.* at 651-52 ("Because disability is not socially caused, the disabled individual has no claim of right to social remediation, and any benefits or assistance that society chooses to bestow on persons with disabilities can be viewed as a charitable response of 'doing special things.'").

21. *Id.* at 652.

22. See, e.g., Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000).

23. Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40

from discriminatory behavior, but also actively altering and enhancing accessibility for individuals with impairments.²⁴

C. Reflections in the Legal Profession

As between the two models, there is little question that attorneys overwhelmingly have embraced a medical model of disability in regulating themselves. The profession to date has struggled with internalizing an imagery of disability that is not synonymous with failure or incompetence resulting from internal medical limitations. Although the situation is slowly changing, there is little evidence to suggest that typical members of the bar have considered thoughtfully whether the structure or practices of the legal profession must or should change to accommodate individuals with disabilities. Instead, when an individual within the profession claims protection under the ADA, she is often met with skepticism that her impairment truly could be sufficiently limiting to warrant legal protection, particularly in the context of intangible impairments. On the other hand, if the impact of an impairment is more obvious to the observer, it is common in the profession to challenge whether the individual could ever be sufficiently qualified to practice in the esteemed profession of law. Both approaches implicitly endorse the view that because the attorney's abilities are limited by his impairments, it is primarily his problem to adapt rather than the profession's responsibility to accommodate.

Three brief examples illustrate this point. Law students with learning disabilities that seek accommodation on examinations are routinely faced with suspicion over the extent of their impairments.²⁵ In many cases, the accommodation sought is extra time to complete the examination.²⁶ In

HARV. C.R.-C.L. L. REV. 141, 148 (2005).

24. *Id.* at 148-49.

25. See, e.g., Ranseen & Parks, *supra* note 13, at 84 (noting that testing organizations like licensing boards have grown "wary" of accommodation requests and therefore have "initiate[d] detailed documentation review procedures"); LAW SOC'Y OF B.C., LAWYERS WITH DISABILITIES: IDENTIFYING BARRIERS TO EQUALITY 17 (2001), available at http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/disabilityreport.pdf ("Now that equity and diversity policies are in place, the main barrier [to the success of law students with disabilities] is resentment from fellow students about accommodations in the universities"); cf. Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 232-33 (2004) (discussing a provost's characterization of learning disabled students as "draft dodgers").

26. See Ranseen & Parks, *supra* note 13, at 90 ("A majority of students who request test accommodation seek extra time to ameliorate deficits in reading speed and comprehension, facility with written language, and ability to sustain attention.").

response to such requests, there is often little reflection on whether time pressure is an essential part of the examination process or whether pedagogical goals might actually be better served by eliminating such pressures.²⁷ Instead, the first reaction often is an intense questioning of whether the individual truly has a limiting internal disability, at least in the context of intangible impairments.²⁸ There is particularly intense skepticism among law students that an individual who is capable of achieving academic success sufficient to warrant admission into a rigorous graduate program could be simultaneously sufficiently impaired to qualify for protection or accommodation. This is exemplified by the fact that many students categorically consider such requests to be unfair attempts to secure academic advantage and respond with resentment toward the requestors.²⁹

In the context of the bar examination, even an expert's testimony about the nature of an applicant's disability may not be enough to overcome such suspicion. Boards at times have refused both claims of disability and requests for accommodation supported with detailed medical evidence with no explanation or apparent justification.³⁰ Cases refusing accommodations do not always include meaningful explanations detailing why the requested

27. Cf. Laura F. Rothstein, *Bar Admissions and the Americans with Disabilities Act*, 32 HOUS. LAWYER, Oct. 1994, at 34, 39 (concluding that with respect to the "LSAT, law school coursework, and the bar examination," "[f]or the most part, time limits are set as a matter of administrative convenience").

28. See, e.g., *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 324 (1998) (overruling the board's determination that a plaintiff with a reading disorder was not an individual with a disability); see also Weiss, *supra* note 25, at 250 ("[T]he trend seems to be that if the impairment is not readily identifiable, it should not be given ample consideration by bar examiners."); Ranseen & Parks, *supra* note 13, at 96 (concluding that licensing boards are "much more likely to take a restrictive, categorical view of [the] disability determination" than would "a mental health professional").

29. See, e.g., Barry E. Katz, *Disabled, Not Disqualified*, 30 STUDENT LAWYER, Apr. 2002, at 21, available at <http://www.abanet.org/lstd/stulawyer/apr02/disabled.html>. The article quotes Nancy Smith, a law student who received accommodations for her learning disability, as stating "I've had snide comments from other students" when they discover she had received extra time for examinations. She reported some students as responding "Yeah, well, I'd do better, too, if I got time and a half in a quiet room." *Id.*; see also Freedly Hunsicker, *Learning Disabilities, Law School, and the Lowering of the Bar*, 24 S. TEX. L. REV. 1, 17 (2000) ("I agree with an op-ed opinion in the New York Post that watering down academic standards for lawyers for the sake of the ADA is 'one accommodation too far.'").

30. See, e.g., *In re Rubenstein*, 637 A.2d 1131, 1138 (Del. 1994) ("[T]he record is devoid of any evidentiary basis to support the [b]oard's decision to disregard the recommendation of [applicant's] expert. . . . [T]he Board's ultimate decision does not reflect that it was the product of an orderly and logical deductive process."); *Argen v. N.Y. State Bd. of Law Exam'rs*, 860 F. Supp. 84, 90-91 (W.D.N.Y. 1994) (concluding plaintiff was not disabled under the ADA despite the testimony of two experts that he had a reading disability); *D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 222 (W.D.N.Y. 1993) (rejecting the board's unsupported conclusion that plaintiff with visual disability did not require accommodations mandated by her expert).

accommodation would result in a fundamental alteration of the examination.³¹ Instead, consistent with a medical model of disability, the focus in many testing accommodation cases remains largely on the severity of individuals' limitations rather than the legitimacy and necessity of the barriers precluding their access to the profession.

Broad fitness questions on some bar applications requiring detailed medical information about any experience with mental impairment in the applicant's lifetime likewise reflect the continuing significance of a medical model of impairment in the profession. These fitness questions reflect the basic assumption by many attorneys that even a relatively fleeting encounter with mental impairment in the distant past automatically calls into question whether an individual is qualified to become an attorney.³² Although the courts have struck down many such questions as overbroad, this is not universally true,³³ and many states continue to routinely require this type of information from applicants.³⁴ Such questions fail to recognize that the risk to the public posed by the professional admission of these individuals is far less substantial than the risk to the applicants posed by the discriminatory attitudes and prejudices of the bar, as reflected by the fact that few applicants are ultimately deemed unfit to practice law.³⁵ Although the best indicator of

31. See, e.g., Weiss, *supra* note 25, at 249-50 (criticizing the bar's failure to provide information indicating "the importance that speed plays in reaching legal conclusions" despite its refusal to grant extra time to many applicants with disabilities); cf. Ranseen & Parks, *supra* note 13, at 101 ("Although a profession may often demand knowledge and problem solving performed under time pressure, it is not typically known whether a licensing exam measures this ability in any meaningful manner.").

32. See, e.g., *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489, 1491 (S.D. Fla. 1994) (challenging requirement that applicants disclose any consultation for or diagnosis of a nervous, mental or emotional condition "ever"); *In re Underwood*, 1993 WL 649283, at *1-2 (Me. Dec. 7, 1993) (challenging requirement that applicants report a diagnosis of a nervous, mental or emotional condition "ever" or receiving treatment for same within ten years prior to the application). Interestingly, the bar's behavior is consistent with the conclusion of a recent study finding that in establishing class membership under the ADA, most mentally-impaired litigants lose because they are deemed not qualified, while most physically-impaired litigants lose because they are deemed not disabled within the meaning of the ADA. See Wendy F. Hensel & Gregory Todd Jones, *Bridging the Physical-Mental Gap: An Empirical Look at the Impact of Mental Illness Stigma on ADA Outcomes*, 73 TENN. L. REV. 47, 66 (2005).

33. See, e.g., *Applicants v. Tex. State Bd. of Bar Exam'rs*, No. A 93 CA 740 SS, 1994 WL 776693, at *1 (W.D. Tex. Oct. 11, 1994) (permitting the board to ask whether applicant in the last ten years had been diagnosed with or hospitalized for "bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder").

34. See Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 95-97 (2001).

35. See, e.g., *id.* at 100-01 ("The narrowing of mental health inquiries to single out serious mental illness and substance abuse—conditions particularly subject to fears, misconceptions, and moral disapprobation—has intensified the stigma felt by applicants."). Bauer notes that despite the existence of

how well a lawyer will function in the future is the lawyer's conduct in the past,³⁶ the fact that many state bars insist on securing information about disability status rather than behavior reflects an imagery of disability that is static, unchanging, and located in the individual rather than in society. In effect, it presumes a fundamental tenet of the medical model of disability—that biology is destiny.³⁷

Finally, the experience of many attorneys with disabilities seeking legal employment reflects the narrow view of disability internalized by many in the profession. There is little doubt that an applicant's identification of disability during the hiring process will create significant roadblocks to employment. Attorneys with disabilities report that their ability to perform any job is openly and routinely questioned in interviews, to the extent an interview can even be secured. A 2004 survey of attorneys in California, for example, reported that 45% of the lawyers with disabilities surveyed believed that they had been denied employment on the grounds of their disability, with the number rising to 68% when limiting the class to those with visible disabilities.³⁸ The attorneys reported that many hiring attorneys began with the presumption that the attorney would be unable to do even menial aspects of the job and voiced concerns that clients would be “‘uncomfortable’ working with them.”³⁹ By way of example, Christine Griffin, a Commissioner with the EEOC who uses a wheelchair, reported that in one hiring interview she was asked how she would get a book off a shelf rather than about her work experience and academic credentials.⁴⁰

mental fitness questions, “very few applicants are denied admission on mental health grounds.” *Id.* at 95-96.

36. See, e.g., Ann Hubbard, *Improving the Fitness Inquiry of the North Carolina Bar Application*, 81 N.C. L. REV. 2179, 2184 (2003).

37. See Hensel, *supra* note 23, at 146.

38. STATE BAR OF CAL., CHALLENGES TO EMPLOYMENT AND THE PRACTICE OF LAW CONTINUE TO FACE ATTORNEYS WITH DISABILITIES 5, 28 (2004), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2004_Attorneys-with-Disabilities-Report-Exec-Sum.pdf.

39. *Id.* at 6-7; see also Brenda Sapino Jeffreys, *Lawyers with Disabilities Say Obstacles, Stereotypes Persist*, 22 TEX. LAWYER, Jan. 22, 2007, at 1, available at <http://www.law.com/jsp/article.jsp?id=1169200940729> (detailing common misconceptions relating to attorneys with disabilities). For example, Mitchell Katine, chair of the State Bar of Texas' Disability Issues Committee, has commented that “we have [not] made much progress” in providing reasonable accommodations to attorneys because “it’s acceptable at most places to have the presumption that if a blind lawyer knocks on your door for a job to say, ‘Really, how is this going to work?’” *Id.*; see also LAW SOC’Y OF B.C., *supra* note 25, at 25 (explaining that “negative attitudes about disabilities” are prevalent in the legal profession in Canada, with one attorney reporting that “[i]t comes down to . . . the presumption that, if you have any obvious disability, you are probably more or less incompetent”).

40. American Bar Association, *ABA Commission Promotes Hiring, Retention of Lawyers with*

The lucky few who get in the door, moreover, find that problems relating to their disabilities continue. When requests for reasonable accommodation are made, they continue to be opposed both by legal employers and the courts.⁴¹ Even more troublesome, many attorneys with disabilities have reported that firms are reluctant to acknowledge that any aspect of professional performance is not an “essential function” of the position and are skeptical that any alteration of the environment could be considered “reasonable” within the meaning of the law.⁴² By placing the source of difficulty within the requesting attorney rather than in the attitudes of fellow attorneys and the structure of legal practice, attorneys once again reflect a medicalized understanding of disability that does not acknowledge the barriers created by institutional policies and societal attitudes.

II. CREATING THE SKEPTICS: A PRIMER IN SUSPICION

It is no surprise that lawyers, like most people, primarily conceive of impairments within the context of the medical model of disability. To the extent that claims of disability are followed by requests for accommodation, which many continue to view as affirmative action rather than as anti-discrimination, some degree of skepticism toward disability claims would seem both natural and expected. It may be, however, that attorneys as a group are more likely to resist a social view of disability than the average member of the public. There are many aspects of legal education and the legal profession that would seem to exacerbate skepticism and create serious challenges to internalizing a contextual model of impairments. The remainder of this Article explores these challenges and their implications for attorneys with disabilities in the future.

Disabilities, YOUR ABA, June 2006, <http://www.abanet.org/media/youraba/200606/article08.html> [hereinafter *ABA Commission*].

41. See, e.g., STATE BAR OF CAL., *supra* note 38, at 9 (reporting that 24% of attorneys with disabilities polled had encountered refusals or resistance to providing reasonable accommodations in employment settings, while 21% encountered resistance at court hearings and conferences).

42. *Id.*

A. Challenges in Legal Education

There is no shortage of critique on the current state of legal education.⁴³ Because, as one study put it, “[l]aw school provides the single experience that virtually all legal professionals share,”⁴⁴ it is important to evaluate whether there are aspects of legal education that may inadvertently contribute to a narrow understanding of disability by attorneys.

The case method used by many professors may ultimately contribute to a conservative view of disability by the profession. In this approach, students generally take existing legal arrangements as unquestioned givens. Students engaged in a property course, for example, are instructed in the legal arrangements that exist in Western society for the protection of property but rarely systematically ask whether property warrants such protection in the first place.⁴⁵ As a result, the power relationships and implicit institutional assumptions that drive the status quo generally receive secondary consideration at best. Having learned that one’s “function as a lawyer is geared to the basic system of power relationships which the ‘law,’ as the coercive power of the state, protects,” students leave school with a largely conservative outlook.⁴⁶ Because the medical model takes institutional arrangements as a given and looks to limitations created internally rather than externally, it is a more natural fit with such conservatism than is the social model of disability which challenges the assumptions and implicit understandings which underlie the status quo for people with disabilities.

Some critics have argued that legal education encourages students to be “apolitical and socially conservative,”⁴⁷ which likewise can foster a medical understanding of disability. The Socratic method employed by professors teaches students to distrust their sense of social justice and broad concern for others.⁴⁸ All first-year law students are trained to justify and defend each statement they make based on rational, legal argument. Students are encouraged to take a “value-neutral” approach which separates out discussions

43. See, e.g., Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL’Y 267, 272-75 (2000) (discussing critics of legal education).

44. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 2 (2007).

45. Julius Cohen, *Crisis in Legal Education*, 488 U. CHI. L. REV. 588, 593 (1948).

46. *Id.* at 592.

47. DOUGLAS LITOWITZ, THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L 49 (2006) (“If you doubt that law school has a conservative influence, ask yourself whether you know any law students who became *more* radical in law school.”).

48. *Id.* at 48.

of equity from legal doctrine and procedure.⁴⁹ The moral consequences of any position are not only given secondary consideration, but often are treated as a hindrance to divining the legal doctrine. Critics have argued that the result is a “rationality, skepticism, and cynicism . . . [which] dulls or destroys the law student’s basic sense of fairness and justice”⁵⁰ and substitutes “new views consistent with the status quo.”⁵¹

This process of learning to “think like a lawyer” can make seeing the broader social justice implications of anything difficult.⁵² Students learn the art of compartmentalizing information into categories that lead to certain legal results and breaking down arguments into the smallest component within the larger argument so as to be unassailable.⁵³ The medical model of disability is a natural complement to this approach because it involves categorizing symptoms into an identifiable, compartmentalized impairment. The social model of disability, on the other hand, challenges the process of categorization and encourages the breakdown of formerly unchallenged assumptions regarding classification systems. The goal is not to fit the individual with impairments into a preconceived category, but instead to challenge the legitimacy of categorization itself, thus exposing the unstated assumptions about human functioning and institutional arrangements that can prove extremely difficult for people with disabilities.⁵⁴

49. SULLIVAN ET AL., *supra* note 44, at 57.

50. Murray L. Swartz, *How Can Legal Education Respond to Changes in the Legal Profession?*, 53 N.Y.U. L. REV. 440, 445 (1978).

51. ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 73 (1992).

52. See, e.g., Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 281 (“In testing our . . . hypothesis, we found that students declined in their endorsement of intrinsic values over the first year, specifically moving away from community service values and moving towards appearance and image values.”); KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 116 (1996):

The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.

Id.

53. See, e.g., SULLIVAN ET AL., *supra* note 44, at 66 (noting that “the exclusive focus of attention” in the law school classrooms, the study’s authors observed, “was learning how to classify events according to legal rules and to apply those rules to various sets of pre-organized ‘facts’”).

54. Cf. Lawrence S. Krieger, *What We’re Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 17 (1998-1999) (“[T]he law’s requirement for distinguishing and analyzing can create a habit

The extreme competitiveness that is the hallmark of many law school experiences likewise may make it particularly difficult for young lawyers to endorse a broad understanding of disability. The nature of legal education encourages students to view themselves as players in a “high-stakes, zero sum game” that focuses on individual achievement rather than solidarity with other students.⁵⁵ Students are required on a daily basis to answer detailed questions from professors in a very public and intensely competitive setting.⁵⁶ Unlike other professional schools, little time is spent during the three years on collaborative group projects that focus on assisting clients.⁵⁷ Divorced from the social and humanizing context of the law in their studies, students may find it challenging to take a holistic approach to exploring the moral and ethical considerations of legal questions like the dimensions of disability.⁵⁸ Disability divorced from context is entirely medical; it simply does not recognize that attitudes and institutional barriers can pose even greater obstacles than impairments themselves. In contrast, there is no social model absent a contextual exploration of the setting in which a disability is deemed to “matter.”

The highly competitive nature of the job market also encourages students to be hyper-sensitized to class ranking and performance and to consider others’ gains to come at their expense. The high degree of debt with which most law students graduate makes large firms, which tend to be more conservative, look highly attractive. Because many such firms interview only students in the top 10% of their class, particularly when hiring from law schools outside of the top tier, each individual in front of a student in class ranking can appear to diminish that student’s job prospects markedly.

of judging and ranking people in the same way that we deal with ideas and issues, rather than as unique human beings.”).

55. See, e.g., SULLIVAN ET AL., *supra* note 44, at 31, 149.

56. *Id.* at 24 (explaining that law students “are expected to engage in intense verbal duels and competitions with the teacher” in order to learn to “think[] like a lawyer”); LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE* 13 (1997) (“Many men . . . see law school participation[] as an exchange of verbal retorts. You win when you silence your opponent.”).

57. LITOWITZ, *supra* note 47, at 32; Barbara Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 905-06 (1997) (“Opportunities for students to work on teams are rare outside the context of clinical or skills settings. Team teaching is even rarer. The grading systems of law schools emphasize that the exercise of individual skills in a competitive setting constitutes competence.” (footnotes omitted)).

58. See, e.g., SULLIVAN ET AL., *supra* note 44, at 31 (explaining that the competitive nature of law school “undercut[s] the likely success of efforts to make students more attentive to ethical matters”); Fines, *supra* note 57, at 906 (“Educational psychologists note that competitive environments decrease the tendency to exercise and develop empathy and altruism. In some instances, this ‘battle’ mentality can lead to disturbing stereotyping and group isolation.” (footnote omitted)).

Because most professors grade on a curve such that there are only a predetermined number of As, even the slightest perception of unfair advantage during examinations can create serious angst and resentment. In this environment, it is no surprise that students with disabilities who look and act like their typical peers are viewed as fakers seeking unjustified preferential treatment. The intensely competitive, individualized experience of law school encourages students to adopt a self-centered mentality that discounts the notion that an individual's success or failure can be significantly affected by discriminatory external, rather than internal, sources.

B. Challenges in the Legal Profession

There are a number of aspects of the legal profession which likewise contribute to a medicalized view of impairments. The profession is no more resistant to the pressures of self-interest than any other occupation in society, and "[n]o occupational group, however well intentioned, can make unbiased assessments of the public interest on issues that place its own status and income directly at risk."⁵⁹ Some scholars have argued that the bar examination stands as a testimony to this idea, and that its true purpose is to restrict the number of attorneys practicing law and thereby protect the client base for existing attorneys.⁶⁰ Although the exam initially was justified as a way to exclude "the poorly-educated, ill-prepared, and morally weak candidate" from the profession, historians have concluded that its real purpose was to exclude "those growing numbers of the metropolitan bars who were foreign-born, of foreign parentage, and most pointedly, Jews."⁶¹ Adding the category of "disabled" to this list, a group often on the bottom of the civil-rights hierarchy, is no great stretch. In this way, the "insiders" ostensibly protect the public from the "outsiders." Because the source of applicants' difficulties is identified as their own internal limitations, society never turns to question the legitimacy or necessity of the examination in the first instance.

Such difficulties do not end, moreover, upon entrance to the profession. As instrumental as the law has been in equalizing the treatment of people outside the societal norm, the field of law continues to be a conservative

59. RHODE, *supra* note 2, at 16 (challenging the statement by the New York City Bar's Committee on the Profession that "[w]hile superficially there may appear to be a tension between professional responsibility and self-interest, in fact, broadly speaking, there is none").

60. LITOWITZ, *supra* note 47, at 22.

61. *Id.* at 54 (internal citation marks omitted) (citing MAGALI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 173 (1977)).

profession that is resistant to change. In light of the discriminatory attitudes towards impairment detailed above, it is no surprise that few people with disclosed disabilities are employed by, let alone play a prominent role in, large law firms across the country. Although statistical information is difficult to come by, one recent survey of law firm diversity completed by the New York City Bar identified only 0.1% of attorneys in 94 law firms as disabled, or 15 of over 18,000 attorneys at signatory firms.⁶² Although the actual number of attorneys with disabilities may be greater than the number reported, the intense skepticism and negative consequences that flow from disclosure in the workplace, particularly for attorneys with intangible, hidden disabilities, ensures that the number of attorneys with divulged disabilities will remain low.⁶³ As one study of the Canadian legal profession noted, “getting lawyers with disabilities to self-identify [is] extremely difficult” because “many lawyers have learned that identifying themselves as ‘disabled’ is a faster way to job loss than employee theft.”⁶⁴

Whatever the reason for the low reported numbers, the lack of a critical mass of identifiable attorneys with disabilities creates difficulties in a number of ways. Studies have shown that mentorship plays a key role in career success for younger lawyers, and the scant number of attorneys with disclosed disabilities makes it difficult for this to occur. Studies reflect that mentorship programs are most successful when the mentor and mentee share similar characteristics.⁶⁵ Because few attorneys with disabilities are openly employed, there necessarily are fewer opportunities for collaboration and advice between senior and junior attorneys with impairments. To the extent that attorneys with disabilities are not present in corporate settings, moreover, there may be insufficient market pressure to demand that more attorneys with disabilities be present on client teams, a tact that has been successful in the context of women and minorities.⁶⁶

62. See NEW YORK CITY BAR ASS'N, *supra* note 3, at 28. The same survey found no attorneys represented in corporate law departments participating in the survey. *Id.* at 30. These numbers are likely to be consistent across the country, as the National Association of Legal Professionals likewise has reported an employment rate of less than 0.1% nationwide. *Id.* at 6. Interestingly, some have argued that the low numbers of attorneys with disabilities reported by firms “may reflect a lack of common definition on disabilities.” *Id.*

63. STATE BAR OF CAL., *supra* note 38, at 6.

64. LAW SOC'Y OF B.C., *supra* note 25, at i.

65. RHODE, *supra* note 2, at 41.

66. There is some indication that this situation may be improving. One recent article noted that “companies such as Wal-Mart are looking for lawyers who can relate to the firm’s clients and who are like them, and this would include hiring lawyers with disabilities.” ABA Commission, *supra* note 40.

The lack of self-identified attorneys with disabilities in the profession also means that the concept of disability is not normalized and remains a subject of speculation and myth. People with disabilities do not appear prominently in the public discourse. Often, the most frequent references to individuals with impairments come in the form of the mentally impaired identified as criminals in television dramas and newspapers more frequently than is justified by their actual participation.⁶⁷ Experience shows that it can be very difficult for attorneys with disabilities to challenge the discomfort and negative assumptions attached to disability in the absence of routine exposure to impairments in the environment. Attorneys who have no daily contact with colleagues with disabilities can more readily conclude that such impairments automatically render attorneys unqualified to practice law.⁶⁸ Lack of familiarity with disability raises questions about even the most basic ability to function in the workplace and qualifications for the profession generally. Given that, as one scholar has noted, “[t]he legal profession is not known for resisting self-promotion,”⁶⁹ this can lead to serious difficulties for attorneys with disabilities. Lawyers—often “strongly driven by symbols and apparent security: grades, credentials, win ratios, power, money and tangibles that suggest affluence, prestige, or competitive advantage”—continue to view the practice of law as a highly esteemed profession reserved for the gifted elite.⁷⁰ Accordingly, some may view the accommodations or altered work expectations necessary for attorneys with disabilities to succeed in the current environment to be a dilution of the prestige associated with the profession or an indication that second-class citizens are now practicing law. Even more troubling, attorneys may view their role as officers of the court to demand that they protect the public from those in the profession they view as substandard in their abilities.

The problems that flow from the demanding work conditions facing many attorneys may also make it difficult to take an expansive view of impairment.

67. See, e.g., Hensel & Jones, *supra* note 32, at 52-53 (discussing studies relating to the portrayal of individuals with disabilities in the media).

68. Unfortunately, even daily contact may not be a panacea to this problem. Attorneys with disabilities in a recent survey in California, for example, reported that the attorneys they work with “have little or no knowledge about the nature of an attorney’s disability, nor do they seem to create an opportunity to be knowledgeable about such disability.” See STATE BAR OF CAL., *supra* note 38, at 13.

69. RHODE, *supra* note 2, at 5.

70. Krieger, *supra* note 54, at 18; see also Weiss, *supra* note 25, at 255 (“Especially in the practice of law, a heightened level of uneasiness is present when emphasis on academic success is accomplished by alterations for the learning disabled.”).

As one commentator put it, “attorneys seem to be an unhealthy lot.”⁷¹ One study in 1995 found that “lawyers manifested clinical levels of depression, anxiety, phobia, and interpersonal sensitivity 5-15 times more commonly than the general population.”⁷² Many attorneys would consider such conditions merely to be common side effects of the widespread stress and long hours experienced by most practitioners.⁷³ Attorneys struggling with problems who resist applying the label “disability” to themselves may be particularly skeptical and unreceptive to claims of disability in others. They may resist concluding that someone who looks and acts like everyone else could be disabled enough to qualify for protection under the law, particularly in the context of intangible impairments.

The reality of law firm life for young attorneys, particularly in large firms, also encourages a skeptical view toward impairments. Lawyers are often compensated on the number of hours worked rather than on the value of the work completed.⁷⁴ Most associates are required to work a significant number of billable hours, which are then closely tied to promotion and partnership opportunities.⁷⁵ Less than 5% of lawyers work reduced hours, despite the attractive nature of such arrangements.⁷⁶ Perhaps as a result, fully “[t]wo-thirds to three-quarters of lawyers report high levels of stress, and one-third acknowledge that it is damaging their physical and emotional well-being.”⁷⁷ In such an environment, an associate’s request for a reduced-hour arrangement is very likely to be greeted with suspicion and resentment. The reduced work load for one inevitably may be viewed as an increased load for others in proximity. Because of the plum nature of such an assignment, such requests encourage fellow associates to view individuals with impairments as

71. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 881 (1999) (detailing a variety of health problems suffered by attorneys at rates higher than the national average).

72. Sheldon & Krieger, *supra* note 52, at 262 (citing Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995)).

73. Cf. AM. BAR ASS’N, THE REPORT OF AT THE BREAKING POINT: A NATIONAL CONFERENCE ON THE EMERGING CRISIS IN THE QUALITY OF LAWYERS’ HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES 3 (1991) (noting that a “significant” cause of the diminishing quality of lawyers’ health and lives is the fact that they “do not have enough time for themselves and their families—what many have come to call ‘the time famine’”).

74. James J. Alfani & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 63 (1995).

75. Schiltz, *supra* note 71, at 891-93 (describing the increase in billable hour requirements over time).

76. RHODE, *supra* note 2, at 21.

77. *Id.* at 25.

potentially unmotivated malingerers seeking unfair advantages.⁷⁸ In this environment, it will be difficult for attorneys to view claims of disability by colleagues with anything other than jaundiced eyes.

III. ADDRESSING THE SKEPTICS: PROPOSALS FOR CHANGE

As detailed above, there are a number of institutional aspects to legal education and the legal profession generally that may lead members of the profession to view claims of disability with more skepticism and resistance than perhaps an average member of the public. There are many systemic aspects that encourage members of the profession to view the world as a zero-sum game where any advantage secured by a colleague comes at their personal expense. It would be easy to be disheartened by this state of affairs, since it suggests that change must take place on a global level before any real individual improvement takes place. It may be, however, that a number of more discrete changes may nevertheless facilitate the integration of attorneys with disabilities in a meaningful way.

Because law school sets the stage for the later attitudes of attorneys, it provides the best arena to potentially change attitudes toward the concept of disability. In classes that primarily focus on the Socratic method and case review, professors could highlight the factual narrative of cases to emphasize their context within the larger social environment, particularly when cases touch in some way on issues of disability and impairment. Rather than forcing students to divorce social justice concerns from legal reasoned analysis, professors can acknowledge and endorse instinctual responses while simultaneously requiring a legal justification to back the “gut” feeling that precedes it. Emphasizing the human aspects of the law will facilitate students in challenging categorizations and seeing beyond the implicit assumptions that form the foundational legal rules.

The intense individualism that is the hallmark of legal education, moreover, could easily be modified by introducing more group-oriented, problem-solving work that fosters a community orientation. Following in the footsteps of other professional schools, law students addressing hypothetical situations would be required both to negotiate solutions with their peers and to directly confront the real-world impact of the law on the individual

78. See, e.g., STATE BAR OF CAL., *supra* note 38, at 8 (“[R]esponders [in a survey of attorneys with disabilities in California] described an all too common comment that a person with a disability was merely seeking an unfair advantage and trying to get things others couldn’t.”).

hypothetical client. This more outward-looking focus would encourage students once again to connect with the social justice implications of the law and work for the benefit of others rather than solely for personal advancement. In taking this approach, law professors would be doing a service not only to people with disabilities, but to each student as well. As one legal critic has said, “Teamwork, listening skills, and creativity in problem solving may be equally important, and sometimes even more important than argumentativeness, aggressiveness, or individualism as we prepare to enter a new era.”⁷⁹

The widespread availability of legal clinics and client-orientated work potentially would have an even greater impact in this regard, particularly clinics which provide exposure to clients with disabilities. The more law students are exposed to people with disabilities, the more likely they are to view disability as a normal part of the human continuum of ability rather than as a condition synonymous with failure and incapacity. They may also begin to recognize and respect the significant challenges that face this population not only in the hard environment, but also in the institutional arrangements and implicit assumptions that form the invisible backdrop of social policies and organizations.

Within the practice of law itself, educational efforts about the face and abilities of people with impairments will continue to pave the way through the front door of the office. People who are responsible for hiring must become educated about and comfortable with a concept of disability that is not synonymous with incompetence or extreme limitation. When the doors to the law firm have opened to allow a critical mass of attorneys with disclosed disabilities to enter, the problems of isolation and stigma will begin to diminish, and attorneys with disabilities will be seen for who they are: talented individuals who deserve the same chance for success and failure as all other members of the profession.

IV. CONCLUSION

Unlike other vocations, the legal profession is unique in that its members act as “social regulators” who are obligated to uphold and assist with the “proper functioning of institutions of law.”⁸⁰ Attorneys are the holders of the public trust, and that trust demands the equal application of laws to the

79. GUINIER ET AL., *supra* note 56, at 7.

80. SULLIVAN ET AL., *supra* note 44, at 82.

profession. Lawyers have been critical in enabling civil-rights advancements across society over the last several decades. It now remains for the profession to turn that same dedication and energy inward in order to maximize opportunities for all attorneys.