Walking the Tightrope: Addressing Mental Illnesses & Disabilities

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Walking the Tightrope: Recognizing, Addressing and Accommodating Mental Illness in the Legal Profession
I. INTRODUCTION

Mental illness in the legal profession is a topic of growing significance in recent years. Mental illness encompasses a variety of mental impairments that may affect an individual’s thought, mood, or behavior and his/her ability to function psychologically, socially, occupationally, or interpersonally. Mental illness ranges from attention deficit hyperactivity disorder (“ADHD”) to depression and schizophrenia. A lawyer’s role is to advocate for his/her clients. And lawyers have the duty to act competently, maintain client confidentiality, avoid adverse interests, and communicate with clients to keep them reasonably informed, among other duties. Mental illness can affect a lawyer’s ability to abide by these duties and provide professional and competent representation. Thus, mental illness can lead to decreased work performance, questions and interventions by colleagues, burning out, the inability to maintain ethical responsibilities, legal exposure, and discipline by the State Bar.

On the other hand, California recognizes the chance to seek and hold employment, free from discrimination, as a civil right. Accordingly, employers must give applicants and employees with mental disabilities due consideration and fair treatment. This is also true for the legal profession. Attorneys suffer from mental illness at alarmingly higher rates than the general population. Attorneys also experience substance abuse at higher rates than other professionals. Given the prevalence of mental illness in the legal profession, public employers and law firms need to be knowledgeable about their legal obligations to prevent disability discrimination claims. Indeed, providing reasonable accommodations may have important ethical implications.

This paper will examine the rights and obligations that employers have under California law with respect to attorneys suffering from mental illness. It will discuss the prevalence of lawyers with mental health issues, the reasons why lawyers suffer from mental illness, and inherent obstacles in the legal profession. It will also review the legal definition for a mental disability, what information an employer may gather from applicants and employees, what testing or examination is permitted, what constitutes reasonable accommodation, how to engage in the interactive process, and what responsibilities the employer holds for disability retirement.

II. MENTAL ILLNESS AND SUBSTANCE ABUSE IN THE LEGAL PROFESSION

A. The Prevalence of Mental Illness in the Legal Profession

Mental illness in the legal profession is an important and relevant topic that has garnered an increasing amount of attention in recent years. In the only survey by the California State Bar on the subject, 14% of disabled attorneys reported having psychological disabilities, and 50% of disabled attorneys reported having non-visible disabilities. Attorneys also report high levels of resistance to requests for reasonable accommodations. The survey also found that attorneys with disabilities reported high levels of perceived discrimination during the hiring process.  

1 Gov. Code, § 12921, subd. (a).
3 Id. at p. 43.
4 Id. at p. 42.
A 2016 study funded by the American Bar Association and the Betty Ford Foundation found that 28% of attorneys surveyed experienced mild or high levels of depression; 19% reported experiencing anxiety; and 23% reported experiencing significant stress. The same study also found that 20.6% percent of attorneys surveyed had scores consistent with problematic drinking, while 36.4% of attorneys had scores consistent with hazardous drinking or alcohol abuse. The study concluded that attorneys experienced problematic drinking at rates much higher than the general population, and that depression, anxiety, and stress were significant problems for this occupation. Despite these high rates, a 2018 report from the National Association for Legal Career Professionals (“NALP”) states that only about one-half of one percent of partners report being disabled compared to 0.46% of associates. This is much less than the 12.9% of all Americans who are disabled, suggesting law firms have been slow to recognize the problem of mental illness. Lawyers experience major depressive disorder at higher rates than other occupation groups.

Similarly, the California Bar Association’s Lawyer Assistance Program (LAP), which provides support to attorneys who are struggling with substance abuse and/or mental health issues, found that 73% of participants had a substance use disorder at intake, and 24% had a combined mental health and substance abuse diagnosis. Attorneys involved in the standard discipline process through the State Bar Court (SBC) made up 14% of intakes, highlighting the role that mental health impairments plays in the state’s disciplinary process. Indeed, in one case study 60% of lawyers who entered Oregon’s substance abuse assistance program had malpractice suits filed against them while they were suffering from substance abuse.

B. Reasons for the Prevalence of Mental Illness in the Legal Profession

There are many reasons for why individuals in the legal profession may be prone to mental illness. Being a lawyer is a high stress profession. Lawyers are expected to take on heavy workloads and be problem solvers. By its nature, the legal profession is littered with conflict and adversity is part of the profession. Lawyers have to deal with conflict and uncertainty from clients, witnesses, opposing counsels, co-workers, insurance companies, judges, and jurors. Many lawyers also have to deal with the stress of billable hours while trying to balance professional goals with

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6 Id. at p. 48.
7 Id. at p. 52.
personal and/or family goals. Lawyers are also trained to be analytical problem solvers and may view seeking help as a sign of weakness. The workforce is also aging: The State Bar of California reports that the average “active” attorney is now 49 years old.13

Further, Americans generally appear to avoid treatment for mental illness and substance abuse. The 2017 National Survey on Drug Use and Health indicated that nearly 46.6 million adults had some type of behavioral or emotional disorder.14 Less than half, however, received any form of treatment in the prior year.15 The survey also found 19.7 million persons 12 and older had a substance use disorder, and only about 20% received any substance abuse treatment.16 Similarly, 8.5 million Americans had a mental health disorder and a substance abuse disorder, and only about one-half of this group received any type of service in the preceding year.

This general aversion to treatment may be stronger for lawyers – despite being more prone to mental illness than the general population – because of the stigma attached to mental illness. Lawyers may choose to avoid treatment out of concern that they will be diagnosed with a mental illness and the fear of what it could mean to their ability to practice law. Lawyers who reveal their mental illness may risk being viewed as incompetent, disorganized, unreliable, and subject them to heightened scrutiny. Lawyers may also fear that being diagnosed with a mental health condition will cost professional relationships and prestige. Attorneys also have aggressive and competitive personality traits that may make them less likely to seek treatment.

III. ATTORNEY MENTAL ILLNESS AND THE WORKPLACE

A. THE FAIR EMPLOYMENT & HOUSING ACT

California’s Fair Employment & Housing Act (“FEHA”) provides protection from disability discrimination. The FEHA makes it unlawful for an employer to discriminate against a qualified individual with a physical or mental disability because of that disability. This statute generally applies to all California employees, including those in the legal profession. As such, much of the discussion below will apply to a wide range of jobs and professions.

The FEHA’s definition of “disability” is broad, encompassing a wide range of physical and mental conditions. Generally, a physical or mental condition17 that limits a major life activity will be considered a disability.18 The term “major life activity” is broadly interpreted to include

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13 State Bar of California, Attorney Demographics, available at: https://members.calbar.ca.gov/search/demographics.aspx (accessed on September 11, 2019.)
15 Id. at p. 52.
16 Id. at p. 2, 46 (noting 4 million people 12 and older received substance abuse treatment).
17 Though not the subject of this presentation, it is important to note the following for physical disabilities: To qualify, the physical disability must limit the performance of a major life activity and manifest itself physically, affecting the body’s “neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, [or] endocrine” systems. (Gov. Code, § 12926, subd. (m)(1).) Mental disabilities need only limit the performance of a major life activity to be covered by the FEHA.
18 Gov. Code, § 12926.1, subd. (c).
“physical, mental, and social activities and working.” This covers activities like “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, [and] communicating.”

It can also include a properly functioning bodily functions, like normal cell growth. A physical or mental condition limits a major life activity if it simply makes the achievement of that activity difficult to perform compared to the general population. The limitations imposed by a mental or physical disability are weighed without consideration to any mitigating measures, like medication or assistive devices, unless the mitigation itself limits a major life activity.

The FEHA offers broad and encompassing protection – even if the attorney does not have a disability. An attorney is generally entitled to FEHA protection if s/he:

- Has a physical or mental impairment that limits a major life activity;
- Is regarded to have had a past impairment, to be currently impaired, or having a condition that may become a limiting impairment in the future;
- Has a record of such an impairment; or
- Is associated with someone who has such an impairment.

Further, the FEHA expressly incorporates the definition of “disability” from the Americans with Disabilities Act (ADA) into its own definition. The ADA is the federal counterpart of the FEHA to the extent FEHA addresses disability discrimination. California courts will often look to federal courts analyzing the ADA for interpretive guidance on applying the FEHA. Any condition which otherwise would not have qualified as a disability under the FEHA, but which meets the ADA definition, will be recognized as a disability under both. Generally, the FEHA offers broader protection than the ADA. For example, the FEHA only requires that a condition limit a major life activity, whereas the ADA requires a condition to substantially limit a major life activity to be a disability. The FEHA also finds limitations on working if the condition affects one job or a whole class of jobs. Accordingly, a qualifying condition under the ADA will likely qualify under FEHA, though a disability under FEHA is not necessarily a disability under the ADA.

Under the FEHA, a “mental disability” is broadly defined to include “any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities that limit a major life activity.” The FEHA definition also includes any other disorder or condition that requires special education or

23 Gov. Code, § 12926, subd. (m)(4).
24 Gov. Code, § 12926, subd. (m)(3).
27 Gov. Code, § 12926, subd. (n).
28 Gov. Code, § 12926.1, subd. (c).
29 Ibid.
30 Gov. Code, § 12926, subd. (j)(1).
similar services.\footnote{Gov. Code, § 12926, subd. (j)(2).} Conditions that will generally qualify as a “mental disability” under the FEHA include schizophrenia, clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.\footnote{Cal. Code Regs., tit. 2, § 11065, subd. (d)(1).} The FEHA expressly excludes the following conditions: “sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from [unlawful drug use]” as mental disabilities.\footnote{Gov. Code, § 12926, subd. (j)(5).}

**B. EXAMINATIONS, TESTING, AND ACQUIRING INFORMATION**

The FEHA limits what actions an employer may take concerning attorneys with qualifying disabilities, including what information the employer may gather regarding disabilities and what examinations or testing the employer may require. The limitations differ based on whether the employer seeks information about an applicant or an employee.

1. **FOR ATTORNEY APPLICANTS**
   a. **Examinations and Inquiries**

   Generally, employers cannot require job applicants to undergo medical or psychological examinations, ask any medical or psychological-related questions, ask whether an applicant has a mental disability, or ask about the nature or severity of an applicant’s mental disability.\footnote{Gov. Code, § 12940, subd. (e)(1).} An employer may ask about the applicant’s ability to perform job-related functions. The employer may also respond to an applicant’s request for reasonable accommodations.\footnote{Gov. Code, § 12940, subd. (e)(2).}

   In narrow circumstances, employers are permitted to require medical or psychological examinations for applicants, or may ask the applicant medical or psychological-related questions. The exam or inquiry must be job-related, consistent with business necessity,\footnote{Cal. Code Regs., title 2, § 11010(b) defines “business necessity” as a “legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.” Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 890, expands on the definition: “The ‘business necessity’ standard is quite high, and is not to be confused with mere expediency. Such a necessity must substantially promote the business' needs. Furthermore, the employer must demonstrate that the qualification standard is necessary and related to the specific skills and physical requirements of the sought-after position.” (Internal quotation marks and citations omitted.)} and the employer must apply the same standard for all applicants to that job classification. Additionally, the exam or inquiry must take place after the applicant has received an offer for employment but before the applicant begins performing employment duties.\footnote{Gov. Code, § 12940, subd. (e)(3).} If these requirements are met, the employer may require an examination or ask the applicant about physical fitness, medical conditions, or medical history. An employment offer may be withdrawn based on the results of such testing where it is determined that the applicant is unable to perform the essential job duties or would endanger his/her health or the health or safety of others with or without a reasonable accommodation.\footnote{Cal. Code Regs., title 2, § 11072, subd. (b)(1), (4).}
The term “job-relatedness” is not defined by statute. However, California appellate courts have treated “job-relatedness” and “business necessity” as interchangeable.39 In City and County of San Francisco v. Fair Employment & Hous. Com., after an administrative hearing, the Fair Housing and Employment Commission (FEHC) found that San Francisco had discriminated against firefighter applicants with a written test in violation of the FEHA. San Francisco applied for a writ of mandamus and vacated the administrative decision. The FEHC appealed. The appellate court disagreed with the trial court’s determination that San Francisco had demonstrated its written test was sufficiently job-related. The appellate court used the statutory definition for “business necessity” in its examination of job-relatedness.40

b. Physical Fitness or Agility Testing

Generally, employers cannot test attorney applicants for physical fitness or agility unless the test is job-related.41 Since most attorneys perform intellectual functions as opposed to physical tasks, this type of testing would generally not be job related. If the testing is job-related, it is good practice for employers to inform applicants of the test’s criteria. Since employers cannot ask about the applicant’s medical background before making an offer for employment, informing the applicant about the test’s criteria may avoid liability or misunderstanding later. An applicant with a disability who performs poorly or injures himself or herself in a fitness test will have weaker grounds to challenge the test if he or she knew the criteria beforehand.

2. FOR EMPLOYEES

a. Examinations and Inquires Generally

Limitations regarding current employees are largely similar to that of applicants. Generally, employers cannot require medical or psychological examinations, make any medical or psychological inquiries, ask whether an attorney has a mental disability, or ask about the nature or severity of the mental disability.42 However, if the employer can show the examination or inquiry is job-related and consistent with business necessity, it may proceed.

b. Fitness for Duty Examinations

Despite the general prohibition above, employers may require fitness for duty examinations that it can show to be job related and consistent with business necessity.43 Fitness for duty exams typically become an option in two situations: when a current employee’s performance has already declined, or when there are signs that an employee’s performance will decline. Within the context of fitness for duty examinations, “job-related and consistent with business necessity” take on a specific meaning. In either instance, the standard is high, but attainable. A work environment where people can work safely, for instance, may be a sufficient basis.44

40 Id. at 989–990.
42 Gov. Code, § 12940, subd. (f)(1).
43 Gov. Code, § 12940, subd. (f)(2); Cal. Code Regs., tit. 2, § 11071, subd. (d)(1) (“An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees so long as the inquiries are both job-related and consistent with business necessity”).
When an employee’s performance has already declined, the employer must show that “health problems have had a substantial and injurious impact on an employee’s job performance.”45 In *Yin v. California*, state tax auditor Cecelia Yin displayed excessive absenteeism over a period of five years, missing almost four months’ work at one point.46 As a result, she had one of the lowest productivity levels in her district. After several years of the same pattern, the state requested her medical records. It then requested that she submit to a fitness for duty examination. Yin refused both requests and was eventually terminated. She filed in district court, alleging violations of the ADA and her Fourth Amendment rights. The district court granted summary judgment for the state, so Yin appealed. The Ninth Circuit affirmed the lower court’s decision, reasoning, “[T]he proposed medical examination was job-related.[] Yin's supervisors had good cause for trying to determine whether she was able to perform her job. Yin had missed an inordinate number of days at work.[] Yin's excessive absenteeism had taken a serious and deleterious toll on her productivity and overall job performance.”47

Alternatively, a fitness for duty exam may be appropriate *before* an employee’s job performance declines. In *Brownfield v. City of Yakima*, the Ninth Circuit affirmed the lower court’s summary judgment for the City against Brownfield’s claims of ADA violations.48 There, Oscar Brownfield served as a Yakima police officer. Within a one-year period, Brownfield had multiple negative outbursts at work. He made inappropriate criticisms against another officer, he committed several acts of insubordination, he had a public argument with another officer, his estranged wife complained to the City about an alleged domestic violence incident, and he once reported he felt himself “losing control” during a routine traffic stop.49 The City ordered a fitness for duty exam, and Brownfield was diagnosed with a psychological condition that would preclude him from serving as an officer. Brownfield got a second opinion that said he was treatable. When the City ordered a follow-up examination, Brownfield refused and was terminated.

Brownfield filed in district court, lost on summary judgment, and appealed. The Ninth Circuit affirmed the summary judgment. The court stated that the “business necessity” standard may be met “even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.”50 Here, multiple, highly emotional outbursts within one year was enough to support a fitness for duty exam before the employee’s performance had actually declined. Notably, the court took Brownfield’s position as a police officer into consideration, reasoning that police departments have good reason to act if they have evidence that calls an officer’s capability into question. The court also differentiated the “significant evidence” required to meet the standard from an employee who is “merely annoying or inefficient;”51 a fitness for duty examination would not be appropriate for the latter.

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45 *Yin v. California* (9th Cir. 1996) 95 F.3d 864, 868.
46 Id. at 867.
47 Id. at 868.
48 *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140.
49 Id. at 1143.
50 Id. at 1146.
51 Ibid.
C. REASONABLE ACCOMMODATIONS FOR MENTAL DISABILITIES

1. Requirements

Once an employer knows an attorney has a disability under the FEHA, the employer has an affirmative duty to make reasonable accommodations.52 This occurs through the interactive process (discussed below). In short, the FEHA requires employers to make reasonable accommodations for the known disabilities of applicants and employees to enable them to perform the essential functions of the job. The employer is required to consider the attorney’s preferred accommodation, and if possible must implement an effective accommodation. An accommodation is effective if it allows the attorney to perform the essential functions of the job. An employer should generally respond quickly to a request for a reasonable accommodation.

A reasonable accommodation may require the employer to make existing facilities readily accessible and usable by the disabled employee. It may also require “[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters,” or similar adaptations for disabled attorneys.53

The purpose of a reasonable accommodation is to achieve one or more of the following: (1) to give a disabled applicant an equal consideration for a desired position; (2) to enable a disabled employee to perform the job’s essential functions; or (3) to allow a disabled employee to enjoy the same privileges or benefits as similarly situated, able employees.54

2. Limitations

Generally, it is unlawful for an employer to fail to make a reasonable accommodation.55 Employers also cannot retaliate or discriminate against an attorney who makes a request for accommodation. An employer may avoid the requirement for reasonable accommodations if it can demonstrate that the accommodation would cause undue hardship.56 Actions, which “require significant difficulty or expense”, qualify as undue hardships.57 This type of assessment takes into consideration the employer’s overall resources and distribution among all employees, as well as the specific facility’s resources and distribution among its employees, and the impact of the accommodation, among other factors. This fact-specific defense is often a source of litigation.

An employer is not obligated to hire or retain an applicant or attorney who cannot perform the position’s essential functions due to a disability, even with accommodations.58 “Essential functions” refers to the position’s fundamental duties.59 A duty is fundamental if the job exists for the performance of that duty. A duty may also be fundamental if there is a limited number of

53 Gov. Code, § 12926, subd. (p).
55 Gov. Code, § 12940, subd. (m).
57 Gov. Code, § 12926, subd. (u).
58 Gov. Code, § 12940, subd. (a)(1).
59 Gov. Code, § 12926, subd. (f).
employees who can perform that duty. If the duty is highly specialized, to the point that the employee is hired to perform that specific function, then it is likely fundamental. Some essential functions in the legal profession may include “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 […].” This list is non-exhaustive and will vary by position.

In one case, for instance, a bank employee suffered from posttraumatic stress disorder after she experienced an attempted bank robbery. She asked the bank to accommodate her mental disability and applied for numerous transfers within the company. The bank informed her that no jobs were available within her work restrictions or qualifications and sought to establish that it did everything required to reasonably accommodate her. In denying the bank’s motion for summary judgment, the court held that the bank overlooked that a disabled employee is entitled to preferential consideration to reassignment of vacant positions for existing employees. Even though the employee kept adding to her list of restrictions, the court did not agree that the bank met its burden of establishing the absence of a triable issue of material fact with respect to Plaintiff’s reasonable accommodation cause of action.

In another case, a medical transcriptionist with OCD sued her employer for disability discrimination under the ADA and FEHA. She struggled to arrive to work on time, or at all, because her OCD caused her to engage in a series of obsessive rituals, such as washing her hair for an hour. Her employer agreed to allow her to work a flexible start-time schedule where she could begin work at any time within a 24-hour period. However, when the accommodation did not work, she suggested she work from home. The employer denied her request in a letter and provided no alternative accommodation. The employee was absent twice more and the employer terminated her employment. The Ninth Circuit held that the employer had an affirmative duty under the ADA and FEHA to explore further methods of accommodation before terminating employment. The flexible start-time accommodation was ineffective and the employer had a continuing duty to accommodate, which was not exhausted by one effort. By rejecting the employee’s request to work at home and offering no alternative accommodations, the Court held the employer failed to engage in the interactive process.

The reasonable accommodation process should reflect a diligent and serious effort aimed at identifying effective accommodations. Because the employer will have more access to information about possible accommodations than the employee, the employer should not disengage simply because it concludes the employee’s request is not feasible.

60 Gov. Code, § 12926, subd. (f)(1).
63 Id at 1128.
64 Id at 1137.
65 Humphrey v. Memorial Hospitals Assn. (9th Cir. 2001) 239 F.3d 1128, 1138.
66 Id at 1139.
There are many ways for an employer to reasonably accommodate a disabled attorney. In the context of accommodating mental illness, some accommodations may include:\(^{67}\)

- Reducing workplace pressure;
- Making adjustments to the type of work the attorney performs (e.g., performing legal research or drafting transactional documents as opposed to jury trials);
- Part-time or modified work schedules;
- Changing methods of supervision or tailoring supervision to the individual (e.g., providing written critiques rather than face to face); and
- Telecommuting in some situations.

According to one study, the most common examples of reasonable accommodations that were offered to lawyers with mental illness included offering short term leave, reduced work schedules, and being assigned less stressful work.\(^{68}\) In contrast, law firms were more likely to offer a temporary leave of absence in the context of attorney substance abuse.\(^{69}\)

D. THE INTERACTIVE PROCESS

1. The Interactive Process Generally

The interactive process is a dialogue between the employer and a disabled attorney, with the goal of finding a reasonable accommodation for the attorney. It is meant to bridge the gap between what the employer needs done and what the employee can do. Once an employee requests an accommodation or an employer becomes aware of a need for one,\(^{70}\) the FEHA requires the employer to begin a “timely, good faith, interactive process” to examine reasonable accommodation.\(^{71}\) The interactive process represents a continuing legal obligation; employers should not assume they have satisfied their obligations in this regard by offering a single accommodation for an ongoing disability.\(^{72}\) An accommodation that may be effective in the beginning may become ineffective in the future. There is California authority suggesting a single failure to accommodate a disabled employee could give rise to a legal claim.\(^{73}\)

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\(^{68}\) Donald Stone, The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession – An Empirical Study of the Disabled Lawyers, 27 LAW & INEQ. 93 (2009) at p. 122.

\(^{69}\) Id. at p. 126.

\(^{70}\) Awareness can occur through normal observation and includes situations where the employee exhausts available leave but still requires more time to recuperate from a disability. (Cal. Code Regs., tit. 2, § 11069(b)(3).) In such an instance, the employer would need to begin the interactive process.

\(^{71}\) Gov. Code, § 12940, subd. (n).


Generally, the attorney has the responsibility to notify the employer of a disability or to request an accommodation. However, the attorney need not initiate the process if his/her disability or limitation is obvious. Likewise, the employer is required to initiate the interactive process if it becomes aware of the need for a reasonable accommodation through a third party or by observation. Both employer and the attorney have obligations to deal in good faith, to communicate openly, and to refrain from obstructing the interactive process.

a. Employer Rights and Obligations

In addition to the above, an employer must give an attorney’s request for a reasonable accommodation due consideration. If the employer denies the initial request, it must discuss alternative accommodations with the attorney as part of the interactive process.

An employer can require reasonable medical documentation from an attorney requesting accommodation if the disability is not obvious and the documentation has not already been provided. Additionally, the employer can request clarification from the attorney on documentation that was provided. An employer cannot, however, inquire about underlying medical causes of the disability, but it may seek a second opinion.

An employer may consult experts if necessary to the accommodation or the advancement of the process. The employer must consider an applicant’s or employee’s accommodation preference, but it has discretion to implement any accommodation that is “effective” in that it allows the individual to perform essential job functions. If the accommodation is reassignment to an alternative position, the employer may request the employee’s educational background and work history to help the employer make a suitable assignment.

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74 Note that, while the responsibility to notify an employer of a disability often rests with the employee, the responsibility to start the interactive process always rests with the employer. Once the employer becomes aware of a disability, it must begin the dialogue with the employee.
78 Swanson, supra, 232 Cal.App.4th at 971–972.
82 Cal. Code Regs., tit. 2, § 11069(c)(6).
83 Cal. Code Regs., tit. 2, § 11069(c)(8).
84 Cal. Code Regs., tit. 2, § 11069(c)(9).
b. Employer Rights and Obligations

If an attorney requests reasonable accommodation for a disability that is not obvious, but has not given the employer medical documentation showing the existence of the disability, the attorney must then provide reasonable medical documentation at the employer’s request. However, the attorney need not reveal the nature of the disability itself. The attorney is still entitled to reasonable accommodation to the extent that existing documentation supports accommodation, even when the amount of documentation provided is insufficient.

An attorney’s mental or physical inability to engage in the interactive process does not constitute a breach for either side. An attorney may also communicate directly with the employer or use an intermediary. If an employer requires an attorney to use a specified health care provider, the employer must pay the costs and give the employee time off to visit the provider.

2. Documentation And Follow-Up

It is good practice for employers to document every meeting and significant development during the interactive process. Appropriate documentation may include a letter to the employee or a memorandum for the employer’s records, depending on the content. Documentation should keep an accurate record of the proceedings, including the employer’s efforts to engage in good faith dialogue. There should be a clear record of the requested and proposed accommodations, as well as their consideration during the process. Records of meetings should include who attended the meeting, what was discussed, and whether the employee had a representative present. Finally, documentation should record any agreements or understandings reached.

3. Meeting The Employer’s Good Faith Requirement

To meet the good faith requirement for the interactive process, an employer must be able to show: “(1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith.” The employer’s documentation efforts become very important here. An assertion of good faith must be supported by more than the employer’s word to succeed.

For example, in one case an attorney was diagnosed with major depressive disorder and missed work. The law firm partners were informed of his status, told the employee to take the time off he needed to get well, but would not discuss the status of his employment. The attorney was fired a few days later. Applying the ADA, the court concluded the law firm was not entitled to summary judgment on the attorney’s interactive process cause of action, and there were genuine issues of fact on whether the law firm made a good faith effort to accommodate.

E. THE ROLE OF LAW FIRMS AND SUPERVISING ATTORNEYS

Lawyers have professional obligations, including the duty to act competently and communicate with their clients. Rule 5.1 of the revised California Rules of Professional Conduct now impose obligations on law firms and supervisor attorneys to prevent ethical violations. This includes having policies and procedures in place to ensure compliance with ethical rules, which arguably includes appropriate and lawful policies and practices in place on reasonable accommodations. This is because a disabled attorney may need a reasonable accommodation to act competently and comply with their professional obligations.

Formal Opinion 03-429 of the American Bar Association Ethics Committee states that a lawyer owes the same professional duties to his or her clients regardless of whether s/he is impaired. “Simply stated, mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation.” According to this opinion, “When the impaired lawyer is unable or unwilling to deal with the consequences of his impairment, the firm’s partners and the impaired lawyer’s supervisors have an obligation to take steps to assure the impaired lawyer’s compliance with the Model Rules.” To this end, cities and law firms should work towards promoting a climate in which lawyers will not fear requesting accommodations. Indeed, some scholars have argued the duty to make reasonable accommodations is also an ethical duty, because it is designed to allow the attorney to provide competent representation.

IV. DISABILITY RETIREMENT

There are multiple retirement systems and policy options in California. Many public agencies and employers contract with the Public Employees’ Retirement System (PERS) or maintain their own retirement plans under the County Employees Retirement Law of 1937 (CERL). Both systems have options covering disability retirement.

A. WHO IS ELIGIBLE

Employees must meet certain requirements to qualify for disability retirement under PERS. A public employee who has performed 5 years of service and is incapacitated will qualify. A safety employee (e.g., a police officer or firefighter) qualifies if incapacitated in the performance...

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93 Id. at 661.
94 Id. at 672.
95 Alex Long, Reasonable Accommodation and Professional Responsibility, Reasonable Accommodation as Professionalism, 47 UC Davis L. Rev. 1753 (2014).
96 Covered by Government Code § 20000, et seq., the Public Employees’ Retirement Law (PERL).
97 Government Code § 31450, et seq.
98 Gov. Code, §§ 21150, subd. (a).
of duty, regardless of the amount of service.\textsuperscript{99} Here, “incapacitated” refers to a substantial inability of the employee to perform the normal duties of the position.\textsuperscript{100} Within the context of mental disabilities, if an employer could not accommodate an employee with a mental disability after engaging in the interactive process, and the employee still could not perform the job’s usual duties, the employee may then be eligible for disability retirement.

Employees have similar eligibility requirements under CERL. There, a member who is “permanently incapacitated” becomes eligible for disability retirement if she has performed 5 years of service,\textsuperscript{101} or if she received an injury or disease causing incapacity during her employment, and the job substantially contributes to the incapacity.\textsuperscript{102} Under both PERS and CERL, employees who waive their rights to disability retirement are not eligible to receive it.\textsuperscript{103}

\textbf{B. APPLYING FOR DISABILITY RETIREMENT}

Employers must apply for disability retirement on behalf of eligible employees under both the PERS\textsuperscript{104} and CERL.\textsuperscript{105} For PERS, the responsible “employer” includes the head of the employee’s specific office or department, a university for university employees, the agency’s governing body or designated official.\textsuperscript{106} CERL includes the head of the employee’s office or department, the agency’s board or designated agents.\textsuperscript{107} Additionally, the employee herself may apply for disability retirement, or anyone else on the employee’s behalf, under both systems.\textsuperscript{108}

\textbf{C. AFTER A DECISION IS RENDERED}

An employer cannot immediately terminate an employee with a disability under either system.\textsuperscript{109} The employer must engage in the interactive process in good faith. If the employer cannot accommodate the disabled employee, the employer must apply for disability retirement (if the employee is qualified, per above). The governing body\textsuperscript{110} must then render a decision on the application. If the application is denied, the FEHA protections still apply: terminating an employee because of a disability will likely be considered discrimination. Accordingly, the employer must meet the requirements discussed above, especially a good faith engagement in the interactive process, before considering termination.

\textsuperscript{99} Gov. Code, §§ 21151, subd. (a).
\textsuperscript{101} Gov. Code, § 31720, subd. (a).
\textsuperscript{102} Gov. Code, § 31720, subd. (b).
\textsuperscript{103} Gov. Code, §§ 21153, 31720, subd. (c).
\textsuperscript{104} Gov. Code, § 21153.
\textsuperscript{105} Gov. Code, § 31721, subd. (a).
\textsuperscript{106} Gov. Code, § 21152, subds. (a)–(c).
\textsuperscript{107} Gov. Code, § 31721, subd. (a).
\textsuperscript{108} Gov. Code, §§ 21152, subds. (d); 31721, subd. (a).
\textsuperscript{109} Gov. Code, §§ 21153, 31721, subd. (a).
\textsuperscript{110} The PERS board decides the disability retirement applications of non-safety members; the member agency’s own governing body makes the decision for safety employees, excluding school safety employees. (Gov. Code, § 21156, subd. (a)(1).) The CERL board makes the decisions for all disability retirement applicants under its system. (Gov. Code, § 31725.)
V. CONCLUSION

Lawyers suffer from mental illnesses at higher rates than the general public due to a combination of factors. As such, law firms and public entities need to be aware of how mental illness affects lawyers. They also need to be knowledgeable of the ADA, Rehabilitation Act, and FEHA to prevent discrimination claims. Supervisors also need to understand how to provide reasonable accommodations specifically for lawyers with mental illnesses as well as their professional and ethical duties under the Rules of Professional Responsibility. As the legal profession continues to grow, supervisors play an important role in educating lawyers about mental illness and supporting those with mental illness by finding ways to continue their success at work while abiding by ethical and legal responsibilities.