Oregon Women Lawyers

At the Corner of Law Practice and Disability

Wednesday, October 15, 2014 | 3:00 p.m. to 5:00 p.m.

Stoel Rives, 900 SW Fifth Avenue, 19th Floor Conference Room, Portland

Application has been made for 1.5 Access to Justice and .5 Ethics Oregon MCLE Credit Hours

Featuring

Amber Bevacqua-Lynott
Cheryl Coon
Melissa Kenney
Kendra Matthews
Lisa Porter
Helle Rode
Camilla Thurmond

We thank Stoel Rives, our generous hosts for today's program

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Pursuant to MCLE Rule 4.3, sponsors of Group CLE Activities must apply for accreditation no later than 30 days after the completion of the CLE activity.
Individual bar members may also apply on their own behalf for accreditation of a Group CLE Activity by using this form. No fee is required.
The sponsor fee is $40 for a program of 4 or fewer hours and $75 for a program of more than 4 hours. The sponsor fee for a series of programs not exceeding 3 hours in 3 consecutive months is $40. A sponsor fee is required for each repeat (live or electronic) of the programs. (See MCLE Rule 4.3(c).)

Name and address of person or organization applying (Please print. This will be mailing label):	Applying As (check one):
Oregon Women Lawyers	■ Sponsor ❑ Individual Member Bar # ❑❑❑❑❑❑❑
Phone:	Contact Person (Sponsors only): Diane Rynerson
Title of CLE Activity: At the Corner of Law Practice and Disability, OSB MCLE No. 1024*123	
Name of CLE Sponsor (if not the applicant):	Phone:
Date(s) and Location(s) of CLE Activity Date(s): 10/15/2014 Location(s) (city/state): Portland, OR	Number of credits requested: General _____ Practical Skills _____ Prof. Resp.: Ethics .50 Child Abuse Rep_____ A/J 1.50 TOTAL _____

Delivery method(s):
■ faculty in room with participants; ❑ telephone to broadcast site; ❑ interactive video; ❑ satellite ❑ audiotape presentation; ❑ videotape presentation; ❑ interactive computer/internet; ❑ discussion leader present

Is this a replay?
❑ Yes ■ No If yes, please identify program producer:

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Describe sponsor's experience in providing CLE activities (for non-OSB accredited sponsors):
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✓ *Copy of the program agenda showing timelines*
✓ *Biographical information on the program faculty*
✓ *Copy or sample (15-20 pages) of program's written materials - include ethics portion if applicable*
✓ ***Sponsor Fee***

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Make a copy of this form for your records and mail the original to:
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(503) 620-0222 X368 or 1-800-452-8260 X368

Speaker Bios

Amber Bevacqua-Lynott is the Chief Assistant Disciplinary Counsel and Deputy Director of Regulatory Services for the Oregon State Bar. She has been with the Disciplinary Counsel's Office since 2001.

Ms. Bevacqua-Lynott received her B.A. from the University of Redlands (1993) and her J.D. from Pepperdine University School of Law (1996). She is a member of the Oregon Bar (1999) and an inactive member of the Florida (1998) and California (1996) State Bars. In addition to investigating and prosecuting disciplinary matters, Ms. Bevacqua-Lynott is a regular speaker on professional responsibility and ethics issues. She is the developer and co-moderator of Legal Ethics-Best Practices (started in 2011), a semi-annual day-long ethics school providing a comprehensive review of the ethics rules using interactive hypotheticals.

Cheryl Coon leads the social security disability section of Swanson Thomas Coon & Newton of Portland, Oregon, where she represents individuals applying for both SSD and SSI benefits, at all stages of the process. Cheryl holds a J.D. from Boston University School of Law and an LL.M from the University of Washington School of Law. During her thirty-seven years practicing law, she has litigated in state and federal courts and administrative tribunals; spent six years working on public policy issues in the United States Congress as legal counsel and staff director of committees of the Congress; practiced for a decade as a senior assistant attorney general in the Oregon Attorney General's office and taught as an adjunct at the Lewis and Clark Law School. Cheryl is a current member of the Board of the Disability Law Section of the Oregon Bar and a past member of the Boards of the Brain Injury Alliance of Oregon and the Children's Diabetes Network. She is the incoming Co-Chair of the newly established Social Security Disability section of the Oregon Trial Lawyers Association. Cheryl presents frequently on social security disability benefits issues and provides trainings to caseworkers and counselors on filling out disability applications and reports.

Melissa Kenney is a member of KP Law, PC, a social security and veteran's disability law firm providing representation throughout the Pacific Northwest. Since moving from Maryland where she is admitted to practice law, Ms. Kenney now concentrates in social security disability law. In addition to representing claimants at disability hearings in Oregon, Washington, and Idaho and writing appellate briefs for disability cases, Ms. Kenney is an active citizen in Portland, OR as a board member for one organization, AYCO (African Youth and Community Organization). She is also a member of Oregon Women Lawyers and the Portland Asperger's Network.

Ms. Kenney possesses presentation and teaching experience in law, disability and cross-cultural issues in working with clients, including recent presentations for the Oregon Women Lawyers Leadership Forum in Portland, OR, and for National Organization of Social Security Claimant's Representatives (NOSSCR) in San Antonio, TX.

A graduate of Catholic University, Columbus School of Law Ms. Kenney is a member of the Maryland State Bar Association, and was nominated for the Top 100 Lawyers in Maryland in 2009. Prior to her legal career, Ms. Kenney worked as a therapist for adults and youth with mental illness, and spoke at NGO education conferences in Latvia.

Kendra Matthews is a member of Ransom Blackman LLP, and the current president of Oregon Women Lawyers. After attending Georgetown University Law Center and clerking for the honorable Rex Armstrong at the Oregon Court of Appeals, Kendra joined Ransom Blackman LLP in 1998. Though her first love is representing people on appeal, her practice includes the representation of individuals and entities in criminal investigations and cases brought in all levels of the state and federal courts. She represents individuals and entities accused of a broad range of allegations that fall under the label "white collar crime," as well as those accused of more traditional crimes. In addition, her practice also involves representing professionals in proceedings before their regulatory boards.

Camilla Thurmond graduated from Emory University in 1997 with a B.A. in Women's Studies. She received a J.D. from Lewis & Clark Law School in 2002. Ms. Thurmond's legal work experience includes working as a Judicial Clerk for the Honorable Merri Souther Wyatt and working as a Staff Attorney for St. Andrew Legal Clinic. Ms. Thurmond currently works as an Attorney Advisor for the Social Security Administration Office of Adjudication and Review. She has worked as an Attorney Advisor since October 2008.

Lisa Porter is an attorney and a founding partner of KP Law, PC., based out of Portland, Oregon. Lisa's practice focuses exclusively in Social Security Disability law, providing legal services, disability rights education, and public policy advocacy on behalf of disabled citizens nationally. Lisa also teams up with other disability attorneys and law firms in providing hearing level representation as well as appellate research and brief writing in Social Security Disability cases from Appeals Council to the 9th Circuit Court of Appeals.

Lisa grew up in Southern Oregon. She was raised by a mother with diagnosed Multiple Sclerosis. After high school, Lisa became a lead paralegal for eight years for a handicapped attorney. From an early age, Lisa understood the day to day struggles of those with disabilities whether at home or in the work place. Because of this, Lisa developed a strong passion for helping those with disabilities. She went on to graduate from Northwestern School of Law at Lewis and Clark in 1995. At the same time, she held a clerkship with former Plaintiff's Firm, Pozzi, Wilson, Atchison where she focused on workers compensation appeals, personal injury, and Social Security Disability. After working as a corporate attorney/account executive managing large class action lawsuits, Lisa began a solo practice. In her practice as Johnston Porter Law Office, Lisa continued to offer legal services in the areas of Workers Compensation both state and federal levels, personal injury, and Social Security Disability. In 2011, Lisa partnered with Melissa Kenney to form the law firm, KP Law PC, which merged with retiring disability attorney, David B. Lowry's, law practice. With Lisa's advocacy skills, KP Law PC is now one of the premier law firms in Social Security Disability on the West Coast, and is now making national recognition, as Lisa has successfully represented clients from Alaska to Puerto Rico.

Credentials:

Certified Legal Specialties

- VA Disability, Accredited by Veteran's Administration, 2011
- Certified Mediator/Arbitrator 2000

Bar Admissions

- Oregon, 2002
- Washington, 2001
- U.S. District Court District of Oregon
- U.S. District Court Eastern District of Washington
- U.S. District Court Western District of Washington
- U.S. Court of Appeals 9th Circuit

Education

- **Lewis and Clark College Northwestern School of Law, Portland, Oregon**
  - J.D. - 1995
- **Southern Oregon University**
  - B.A. - 1992
  - Honors: With Honors
  - Major: Political Science/Criminal Justice

Helle Rode

Helle works as the Equal Opportunity Compliance Officer for the Oregon Health & Science University (OHSU) Affirmative Action and Equal Opportunity Department (AAEO). In this role, she engages employees and managers in collaborative conversations about reasonable accommodations to assist OHSU employees with disabling conditions. Whether a custodian, researcher, or doctor, Helle works with all employees to create accommodation plans that enable staff to thrive in their positions.

Helle particularly enjoys the preventative and practical work she does at OHSU, helping employees to continue their employment with sometimes minor and sometimes major adjustments or accommodations.

Prior to joining OHSU, Helle practiced employment law for over 20 years in both the public and private sectors, including as a partner at both Dunn Carney and Bullard Law and as a Senior Assistant Attorney General with the Oregon Department of Justice Labor and Employment Section.

Past bar leadership roles have included President of OWLS, President of the Federal Bar Association of Oregon, and Chair of the OSB Dispute Resolution Committee; and she has also served on various state and local bar association committees. At OHSU, Helle currently serves as Chair of the Workplace Expression of Breast Milk Advisory Committee and as an ad hoc member of the School of Medicine's Women in Academic Medicine Committee.

REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES

INTRODUCTION

Diversity in the legal profession has been the subject of much discussion and study for a number of years. A 2003 report by the U.S. Equal Employment Opportunity Commission (EEOC), entitled Diversity in Law Firms, notes the significant role that lawyers play in social, economic, and political life and the influence that minorities and women have been able to attain as their numbers in the legal profession increase.[1]

To date, individuals with disabilities generally have not been a part of the discussion about diversity in the legal profession. Yet, access to the profession is important for people with disabilities for the same reasons it is important to minorities and women. While there is little reliable data on the representation of individuals with disabilities in the legal profession, anecdotal evidence suggests that lawyers with disabilities face many of the same barriers to employment that people with disabilities face in other jobs.

Among the problems lawyers with disabilities have cited is lack of access to reasonable accommodations. Title I of the Americans with Disabilities Act of 1990 (ADA) requires private and state and local government employers with 15 or more employees to provide "reasonable accommodation" to qualified applicants and employees with disabilities, unless doing so would cause an undue hardship.[2] Section 501 of the Rehabilitation Act of 1973 imposes the same requirements on federal agencies, regardless of the number of employees they have.[3]

Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications. See the list of specific changes to the ADA made by the ADA Amendments Act.

This fact sheet addresses the application of the reasonable accommodation obligation to attorneys and their employers.[4] Attorneys with disabilities, both as applicants and employees,[5] may need a range of accommodations in order to apply for and perform many types of legal jobs. Most of the accommodations that attorneys with disabilities may need are similar to those needed by other professionals with disabilities who work in an office setting. Thus, much of the discussion in this document will apply to a wide range of administrative and professional jobs.

This fact sheet reviews many of the most common types of reasonable accommodations that lawyers with disabilities may need. [6] Some of these accommodations, such as modified schedules and telecommuting, are often used by legal employers generally to attract and retain attorneys. Many legal employers have recognized the importance of flexibility to remain competitive in hiring the best attorneys. For these employers, providing reasonable accommodation will be an extension of this approach. In addition, providing reasonable accommodation for qualified attorneys with disabilities serves the larger goal of enabling legal employers to diversify their workforce.

A. General Information About Reasonable Accommodation

Reasonable accommodation refers to any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

There are three categories of reasonable accommodation:

- modifications to the job application process
- modifications to the work environment or to the manner or circumstances under which the position held or desired is customarily performed
- modifications that enable an employee with a disability to enjoy equal benefits and privileges of employment (e.g., employer-sponsored training or social events).[7]

Reasonable accommodations remove workplace barriers that would otherwise impede qualified attorneys with disabilities from competing for jobs, performing jobs, or gaining access to the benefits of employment. As with so many ADA issues, reasonable accommodation decisions should be made on a case-by-case basis after discussions that allow the employer to understand the nature of the accommodation(s) requested and the precise aspect of the application process, job, or benefit that poses a barrier. In some circumstances, an employer may also request documentation of the attorney's disability.

B. Misconceptions Concerning Attorneys with Disabilities and Reasonable Accommodation

Some employers assume that all attorneys with disabilities will need reasonable accommodation or that accommodations will be too costly or difficult to provide. In fact, many attorneys with disabilities will never need reasonable accommodation and most accommodations can be provided at little or no cost.[8] Employers also may mistakenly assume that if a person needs an accommodation, she is likely to be unable to meet expected performance measures – for example, satisfying a minimum number of billable hours. Indeed, managers in professions that require long hours, specialized skills, and stressful working conditions sometimes assume that persons with disabilities, or certain types of disabilities, are not capable of performing such work, especially if they request reasonable accommodation.

> Example 1: Juan, an associate with a medium-sized law firm, has a learning disorder (low processing speed). Juan has been working successfully at the firm for six months, but he is concerned that his disability is starting to create some difficulties in performing his job. Juan finds that his disability can cause him to become distracted but that he can fully compensate for this problem by dictating his thoughts into a tape recorder instead of writing or typing. Therefore, he requests that he be permitted to have a secretary transcribe his recordings. This accommodation enabled him to work successfully at his prior firm. Juan's supervisor, a partner, denies the request, telling Juan that, "in a law firm these days, a competent lawyer has to be able to draft his own documents, not dictate them to someone else." Juan leaves the firm soon thereafter.
>
> The firm may have violated the ADA. Even if the partner had questions about Juan's competence, he should have considered that Juan had used this accommodation to work successfully at his prior firm. This would be a strong indication that the accommodation enables Juan to perform his job effectively. The ADA permits employers to discuss how accommodations work and to ensure that an employee is qualified to perform the essential functions – the primary job duties. Here, the partner never discussed his concerns with Juan or gave Juan an opportunity to respond. If this accommodation would have permitted Juan to perform his job, without causing undue hardship to the firm, then the partner's denial is a violation of the ADA.

The need for reasonable accommodation does not signal an inability to do the job. The purpose of workplace accommodations is to enable attorneys with disabilities to perform their jobs and meet the employer's performance standards.

C. Applicants and Reasonable Accommodation

Employers may need to provide reasonable accommodation for the application process. Common forms of reasonable accommodation needed may include using sign language interpreters and providing written materials in alternative formats, such as Braille or large print. Employers may find it helpful to note on applications that applicants may request reasonable accommodation for the hiring process and to specify a contact person.

> Example 2: Using a relay service, Francesca, who is deaf, calls to schedule an interview with a law firm. She tells the secretary that she is deaf and will need a sign language interpreter. The secretary consults with the Human Resources Department which makes the arrangements.
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> Example 3: A law firm is interviewing several third year law students, one of whom uses a wheelchair. The firm practice is to take the students to lunch at a restaurant next door, but that restaurant has steps at the entryway. The managing partner instructs his secretary to change the reservation to an accessible restaurant down the street.[9]

Employers should consider whether their on-line recruiting and application systems afford access to the application process to individuals with disabilities who use specialized computer software (e.g., applicants with vision impairments who use screen reading or magnification software).

During an interview, employers may not generally ask applicants if they need reasonable accommodation to perform a job. However, if an employer knows a particular applicant has a disability, either because it is obvious or because the person has voluntarily revealed it, and the employer reasonably believes the disability might require accommodation to perform the job, the employer is entitled to ask the following two questions:

- Do you need reasonable accommodation to perform the job?
- If the answer is yes, what accommodation do you believe you need? [10]

Employers can assist applicants in assessing whether they will need an accommodation by making clear the job requirements, the duties to be performed, and the expected level of performance.

The need for reasonable accommodation is not a valid reason to reject an applicant.

D. Requesting Reasonable Accommodation

The ADA generally requires applicants and employees with disabilities to request reasonable accommodation, rather than requiring employers to ask if accommodation is needed.[11] A request is the beginning of the reasonable accommodation process, not the end. The employer may have questions about the nature of the impairment – , whether it is a "disability" – and the requested accommodation. Those questions are addressed as part of "the interactive process" that follows the request. The interactive process is discussed in section F.

To request a reasonable accommodation, an attorney must let the employer know that because of a medical condition he needs a change to the application process, to the job, or to a benefit of

employment. An attorney does not have to mention the ADA, the Rehabilitation Act, or "reasonable accommodation" and does not have to provide evidence that the condition is a "disability" at the time the request is made. The attorney just has to make a "plain English" request for a change due to a medical condition. In some instances, a request for reasonable accommodation may come from a third party, for example a doctor's note outlining work restrictions.

Some employers may not appear open to receiving requests for reasonable accommodation, and some lawyers with disabilities may be reluctant to ask for accommodation because they are concerned that the employer will perceive them as less competent – even when the employer has done nothing to suggest that it has such a perception. However, as in other workplace settings, employees in the legal profession who need accommodation must request it and employers should be prepared to respond appropriately.

> Example 4: Omar, who has cerebral palsy, has recently been hired by a law firm. He finds that his physical limitations in using a computer keyboard, combined with the heavy workload and constant deadlines, are causing him to fall behind in his assignments. Omar is concerned about what the firm will think if he asks for a reasonable accommodation, but he talks to his supervising partner about voice-recognition software that would make it much easier to use a computer and therefore perform his work. The partner consults with the firm's Information Technology department and the software is ordered and installed. Omar also receives specialized training in how to use the software.
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> Example 5: Mary, a senior attorney with a federal agency, has bipolar disorder. Her agency is aware of her disability and has provided an accommodation. Mary's doctor has recently changed her medication, which is resulting in temporary problems with concentration. At the same time, Mary is trying to cope with a change in her workload, thus resulting in a significant increase in stress. Mary contemplates requesting a reasonable accommodation, such as temporarily altering her work hours or removing several marginal functions. But, because she is concerned that her employer will view her as unable to meet job requirements if she asks for too many accommodations, Mary decides not to ask for the additional accommodation.
>
> Perhaps Mary can handle the change in medication, the changes in her workload, and the resulting increase in stress. However, if she cannot handle the stress and performance problems result, neither Mary nor her employer benefit. While it may be difficult for an attorney with a disability to ask for an accommodation, or multiple accommodations, it is better for both the attorney and the employer to deal with an accommodation request than to address performance problems that result from a failure to request a needed accommodation.

Employers can do a number of things to create a climate in which lawyers will request needed accommodation. For example:

- They can adopt policies and procedures on how requests for accommodation will be handled and ensure that these policies are well publicized and implemented.
- They can make sure that both employees and managers know that company policy supports full compliance with the ADA and the provision of reasonable accommodation.
- They can require adequate training of supervisors, managers, and human resources professionals

on handling requests for accommodation and other requirements of the ADA.

E. When to Request a Reasonable Accommodation

Individuals with disabilities may request reasonable accommodation at any time during the application process or during their employment.[12] Some attorneys may choose to wait until they have a job offer before requesting a reasonable accommodation. Others may voluntarily raise the issue during the hiring process.[13] And attorneys may develop disabilities during their employment, thus prompting a request for reasonable accommodation.

> Example 6: Roger is General Counsel of a major corporation. He develops macular degeneration and, as a result, requests from the senior vice president the services of a reader as a reasonable accommodation. He explains that his eyesight no longer permits him to read and that he must review many documents and contracts. The senior vice president agrees to this request.

The ADA does not compel attorneys to ask for accommodations at a certain time. However, failure to request needed accommodation in a timely manner (or to accept a proffered accommodation) could affect job performance and result in discipline or termination based on poor performance or conduct.[14]

> Example 7: An attorney at a nonprofit organization recognizes soon after she begins working that she is having difficulty following conversations at meetings because of her deteriorating hearing. While the attorney uses a hearing aid, it only helps her when talking directly to one person and not in a large room where many people participate in a discussion. The attorney believes that she would be able to hear if the employer provided a portable assistive listening device. The attorney brings the situation to her supervisor's attention and explains that a simple assistive listening system would include an FM transmitter and microphone that could be placed at the center of a conference table and an FM receiver and headset that she would wear. The system would amplify speakers' voices over the headset without affecting the way in which other meeting participants would hear the conversation. The employer provides the reasonable accommodation and the attorney now performs all of her job duties successfully.
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> Example 8: A county government attorney chooses not to disclose her hidden disability, even when she begins having performance problems that she believes are disability-related. Her supervisor notices the performance problems and counsels the attorney about her deficiencies, but the problems persist. The supervisor warns that if her work does not show improvement within the next two months, she will receive a written warning. At this point, the attorney discloses her disability and asks for reasonable accommodation. The supervisor should discuss the request and how the proposed accommodation will help improve the attorney's performance. The two-month period to evaluate the attorney's performance should be suspended pending a decision on her request for reasonable accommodation.
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> Example 9: Same facts as in Example 8, but the supervisor's response to the request for reasonable accommodation is to deny it immediately,

explaining, "You should not have waited until problems developed to tell me about your disability." The attorney, however, did not realize that she had any serious performance problems until her supervisor brought them to her attention, thus prompting her to request accommodation. The supervisor should not have summarily dismissed the request but instead should have discussed it, gathered more information if necessary, and determined whether a reasonable accommodation for a disability was needed. Then, as in Example 8, the two-month period could commence to measure whether the attorney's performance improved.

Example 10: An attorney with a small firm has a learning disability and does not request accommodation during the application process or when he begins working. Because the attorney had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations. Performance problems soon arise, and the attorney's supervising partner brings them to the attorney's attention. He tries to solve the problems on his own, but they persist and he is counseled on improving his performance. The firm follows its policy on counseling and disciplining attorneys who are failing to meet minimum requirements, but these efforts are unsuccessful. During this entire period, when the attorney is receiving counseling and warnings, he does not ask for reasonable accommodation. However, when the partner meets with the attorney to fire him, then the attorney reveals a disability and requests accommodation.

The attorney's request for reasonable accommodation is too late. Reasonable accommodation is always prospective. Therefore, an employer is not required to excuse performance problems that occurred prior to the accommodation request. While it may be understandable that the attorney's prior experience made him reluctant to ask for accommodation, his failure to do so was a mistake. The firm correctly responded to the attorney's performance problems and gave him sufficient opportunity to make changes and request accommodation. Once an employer makes an employee aware of performance problems, it is the employee's responsibility to request any accommodations to address and rectify them.

F. Discussing a Request for Reasonable Accommodation: The Interactive Process

The request for accommodation is the first step in an informal, interactive process between the attorney and the employer.[15] This process will generally focus on two issues: whether the attorney has a "disability" as defined by the ADA and why the requested accommodation is needed. In many instances, a simple conversation between the employer and the attorney will suffice to clarify and resolve these issues. However, when the disability and/or the need for accommodation are not obvious, the employer may ask the attorney for additional information. The employer may also seek, if necessary, reasonable documentation from an appropriate health care or vocational rehabilitation professional about the attorney's disability and functional limitations.[16] The employer is entitled to know that the attorney has a covered "disability" for which he needs a reasonable accommodation. But, the employer is not entitled to obtain all of an attorney's medical records, since they will contain far more information than is necessary to determine whether a "disability" exists and why there is a need for reasonable accommodation.

An employer that requests documentation should specify what types of information it needs

regarding the disability, its functional limitations, and/or the need for reasonable accommodation. In some instances, the employer may obtain needed information by asking the attorney to sign a limited release allowing the employer to submit a list of specific questions to the health care or rehabilitation provider, or by requesting that the attorney submit the questions to the provider directly. These questions should avoid legal terminology and relate only to the condition for which the attorney is requesting accommodation and the job-related barriers she is experiencing. Asking the attorney or her health care provider vague questions increases the likelihood of receiving vague answers.

> Unproductive approach: Does Jane Doe's condition substantially limit a major life activity?
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> Better approach: Please specify all activities that are limited by Jane Doe's asthma. For example, does Ms. Doe's asthma affect her ability to breathe? To walk? Any other activities? For all activities affected by Ms. Doe's asthma, please indicate: 1) the degree of limitation (e.g., under certain specified conditions she can have an asthma attack that will result in severe difficulty breathing and require that she go to the hospital; Ms. Doe experiences minor breathing difficulties during spring and fall allergy seasons) and 2) the frequency with which these limitations occur (e.g., constantly, every few weeks, every two months, only during certain seasons, when confronted with high levels of stress).

The employer should be clear about the purpose for asking such questions, i.e., a specific question should be designed to elicit information to enable the employer to determine if the attorney has an ADA "disability," why a reasonable accommodation is needed, or other possible accommodations that would meet the attorney's needs. Clearly, the employer must understand the nature of the problem, how it is connected to the disability, and how a suggested accommodation would resolve the problem before she can assess what accommodation might be appropriate.[17]

> Example 11: Rebecca, an in-house attorney, asks her supervisor to make several changes to accommodate her chronic fatigue syndrome. She requests that she be allowed to arrive at work at 10:00 a.m. (and correspondingly work later in the evening), that meetings not be scheduled before 10:00 a.m., if possible, and that she be given a reclining chair in her office. The general starting time is 8:30 a.m. and no attorneys have reclining chairs. The employer asks for a more specific explanation regarding the connection between the chronic fatigue syndrome and the accommodations requested. The attorney explains that she has a condition closely associated with chronic fatigue syndrome which results in low blood pressure. This, in turn, results in lightheadedness, and she occasionally faints. After such episodes, she feels tired and groggy and experiences problems concentrating for at least a couple of hours. The low blood pressure is more likely to occur during the early morning hours and after prolonged periods of sitting. Rebecca explains that the accommodations she is requesting are designed to enable her to work a full day, uninterrupted by any symptoms, by starting work at 10:00 a.m. and by avoiding the need to sit or stand for prolonged periods. A reclining chair would enable her to avoid sitting upright, thus preventing the onset of the low blood pressure and enabling her to continue working. Since Rebecca's job involves numerous telephone conversations and significant amounts of reading, she can use the reclining chair when her symptoms prevent sitting at her desk. Her request to schedule meetings at a later hour, where possible,

would enable her to avoid missing important work.

The employer requests documentation to substantiate Rebecca's medical condition, the symptoms she experiences, and the need for the accommodations she identifies. The doctor provides information that corroborates Rebecca's description of her chronic fatigue syndrome and low blood pressure, that explains how reclining, as opposed to sitting, can avoid the onset of low blood pressure, and that concludes that Rebecca should be able to work a full day with these accommodations. Assuming the lawyer has a "disability," and absent any undue hardship, the employer must provide these accommodations or alternative ones that address her limitations and enable her to perform the essential functions of her position.

In some instances, it will immediately be clear whether a proposed accommodation will be effective. In other instances, an employer may have to consider more carefully whether an accommodation will work. The attorney should inform his employer whether he has used a proposed accommodation before – for example, at a previous job or in school – and if so, how well it worked.

Changes in the disability or changes to a job may require an accommodation that the attorney has never before used. When this is the case, an employer should not simply dismiss the possibility that an accommodation may work. Depending on the type of accommodation, an employer in this situation may wish to propose providing the accommodation on a trial basis to determine its effectiveness.

G. Types of Reasonable Accommodations

Reasonable accommodations for attorneys may take many forms. Common examples[18] include:

- making existing workplaces accessible (e.g., installing a ramp, widening a doorway, or reconfiguring a workspace)
- job restructuring (e.g., removing a marginal function)[19]
- part-time or modified work schedules
- unpaid leave once an employee has exhausted all employer-provided leave (e.g., vacation leave, sick leave, personal days)
- acquiring or modifying equipment (e.g., a TTY that would enable a deaf attorney to use a telephone relay service, or an assistive listening device that an attorney who is hard of hearing can use at a meeting)
- modifying workplace policies
- providing tests or training materials in an alternative format, such as Braille or large print or on audiotape
- providing qualified readers or sign language interpreters
- permitting telework, even if the employer does not have an established telework program or the employee with a disability has not met all the prerequisites to qualify for an existing telework program (e.g., length of service)[20]
- changing the methods of supervision (e.g., supervising partner provides associate with critiques of his work through e-mail rather than face-to-face meetings)[21]
- reassignment to a vacant position.[22]

This list of accommodations is not exhaustive. For example, lawyers with disabilities affecting arm

strength and the ability to pull and push might require automatic door openers. A lawyer with a vision impairment may need a screen reading program for a computer, and a lawyer whose disability prevents typing may need voice-recognition software.

> Example 12: Deborah required extensive leave due to leukemia. While the firm granted the leave, her supervising partner wants to give her an unsatisfactory review because she did not bill the required number of hours due to her use of extended leave. Penalizing Deborah with a poor review would be a violation of the ADA because it would render the leave an ineffective accommodation and would constitute retaliation for her use of a reasonable accommodation.[23] The firm should evaluate Deborah's performance taking into account her productivity for the months she did work. It might also choose to delay her evaluation for several months or do an interim evaluation and allow Deborah to resume a normal workload, thus enabling the firm to do a more accurate review of her work.
>
> Example 13: Jonathan, a trial attorney working for a federal agency, asks for a reassignment to a less-demanding position because he finds the long hours and constant deadlines increasingly difficult to handle due to Parkinson's disease. The agency has a vacancy for an attorney to draft agency policy directives and respond to legal inquiries from agency field offices and the public. The job does not require the same long hours as his current litigation position and he would have more control over the pace of work. Since Jonathan meets the qualifications for this position and the position is at the same grade level as his current job, the agency must reassign him unless it can show undue hardship.
>
> Example 14: Emily has lymphedema which causes a buildup of lymphatic fluids in her right leg. The swelling is painful and makes it very difficult to walk more than very short distances, thus affecting Emily's ability to commute to work. She provides documentation from her doctor confirming that the lymphedema is a chronic condition that has worsened in the last few months. The doctor does not expect any improvement in the next several months. As a reasonable accommodation, Emily requests that she be allowed to work from home three days a week. Much of her work involves writing and reviewing documents which she can do using a computer. She also can communicate with clients and colleagues through use of the phone and e-mail. The doctor's letter explains that the three days working at home will ease the pain and make it tolerable for Emily to commute the other two days. Emily and her supervising partner work out an appropriate schedule and methods for ensuring that work is completed in a timely manner. Emily also agrees that, with notice, she can switch days working in the office if she needs to attend a meeting. The partner agrees to this schedule for four months as long as Emily's condition does not improve. After four months, the partner will request an update on Emily's condition to determine if she still requires telework as a reasonable accommodation or any modification to this arrangement due to any changes in her condition.

Sometimes employers are quick to provide items that they expect a person with a disability will need, while slow to grant requests for unexpected things. If employers are uncertain why something is needed, they should ask. Often, the unexpected items may be the easiest to provide (e.g., special office

supplies may be necessary because of a disability, such as certain types of pens for attorneys with limited use of their hands).

In some situations reasonable accommodation is needed to make the working environment more accessible to attorneys with disabilities. For example, an employer might have to install flashing emergency lights or provide a personal digital assistant (PDA) to notify an attorney who is deaf of an emergency situation. Employers also might need to shift furniture to make it easier for an attorney who uses a wheelchair to navigate through the office.

While most forms of reasonable accommodation cost little or nothing to provide, some forms of accommodation may entail higher expenses. Before investing money for more expensive accommodations, the employer and the attorney may wish to explore whether a demonstration of the accommodation can be arranged. If an attorney has used an accommodation before, and can give a detailed explanation of how it will work, setting up a demonstration may not be necessary.

Employers that are concerned about an accommodation's cost may choose to explore the possibility that an accommodation can be provided through vocational rehabilitation agencies or other federal or state programs. However, an employer who can pay the cost of a reasonable accommodation without undue hardship cannot refuse to provide an accommodation because it cannot be obtained through some other source.[24]

H. Actions Not Required as Reasonable Accommodation

Certain actions are not required as reasonable accommodations.

- Employers are never required to remove an "essential function" – i.e., a fundamental job duty. An attorney with a disability must be able to perform the essential functions of his position, with or without reasonable accommodation. Conducting legal research, writing motions and briefs, counseling clients, teaching a law course, drafting regulations and opinion letters, presenting an argument before an appellate court, drafting testimony for a legislative body, and conducting depositions and trials are examples of what may be essential functions for many legal positions.

  Employers should be careful to distinguish essential functions from marginal functions -- duties that are tangential or secondary to the primary job duties. While essential functions never have to be removed from a position, marginal functions may have to be removed as a reasonable accommodation if a person cannot perform them because of a disability.

  > Example 15: A senior associate with multiple sclerosis practices trusts and estates law. The essential functions of her position include drafting wills, providing representation at probate hearings, and counseling clients on complex tax implications related to the transfer of property. In order to conserve the limited energy that results from her disability, the attorney requests that her employer no longer require that she serve on the firm's hiring committee. The attorney and firm determine that this is a marginal function and should be eliminated so that she can focus her limited energy on performing the essential functions.

- Employers are not required to lower or eliminate production standards for essential functions, either quantitative or qualitative, that are uniformly applied. For example, a law firm may require attorneys with disabilities to produce the same number of billable hours as it requires all similarly-situated attorneys without disabilities to produce. Reasonable accommodation may be needed to assist an attorney to meet the billable hours requirement, but it would not be a form of reasonable accommodation to exempt an attorney from this requirement.

Employers should make clear their expectations on production standards, the work that must be produced, and any timetables for producing it. If problems arise in any of these areas, supervisors should immediately discuss them with the attorney with a disability just as they would with any other attorney. On the other hand, if an attorney recognizes that a workplace problem is connected to a disability, the attorney should raise the issue of reasonable accommodation to correct the problem, thus enabling the attorney to meet the employer's expectations.[25]

- Employers are not required to change an attorney's supervisor as a reasonable accommodation.[26] However, nothing in the ADA would prevent an employer and attorney from agreeing to a supervisory change for reasons related to a disability.
- Employers are not required to withhold discipline warranted by poor performance or conduct.[27] (See Example 10.)
- Employers do not have to provide "personal use" items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an attorney with a wheelchair, hearing aids, or similar devices if they are also needed outside of the workplace.

I. Management Should Respond Quickly to Requests for Accommodation

After receiving a request for reasonable accommodation, an employer should move expeditiously to respond to it, seeking any additional information that is needed, and make a determination.[28] In some cases, there will be an urgent need to make a determination.

> Example 16: A law firm's mergers and acquisitions department announces on Monday that all attorneys are expected to attend a staff meeting on Wednesday. A deaf attorney requests a sign language interpreter. The firm must move quickly to provide an interpreter for the meeting.

In other situations, time may not be as critical, but it is always best to make responding to a request a priority. This is especially true when there may be a need to obtain documentation on the disability and/or need for the accommodation or to consult with outside sources on possible accommodations. Employers should keep the attorney informed of developments and explain any delays in processing the request or providing the accommodation. Any unnecessary delay in responding to a request for reasonable accommodation could result in a violation of the ADA.

J. Management May Choose Between Effective Accommodations

In many situations, more than one possible accommodation may meet the needs of the attorney with a disability. The ADA requires that any accommodation chosen be reasonable and effective in eliminating the workplace barrier.[29] While the employer should give serious consideration to a specific accommodation requested by an attorney, the employer is not required to provide that accommodation. The employer may choose among reasonable accommodations as long as the chosen accommodation is effective in eliminating the workplace barrier.[30] This means an employer is free to choose a less expensive or less burdensome alternative if it will still be effective in meeting the attorney's needs. If an attorney has problems with an accommodation suggested by management, she should explain why it is ineffective, or less effective, in eliminating a workplace barrier, and not merely object to the alternative accommodation.[31]

> Example 17: A deaf summer associate will accompany a litigator to an all-day deposition. He requests two sign language interpreters. The law firm suggests that one interpreter should be sufficient. The associate

explains that a sign language interpreter cannot interpret for several consecutive hours. In order to avoid calling frequent breaks in the deposition, the associate believes that two interpreters are needed. The firm agrees and makes the arrangements.

Example 18: A law professor with a visual disability finds that the glare created from light coming through her office window makes it very difficult to read. She explains the problem to the head of her department and requests that she be moved to an office without a window. While such an office is available, the department head asks if curtains or shades would solve the problem. The professor agrees that they would and the department head makes arrangements for shades to be installed rather than moving the professor to a new office.

Sometimes the goal in the interactive process may be to identify several types of effective accommodations, to assess their relative merits, to get the attorney's input on what he prefers and why, and then to have the employer make a decision. While employees often have suggestions for possible accommodations, employers should be actively involved in proposing ideas based on a thorough understanding of the workplace barrier. The employer may seek assistance from a variety of sources on possible accommodations, including the Job Accommodation Network, Disability and Business Technical Assistance Centers, disability organizations, and the EEOC.[32]

K. Employers May Need to Provide More Than One Accommodation

Sometimes an attorney may need only one accommodation, while in other cases she may need two or more accommodations.[33] The need for reasonable accommodation also can change over time, particularly for degenerative disabilities.[34] Attorneys with disabilities should not assume that since they asked for accommodation once, the employer knows when a different accommodation is needed. To the contrary, attorneys should make a new request if a current accommodation no longer works or if an additional accommodation is required. If it is unclear why a new accommodation is needed, an employer should again engage in the interactive process. Generally, an employer should not ask for additional information to establish that the attorney has an ADA "disability" unless previous information suggested that the disability or its limitations would be of limited duration.[35]

Example 19: A senior associate has multiple sclerosis. As a reasonable accommodation, he is allowed to work a flexible schedule as long as he coordinates his hours with other attorneys in his practice area. He also is allowed to work from home when his disability flares up and makes commuting to work more difficult. The attorney's eyesight is beginning to deteriorate severely as a result of the disability. He raises the issue of his failing eyesight with the firm's human resources department, which handles most accommodation requests, and asks if he might be assigned additional secretarial help. The human resources manager does some research and learns about equipment that he believes may enable the attorney to continue reviewing and drafting documents on a computer, including software that will read information on the screen and an optical scanner that can be used to convert printed material into an electronic format. The attorney agrees that this equipment should meet his needs. The firm purchases the equipment and provides the attorney with appropriate training on how to use it.

It is always a good idea for an employer to consult with the attorney after providing a reasonable

accommodation to ensure that it is working as expected. Sometimes, despite everyone's best intentions, a reasonable accommodation does not work. In that case, the employer should consider whether there is another accommodation that would work and would not cause undue hardship.[36]

L. Thinking Ahead Can Avoid Future Problems

Sometimes employers make major changes in the work environment that affect all employees but may have a particular impact on attorneys with disabilities, such as changes to information technology or relocation of physical facilities. Consulting with an attorney with a disability before making such changes can avoid problems and save money.

> Example 20: A law firm intends to move into a building that is under construction. The firm has a mid-level associate who uses a wheelchair. The firm consults with the attorney about what questions it should ask the building owner and its architectural firm to ensure accessibility. The attorney provides a list of items addressing areas such as the entry to the building, the elevators, the restrooms, the parking lot, the stairwells (to ensure they are designed appropriately for emergency evacuation), and the firm's own space. The firm discusses the attorney's concerns with the building owners and the architectural firm, and continues to consult with the associate throughout the building process to ensure the new space is accessible. Involving the employee with a disability helps ensure compliance with Title III of the ADA,[37] which requires that newly constructed buildings meet certain accessibility standards. Moreover, the employee may require additional adaptations not mandated by Title III, but nonetheless required as a reasonable accommodation (absent undue hardship) under Title I. Ensuring that accessibility features are built into the new structure avoids the difficult and potentially more expensive situation of considering retrofits after the building's completion.

Employers also should include employees with disabilities when reviewing or making changes to emergency protocols.[38] This includes ensuring that employees with certain disabilities are promptly made aware of emergency situations (e.g., installing flashing lights in addition to alarm bells) and that appropriate plans are in place for the evacuation of anyone with a mobility impairment.

M. Reasonable Accommodation to Gain Equal Access to Benefits of Employment

The reasonable accommodation obligation extends to ensuring equal access to the "benefits and privileges of employment."[39] Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training that can lead to employee advancement (whether provided by the employer or an outside entity);[40] (2) services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation); and (3) social and professional functions (e.g., parties to celebrate retirements and birthdays, company retreats, and outings to restaurants, sporting events, or other entertainment activities). Benefits and privileges of employment also include access to information communicated in the workplace, such as through e-mail, public address systems, or during meetings, whether or not that information relates directly to performance of an attorney's essential job functions.

> Example 21: A corporation provides parking for its employees. Parking spaces are unassigned. An attorney has severe emphysema and asks for

a parking space next to the door. His disability requires constant use of a portable oxygen tank which, in turn, restricts him from walking even relatively short distances. The attorney is seeking an accommodation to use the employer-provided benefit. Therefore, the employer should reserve a parking space next to the door for use by the attorney as a reasonable accommodation, if there is no undue hardship, in order to provide him equal access to the parking benefit.

An employer's obligation to make a benefit accessible with reasonable accommodation does not require the employer to provide an alternative benefit.[41]

Example 22: A corporation subsidizes paid parking for its employees. A lawyer with epilepsy does not drive because of her disability. She requests that the employer provide her with the cash equivalent of the parking subsidy as a reasonable accommodation so that she can use the money to pay for her transportation. The employer does not have to grant this request because the attorney is asking the employer to provide her with a different benefit – subsidized use of public transportation. The employer has the right to choose to provide paid parking while not providing subsidies for use of public transportation. The fact that the lawyer's disability does not allow her to make use of the paid parking does not require the employer to provide her with a different benefit.

N. Limitation on Providing Reasonable Accommodation: Undue Hardship

An employer has no obligation to provide a specific form of reasonable accommodation if it will cause "undue hardship," i.e., significant difficulty or expense.[42] Employers should not assume that because one accommodation would result in undue hardship, there would be undue hardship in providing any accommodation. Undue hardship must be determined on a case-by-case basis, taking into consideration the following factors:

- the nature and cost of the accommodation needed
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity)
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation
- the impact of the accommodation on the operation of the facility.[43]

Example 23: A law firm based in New York has offices in four other cities. The firm has an executive committee comprised of partners from each office that sets salaries, establishes hiring policies, determines billing rates, and makes partnership decisions. The Atlanta office is considering hiring a blind attorney who has requested the following: a screen reader computer program that converts what is on the screen to

speech; a computer program that scans written text and reads it aloud; a Braille printer; and a screen magnification program. In determining whether undue hardship exists, the Atlanta office must look at not only its resources but the resources of the entire firm. The Atlanta office is not an independent entity but maintains an integrated administrative and fiscal relationship with the head office in New York and the other offices; therefore, the resources of the entire firm must be taken into account in assessing undue hardship.

If the employer determines that the cost of a reasonable accommodation constitutes an undue hardship, it should consider whether some or all of the cost can be offset. In some instances, state rehabilitation agencies or disability organizations may provide certain accommodations at little or no cost.[44] An employer should also determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation.[45] But, an employer cannot claim undue hardship solely because it cannot obtain a reasonable accommodation at little or no cost, or because it is ineligible for a tax credit or deduction.

An employer cannot claim undue hardship based on employees' fears or prejudices about the attorney's disability. Similarly, employers cannot base an undue hardship decision on the fears, prejudices, or preferences of clients or the public.[46] However, undue hardship may exist if a particular form of reasonable accommodation actually disrupts the ability of other attorneys and employees to do their jobs.

Example 24: Rachel, a city government attorney, seeks and is granted a modified work schedule because of her disability. Rachel's job requires that she work closely with department attorneys as well as other employees. Her new schedule means she often is not available when other attorneys and employees need her assistance, thus resulting in missed deadlines and incomplete work. Additionally, other attorneys are handling more requests for assistance because of Rachel's new schedule. Rachel's new schedule is causing an undue hardship on the agency because it adversely affects the ability of other employees to perform their essential functions in a timely manner.

O. Legal Enforcement

Private Sector/State and Local Governments

An attorney who believes that his employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a "charge of discrimination" with the EEOC. The charge must be filed by mail or in person with a local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination law also covers the charge.[47]

The EEOC will notify the employer of the charge and may ask for a response and supporting information. Before a formal investigation, the EEOC may select the charge for its mediation program. Participation in mediation is free, voluntary, and confidential. Mediation may provide the parties with a quicker resolution of the case.

If mediation is not pursued or is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination occurred. If reasonable cause is found, the EEOC will then try to resolve the charge. In some cases, where the charge cannot be resolved, the EEOC will

file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a lawsuit. A charging party also can request a notice of a "right to sue" from the EEOC 180 days after the charge first was filed with the EEOC.

For a detailed description of the process, please refer to the EEOC website at http://www.eeoc.gov/employees/charge.cfm.

Federal Government

An applicant or employee who believes that her employment rights have been violated on the basis of a hearing disability and wants to make a claim against a federal agency must file a complaint with that agency. The first step is to contact an EEO Counselor at the agency within 45 days of the alleged discriminatory action. The individual may choose to participate in either counseling or in Alternative Dispute Resolution (ADR) if the agency offers this alternative. Ordinarily, counseling must be completed within 30 days and ADR within 90 days.

At the end of counseling, or if ADR is unsuccessful, the individual may file a complaint with the agency. The agency must conduct an investigation unless the complaint is dismissed. If a complaint contains one or more issues that must be appealed to the Merit Systems Protection Board (MSPB), the complaint is processed under the MSPB's procedures. For all other EEO complaints, once the agency finishes its investigation the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency.

In cases where a hearing is requested, the administrative judge issues a decision within 180 days and sends the decision to both parties. If the agency does not issue a final order within 40 days after receiving the administrative judge's decision, the decision becomes the final action of the agency.

A complainant may appeal to EEOC an agency's final action within 30 days of receipt. The agency may appeal a decision by an EEOC administrative judge within 40 days of receiving the administrative judge's decision.

For more information concerning enforcement procedures for federal applicants and employees, visit the EEOC website at http://www.eeoc.gov/facts/fs-fed.html.

Endnotes

[1] See http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/#intro.

[2] See 42 U.S.C. §§ 12111(2) and (5), 12112(b)(5)(A); 29 C.F.R. §§ 1630.2(b), (d) and (e), 1630.9(a). Pursuant to Title II of the ADA, state and local government agencies with fewer than 15 employees must follow the same employment discrimination rules as found under Title I. 28 C.F.R. § 35.140(b)(2).

[3] 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b). This document will use the term "ADA" to refer to both the Americans with Disabilities Act and the Rehabilitation Act.

[4] In 1999, the U.S. Equal Employment Opportunity Commission (EEOC) issued a comprehensive Enforcement Guidance addressing many legal, policy, and practical concerns involving the "reasonable accommodation" obligation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (rev. Oct. 17, 2002) at www.eeoc.gov/policy/docs/accommodation.html [hereinafter "Reasonable Accommodation"]. Readers who want more specific information about the topics discussed in this Fact Sheet should consult the Guidance.

In addition to the Guidance, the EEOC has published documents on many other ADA-related subjects, including specific disabilities or types of disabilities (e.g., psychiatric disabilities, cancer, and

diabetes) and the rules regarding when employers may require applicants and employees to answer disability-related questions and undergo medical examinations. The ADA, the implementing regulations and its appendix, and all of the EEOC's ADA-related documents cited in this fact sheet (as well as others) can be found at EEOC's website, www.eeoc.gov.

[5] Under some circumstances, partners may be considered employees entitled to the protection of the employment anti-discrimination laws. The position title is not determinative. Rather, whether a partner is considered an employee depends on the level of control the organization has over the partner. See Clackamas v. Gastroenterology Assocs, P.C. v. Wells, 538 U.S. 440, 448-51 (2003).

[6] This fact sheet is not intended to be a basic primer on the legal requirements regarding reasonable accommodation; nor will it provide a full discussion of many important ADA terms and concepts, such as the definitions of "disability," "qualified," and "essential functions." See 42 U.S.C. §§ 2102(2), 12111(8); 29 C.F.R. §1630.2(g)-(n); 29 C.F.R. pt. 1630 app. §§ 1630.2(g)-(n). More information on these terms and concepts can be found in the appendix to the ADA regulations and EEOC's ADA-related documents referred to in note 4, supra. See also Section H, infra, "Actions Not Required as Reasonable Accommodation," for examples of possible essential functions of an attorney.

[7] 29 C.F.R. § 1630.2(o)(1)(i-iii) (emphasis added).

[8] The Job Accommodation Network (JAN) provides information about the costs of reasonable accommodation at http://askjan.org/links/faqs.htm and http://askjan.org/media/LowCostHighImpact.doc.

[9] See section M, infra, "Reasonable Accommodation To Gain Equal Access To Benefits of Employment."

[10] See pages 6-8 in the EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995) at www.eeoc.gov/policy/docs/preemp.html. While employers may ask a specific applicant with a disability about the need for reasonable accommodation, the employer may not ask questions about the disability (e.g., how long has the applicant had the disability, what treatment does he receive, what is the prognosis). Such questions are prohibited prior to making a job offer.

[11] See Questions 1-3 in "Reasonable Accommodation," supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004); Estades-Negroni v. Associates Corp. of N. Am., 377 F.3d 58 (1st Cir. 2004); Russell v. TG Mo. Corp., 340 F.3d 735 (8th Cir. 2003); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999); and Taylor v. Principal Fin. Group, 93 F.3d 155 (1996 5th Cir.).

[12] See Question 4 in "Reasonable Accommodation," supra note 4.

[13] See Questions 5 and 16 in the EEOC Fact Sheet on Job Applicants and the Americans with Disabilities Act (2003) at www.eeoc.gov/facts/jobapplicant.html.

[14] See 29 C.F.R. § 1630.9(d). See, e.g., Alexander v. Northland Inn, 321 F.3d 723 (8th Cir. 2003); Conneen v. MBNA Am. Bank N.A., 334 F.3d 318 (3d Cir. 2003). But see Fenney v. Dakota Minn. & E.R.R. Co., 327 F.3d 707 (8th Cir. 2003) (employer's motion for summary judgment denied where plaintiff showed that his repeated requests for reasonable accommodation were ignored, thus causing him to take a demotion to avoid termination).

[15] 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9. See also Question 5 in "Reasonable Accommodation," supra note 4. See, e.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789 (7th Cir. 2005); Bartee v. Michelin N. Am., Inc., 374 F.3d 906 (10th Cir. 2004); Brown v. Tucson, 336 F.3d 1181 (9th Cir. 2003); EEOC v. United Parcel Serv., Inc., 249 F.3d 557 (6th Cir. 2001); Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

[16] See Questions 6-8 in "Reasonable Accommodation," supra note 4. See e.g., Templeton v. Neodata Serv., Inc., 162 F.3d 617 (10th Cir. 1998).

[17] See Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

[18] 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); 29 C.F.R. pt. 1630 app. § 1630.2(o). See also "Reasonable Accommodation," supra note 4, which provides detailed information on a number of forms of reasonable accommodation, including job restructuring, leave, part-time or modified work schedules, modifying workplace policies, and reassignment.

[19] See Section H, "Actions Not Required as Reasonable Accommodation," for information on the difference between essential and marginal functions.

[20] See Question 34 in "Reasonable Accommodation," supra note 4; see also EEOC Fact Sheet on Telework as a Reasonable Accommodation (2003) at www.eeoc.gov/facts/telework.html. See, e.g., Mason v. Avaya Communications, Inc., 357 F.3d 1114 (10th Cir. 2004); Kvorjak v. Maine, 259 F.3d 48 (1st Cir. 2001).

[21] See Question 33 in "Reasonable Accommodation," supra note 4; see also Question 26 in EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (1997) at www.eeoc.gov/policy/docs/psych.html.

[22] See section on 'Reassignment' in "Reasonable Accommodation," supra note 4. See, e.g., Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6 (1st Cir. 2004); Hedrick v. W. Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004); Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. 2004); Dilley v. SuperValu, Inc., 296 F.3d 958 (10th Cir. 2002); Skerski v. Time Warner Cable Co., 257 F.3d 273 (3d Cir. 2001); Lucas v. W.W. Grainger, Inc., 257 F.3d 1249 (11th Cir. 2001).

[23] See Criado v. IBM, 145 F.3d 437, 444-45 (1st Cir. 1998); see also Question 19 in "Reasonable Accommodation," supra note 4.

[24] For more information on "undue hardship," see section N, infra, "Limitation on Providing Reasonable Accommodation: Undue Hardship."

[25] See section E, supra, "When to Request a Reasonable Accommodation."

[26] See Question 33 in "Reasonable Accommodation," supra note 4; but see Kennedy v. Dresser Rand Co., 193 F.3d 120 (2d Cir. 1999) (contrary to EEOC's Reasonable Accommodation Guidance, it is not *per se* unreasonable to change an employee's supervisor but there is a presumption that such an accommodation is unreasonable).

[27] See Questions 35-36 in "Reasonable Accommodation," supra note 4. Cf. Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894 (7th Cir. 2000) (court upholds termination because plaintiff never requested reasonable accommodation despite repeated warnings about excessive absenteeism); Hill v. Kansas City Area Transp. Auth., 181 F.3d 891 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

[28] See Question 10 in "Reasonable Accommodation," supra note 4.

[29] See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

[30] See Question 9 in "Reasonable Accommodation," supra note 4. See, e.g., Burchett v. Target Corp., 340 F.3d 510 (8th Cir. 2003).

[31] See, e.g., Wells v. Shalala, 228 F.3d 1137 (10th Cir. 2000); Webster v. Methodist Occupational Health Ctrs., Inc., 141 F.3d 1236 (7th Cir. 1998); Stewart v. Happy Herman's Cheshire Bridge, Inc.,

117 F.3d 1278 (11th Cir. 1997).

[32] Contact information for the Job Accommodation Network and the Disability and Business Technical Assistance Centers, as well as additional organizations that can assist in identifying accommodations, can be found in "Reasonable Accommodation," supra note 4. Individuals also may find helpful information on disability organizations and other resources in the EEOC's Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act/Resource Directory (1992), available free of charge by calling 1-800-669-3362 (Voice) or 1-800-800-3302 (TDD) [hereinafter "ADA Technical Assistance Manual"]. To discuss possible forms of reasonable accommodation, individuals and employers may call the EEOC at 202-663-4691.

[33] See, e.g., Ralph v. Lucent Tech., Inc., 135 F.3d 166 (1st Cir. 1998).

[34] Cf. Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001) (when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

[35] See Question 8, Example B in "Reasonable Accommodation," supra note 4.

[36] See Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128 (9th Cir. 2001)(when it became clear to both parties that the initial accommodation was not working, the employer should not have summarily rejected the employee's request for an alternative accommodation but should have engaged in the interactive process to determine if another reasonable accommodation would have been effective).

[37] 42 U.S.C. § 12183.

[38] See EEOC Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures (2001) at www.eeoc.gov/facts/evacuation.html; "Preparing the Workplace for Everyone: Accounting for the Needs of People with Disabilities" at http://www.dol.gov/odep/pubs/ep/preparing.htm (although this is a blueprint for federal agencies on adopting and implementing emergency plans that address the needs of people with disabilities, most of the information is relevant to other types of employers). Employers also may find helpful information from the National Organization on Disability's Emergency Preparedness Initiative, www.nod.org.

[39] See footnotes 14 and 15 and accompanying text in "Reasonable Accommodation," supra note 4.

[40] See id. at Question 15.

[41] Cf., Alexander v. Choate, 469 U.S. 287 (1985) (Tennessee's reduction in annual inpatient hospital coverage cannot be the basis of a disparate impact claim under §504 of the Rehabilitation Act because the statute does not require a state to alter its definition of a benefit to meet the medical reality confronting a disabled individual); see also section 7.12 in the "ADA Technical Assistance Manual," supra note 32 (an employer does not have to eliminate a benefit because an employee with a disability cannot use it); section (B) ("What is a Disability-Based Distinction") in EEOC Interim Enforcement Guidance on the application of the ADA to disability-based distinctions in employer provided health insurance (1993) at www.eeoc.gov/policy/docs/health.html (health insurance distinctions that are not based on disability and that apply to all insured employees do not violate the ADA even when the definition of a particular benefit may have an adverse impact on certain individuals with disabilities); Question 5 in EEOC Questions and Answers About the Association Provision of the ADA (2005) at http://www.eeoc.gov/facts/association_ada.html (same).

[42] 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p); 29 C.F.R. pt. 1630 app. § 1630.2(p); see also section on 'Undue Hardship Issues' in "Reasonable Accommodation," supra note 4.

[43] 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2); 29 C.F.R. pt. 1630 app. § 1630.2(p).

[44] The Job Accommodation Network (JAN) website, www.jan.wvu.edu/links/funding.htm, provides information on possible funding sources or sources to obtain certain forms of accommodations. Employers may wish to check if any of these sources might be helpful, although many are limited to certain locations and serving certain clientele (e.g., low income individuals).

[45] Two tax incentives may be available to certain businesses to help cover the cost of making access improvements for persons with disabilities. The first is a tax deduction that can be used for architectural and transportation adaptations. The second is a tax credit for small businesses that can be used for architectural adaptations, equipment acquisitions, and services such as sign language interpreters. More information can be obtained at http://www.ada.gov/archive/taxpack.htm and http://www.irs.gov.

[46] See 29 C.F.R. pt. 1630 app. § 1630.15(d).

[47] Many states and localities have disability anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Individuals may file a charge with either the EEOC or a FEPA. If a charge filed with a FEPA is also covered under the ADA, the FEPA will "dual file" the charge with the EEOC but usually will retain the charge for investigation. If an ADA charge filed with the EEOC is also covered by a state or local disability discrimination law, the EEOC will "dual file" the charge with the FEPA but usually will retain the charge for investigation.

This page was last modified on February 2, 2011.

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Work At Home/Telework as a Reasonable Accommodation

Many employers have discovered the benefits of allowing employees to work at home through telework (also known as telecommuting) programs. Telework has allowed employers to attract and retain valuable workers by boosting employee morale and productivity. Technological advancements have also helped increase telework options. President George W. Bush's New Freedom Initiative emphasizes the important role telework can have for expanding employment opportunities for persons with disabilities.

Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications. See the list of specific changes to the ADA made by the ADA Amendments Act.

In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02)*, the Equal Employment Opportunity Commission said that allowing an individual with a disability to work at home may be a form of reasonable accommodation. The Americans with Disabilities Act (ADA) requires employers with 15 or more employees to provide reasonable accommodation for qualified applicants and employees with disabilities. Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. The ADA does not require an employer to provide a specific accommodation if it causes undue hardship, *i.e.*, significant difficulty or expense.

Not all persons with disabilities need - or want - to work at home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.

This fact sheet explains the ways that employers may use existing telework programs or allow an individual to work at home as a reasonable accommodation.

1. **Does the ADA require employers to have telework programs?**

   No. The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

   In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

2. **May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?**

   Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's

preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective. (See Question 6.)

3. **How should an employer determine whether someone may need to work at home as a reasonable accommodation?**

   This determination should be made through a flexible "interactive process" between the employer and the individual. The process begins with a request. An individual must first inform the employer that s/he has a medical condition that requires some change in the way a job is performed. The individual does not need to use special words, such as "ADA" or "reasonable accommodation" to make this request, but must let the employer know that a medical condition interferes with his/her ability to do the job.

   Then, the employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability.

4. **How should an employer determine whether a particular job can be performed at home?**

   An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.

   After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.

   Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

   If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to

review documents and write reports from home.

5. **How frequently may someone with a disability work at home as a reasonable accommodation?**

   An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (e.g., for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home. For example, sometimes the effects of a disability become particularly severe on a periodic but irregular basis. When these flare-ups occur, they sometimes prevent an individual from getting to the workplace. In these instances, an employee might need to work at home on an "as needed" basis, if this can be done without undue hardship.

   As part of the interactive process, the employer should discuss with the individual whether the disability necessitates working at home full-time or part-time. (A few individuals may only be able to perform their jobs successfully by working at home full time.) If the disability necessitates working at home part-time, then the employer and employee should develop a schedule that meets both of their needs. Both the employer and the employee should be flexible in working out a schedule so that work is done in a timely way, since an employer does not have to lower production standards for individuals with disabilities who are working at home. The employer and employee also need to discuss how the employee will be supervised.

6. **May an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?**

   Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.

7. **How can employers and individuals with disabilities learn more about reasonable accommodation, including working at home?**

   Employers and individuals with disabilities wishing to learn more about working at home as a reasonable accommodation can contact the EEOC at (202) 663-4691 (voice) and (202) 663-7026 (TTY). General information about reasonable accommodation can be found on EEOC's website, www.eeoc.gov/policy/guidance.html (Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; revised 10/17/02). This website also provides guidances on many other aspects of the ADA.

   The government-funded Job Accommodation Network (JAN) is a free service that offers employers and individuals ideas about effective accommodations. The counselors perform individualized searches for workplace accommodations based on a job's functional requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at 1-800-526-7234 (voice or TDD); or at www.jan.wvu.edu/soar.

This page was last modified on October 27, 2005.

About Alice Plymell

For many years, Eugene attorney Alice Plymell has volunteered her time and expertise to help clients at Lane County Legal Aid, Law and Advocacy Center, and Senior Law Service. Alice has been practicing law in Lane County since 1963, and she was one of the first women lawyers to practice in Eugene. She is currently a member of the Oregon State Bar and Chair for Lane County Recruitment and Screening Committee of Long Term Care Ombudsman. She specializes in Estate Planning, Probate, Social Security, Disability, and Guardianships.

She was born on a farm north of Ontario, Oregon and went to Cal State in Sacramento, California, where she earned her Bachelor of Arts Degree in Political Science; and then to the University of Oregon Law School where she graduated in 1963 with a Bachelor of Laws.

Alice herself is physically disabled. She made up her mind in 8th grade that she would be a lawyer because she felt this was something she could do with her physical disability. She was interested in the challenge, and she stuck with it. She has since established the Wade and Elsie Marler Plymell Scholarship in honor of her parents. This scholarship helps young people with disabilities fund their higher education so they may live their dream of becoming a lawyer as well.

On May 16, 2004, the Lane County Coalition of Senior Programs honored Alice as one of ten inspirational people over age 60 who are actively involved in work, community and volunteer projects and who exemplify the theme, "Aging Well, Living Well." In a ceremony at the Campbell Senior Center in Eugene celebrating Older Americans Month, the Coalition unveiled a special poster featuring photos of this diverse and interesting group and reflecting the many faces of Older Americans in Lane County.

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October 3, 2014

Diane Rynerson
Oregon Women Lawyers
PO Box 40393
Portland, OR 97240

Reference: Disability

Dear Diane,

The first topic is: What are some practical ways a small firm can accommodate an attorney or staff member with a disability?

One of the most important "practical ways" a small firm can accommodate an attorney or staff member with a disability is by treating them as a member of the team, not a person with a disability.

It is also very important to have the proper desk and chair that can accommodate the needs of the member, and reassess those needs periodically since some disabilities change with time. The firm should be accessible for wheel chairs or scooters so that the team member has full access to the office and other members.

Another very, very important aspect of accommodating is to be sure the facilities are "completely" suitable for the disabled member. Some offices have brought their facilities up to the ADA requirements, but the bare minimum requirements. This really does not assist many disabled clients or team members since the facilities need to be truly accommodating for everyday use.

A firm should also think through the interview questions and not ask questions of the interviewee, as some in the past have, such as "How are you going to go to the courthouse." These situations should have already been answered by the interview committee of how the firm will assist and enable a disabled team member in every aspect of the job, including how to attend the different required buildings, businesses and meetings.

Another modification that could be considered, and does not have to be disabled-based, is modified work hours when needed. Working around a condition can bring the best of the team member's abilities to the table.

Small firms or even large firms should provide proper signage for the disabled, whether employee or client, so that they can find the truly accessible facilities with ease. One of the hardest situations for disabled persons when in a new surrounding is knowing where the best places are.

Video screens and microphones need to be tested to be sure hearing impaired or visually challenged individuals can see and hear the presentation properly. At the recent OWLS conference, the two main speakers had hand-free microphones and were harder to hear than the guest speakers that had hand-held microphones. The video screen should also be with darker print so that it is easier to read.

The next topic is: What are the ethical concerns and best practices for lawyers who have an unplanned medical emergency?

For best practices, firms should have a plan of adaption for the office, just as they would have a plan for evacuation. This plan should be a readiness plan for the firm allowing them to know what to do should something happen to a team member or staff member.

An ethical concern would be that the clients are always taken care of. This will be accomplished if the two-way mentoring program is established and maintained throughout the firm so that there will always be someone that can step into the position of the person with the unplanned medical emergency.

The two-way mentoring in specific areas of law within the firm could possibly be part of the readiness plan so that it is already decided who would take over cases should an unplanned medical emergency arises. Having it preplanned will help in any transition that is needed.

The last topic is: What resources are available for attorneys with disabilities?

There are some resources available to attorneys with disabilities, like transportation services, modified computers, and telephone adaptation for hearing impaired.

There is also a program through the Oregon State Bar that provides a professional that will come to the office to assist when needed.

One accommodation at the court is that disabled persons are allowed to testify from their wheel chair or scooter, rather than having to transition to the witness stand.

Sincerely,

Alice M. Plymell

Alice M. Plymell

AMP:mcm

Materials for CLE "At the Corner of Law Practice and Disability"

Introduction

Brief Overview of Social Security Disability Benefits

1. Who is eligible for social security disability benefits

An individual is eligible for social security disability benefits under the law if:
1) He cannot do "*substantial gainful activity*" (A person who is earning more than a certain monthly amount (net of impairment-related work expenses) is ordinarily considered to be engaging in *substantial gainful activity* (SGA). That amount is currently $1040/month)
and
2) His disability is because of a "medically determinable physical or mental impairment"; and
3) His disability has lasted or will last for 12 months or is expected to cause death.

2. Are there different kinds of benefits?

Yes. You hear most often about **SSI** and **SSD**. But in addition, there are benefits called Disabled widow's benefits and disabled child's benefits which I won't describe further here in our 101 course. SSI and SSD have the same substantive standards. The main difference is that there are additional eligibility requirements for SSI (limited income and resources). And, there are differences in what you get if you win.

3. What is the process for obtaining social security disability benefits? How long does it take?

There are multiple steps in the social security disability process; overall from initial application to hearing you're looking at almost two years.

a. Initial application

Anyone who believes he or she may qualify for Social Security benefits should *apply immediately*. The process takes time, and benefits are paid based on the date of application. If you are able to go back to work, you can always withdraw your application. The important thing is to get the process started.

Call the Social Security Administration (SSA) at 1-800-772-1213 to make your application. SSA will contact you for an interview day. You can also apply online at http://www.ssa.gov but applying online is not recommended unless you are very computer savvy. SSA will notify you of their decision within approximately four to six months of your application.

It's important to know that approximately two-thirds to three-quarters of applicants are denied at this stage. It will take 4-6 months to get a decision.

b. Reconsideration

If the decision on your application is unfavorable, you have the right to request reconsideration, and you should do that because many applications are not granted until the third step in the process — the hearing. Your request for reconsideration must be filed within 60 days of the date on your denial letter.

SSA will notify you of their decision on reconsideration within approximately four to six months of your application.

c. Hearing

If your claim is denied on reconsideration, you have 60 days to request a hearing before an administrative law judge (ALJ). **In Oregon, it currently takes about 15-16 months days for a hearing to occur after you request it.**

The hearing is the only time you get to present your case in person to a decision maker in Social Security. You are entitled to have a lawyer at your hearing. Your lawyer will argue your case to the judge and cross-examine the expert witnesses that the Social Security Administration is likely to have at your hearing, such as medical experts and vocational experts. You are also entitled to bring your own witnesses – friends and family who know your condition. This can be very helpful to your case.

The hearing is a very important stage because *over two-thirds of denied claimants who go to hearing have their cases approved*. After the hearing, the judge will issue a written decision within three months.

d. Appeals Council

If the Administrative Law Judge finds you are not disabled and there is a legal error in the decision, the next step is an appeal to the Appeals Council, which is located in Falls Church, VA. This appeal can take an unpredictable amount of time for a decision to be issued. We have seen it take four months...or two years.

e. Federal Court

If the Appeals Council decision is unfavorable, you can appeal that decision to United States District Court. While it's certainly discouraging to keep being denied, you should not give up. Many cases that go to United States District Court are decided in favor of the applicant and are sent back for a new hearing or payment of benefits.

4. How are cases evaluated?

Social Security Regulations provide for a five-step evaluation process to determine disability.

Step 1: Income

Work generating more than $1040 per month after appropriate deductions constitutes substantial gainful activity (SGA) and disqualifies an applicant for disability benefits. Unsuccessful work attempts of up to 6 months generally don't count.

Step 2: Severity

A claimant must have a medical condition — either mental, physical or both — that limits his ability to work. This is called a "severe" impairment.

In addition, the medical condition must have lasted -- or be expected to last -- **for 12 months** and/or result in death. However, claimants with symptoms that wax and wane may still qualify under this requirement if the active periods of their illness are sufficient enough to keep them from working.

Step 3: The listing of impairments.

This is a shortcut to being found disabled. The Social Security Administration has a list of illnesses that will result in a claimant being found disabled. It's not just the diagnosis alone, however. It's also how the illness affects the ability to function in a job. It is difficult to qualify as meeting a listing, but not meeting a listing does not mean a claimant loses. In that case, the evaluation continues to Step 4.

Step 4: Not able to work at previous jobs.

If a claimant is not found disabled at Step 3, the next question is whether he is capable of doing any work that he has performed in the last 15 years, in light of his limitations.

Step 5: Other work available.

If a claimant is found unable to return to previous work, then Social Security considers whether work exists in the national and local economies in significant numbers that the claimant can do. In this part of the evaluation process, *the older a claimant is, the more likely it is that he will be found disabled.* For example, a 50-year-old person who performed heavy unskilled labor all his life but is now limited to sedentary work due to an injury may be found disabled when a younger person with the same circumstances may not be found disabled.

5. **Other topics of interest:**

- Working while waiting for a decision
- Working after being found disabled
- The role of medical evidence
- Drug and alcohol addiction

Hypothetical

A lawyer in solo practice without staff and without many financial resources has money in her client trust account from Client A. It is the largest amount of money she has seen all year. She is the sole breadwinner for her family. Client A's case, which she is handling on an hourly basis, will allow her to catch up with past-due credit card bills, pay the mortgage, pay her PLF assessment and give her a modest balance to use to advance costs in future cases.

She has a medical emergency requiring surgery. Recovery is expected to take one month. A trial date in Client A's case is set for a date just after the expected recovery period. Surgery had to be delayed for two weeks because she caught a cold, and the surgery schedule couldn't accommodate a sooner date. Her physician said that because of complications resulting from the surgery, she really can't work full time, but that she can work part time for one month and ease into full time towards the end of the second month. She has already asked for a setover because of discovery delays. Opposing counsel asked for another setover because of a conflict. The case is getting old, and the judge is pressing to get the matter tried.

What are the lawyer's ethical duties towards Client A?

What are the lawyer's ethical duties towards Client B, whose personal injury case she took on a contingent fee basis, confident that she could advance costs?

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(4) engage in conduct that is prejudicial to the administration of justice.

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At the Corner of Law Practice and Disability CLE

October 15, 3:00—5:00 p.m.

900 SW Fifth Ave., Portland, OR

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Further Reading

- Postar, Adeen. *Selected Bibliography Relating to Law Students and Lawyers with Disabilities*. 19 J. GENDER, SOCIAL POLICY & THE LAW 13 (2011).

CLE EVALUATION FORM

At the Corner of Law Practice & Disability: Wednesday, October 15, 2014

Please complete this evaluation form and return at the end of the day. Thank you.

	Needs Improvement	Fair	Good	Excellent
Overall quality of the speakers	[ ]	[ ]	[ ]	[ ]
Convenience of location	[ ]	[ ]	[ ]	[ ]
Room where CLE was held *(Please identify anything that negatively impacted your comfort or ability to see and/or hear)*	[ ]	[ ]	[ ]	[ ]

How valuable do you predict the information will be for you and/or your firm? *(Please circle)*	Not At All	A Little	Somewhat	Very	Extremely
How much did you learn from the program? *(Please circle)*	Nothing	A Little	Some	A Fair Amount	A Great Deal
Are you interested in participating in the dialog relating to individuals who have disabilities in the legal workplace? (Please circle)	No	Yes			
Effective ways for me to receive information about OWLS CLEs and programs are *(Please circle all that apply)*	Articles in the AdvanceSheet	USPS Mailing	Email	Other (Please specify)	

Please identify any topics you would like to see in future OWLS CLEs or programs

_____

_____

_____

Additional comments (more space on the back):

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MCLE FORM 1: Recordkeeping Form *(Do Not Return This Form to the Bar)*

Instructions:
Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:	Bar Number:
Sponsor of CLE Activity: Oregon Women Lawyers	
Title of CLE Activity: At the Corner of Law Practice and Disability	
Date: October 15, 2014	Location: Portland, OR

❑ *Activity has been accredited by the Oregon State Bar for the following credit:*

____ **General**
____ **Prof Resp-Ethics**
____ **Access to Justice**
____ **Child Abuse Rep.**
____ **Elder Abuse Rep.**

Application has been made to the Oregon State Bar MCLE Administrator for 1.5 Access to Justice and .5 Ethics credits

❑ **Full Credit.**
I attended the entire program and the total of authorized credits are:

____ **General**
____ **Prof Resp-Ethics**
____ **Access to Justice**
____ **Child Abuse Rep.**
____ **Elder Abuse Rep.**
____ **Practical Skills**
____ **Pers. Management Assistance**

❑ **Partial Credit.**
I attended _____ hours of the program and am entitled to the following credits:*

____ **General**
____ **Prof Resp-Ethics**
____ **Access to Justice**
____ **Child Abuse Rep.**
____ **Elder Abuse Rep.**
____ **Practical Skills**
____ **Pers. Management Assistance**

***Credit Calculation:**
One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:
If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.