With the conservative Republican victory in Congress in 1994, followed by calls to amend or even repeal the ADA and the Individuals with Disabilities Education Act (or IDEA), Dart, and disability rights advocates Becky Ogle and Frederick Fay, founded Justice for All, what Dart called "a SWAT team" to beat back these attacks. Again, Dart was tireless -- traveling, speaking, testifying, holding conference calls, presiding over meetings, calling the media on its distortions of the ADA, and flooding the country with American flag stickers that said, "ADA, IDEA, America Wins." Both laws were saved. Dart again placed the credit with "the thousands of grassroots patriots" who wrote and e-mailed and lobbied. But there can be no doubt that without Dart's leadership, the outcome might have been entirely different.

In 1996, confronted by a Republican Party calling for "a retreat from Thomas Jefferson, Abraham Lincoln democracy," Dart campaigned for the re-election of President Clinton. This was a personally difficult "decision of conscience." Dart had been a Republican for most of his life, and had organized the disability constituency campaigns of both Ronald Reagan and George Bush, campaigning against Clinton in 1992. But in a turnabout that was reported in the New York Times and the Washington Post, Dart went all out for Clinton, even speaking at the Democratic National Convention in Chicago. The Darts yet again undertook a whirlwind tour of the country, telling people to "get into politics as if your life depended on it. It does." At his speech the day after the election, President Clinton publicly thanked Dart for personally campaigning in all fifty states, and cited his efforts as "one reason we won some of those states."

Dart suffered a series of heart attacks in late 1997, which curtailed his ability to travel. He continued, however, to lobby for the rights of people with disabilities, and attended numerous events, rallies, demonstrations and public hearings. Toward the end of his life, Dart was hard at work on a political manifesto that would outline his vision of "the revolution of empowerment." In its conclusion, he urged his "Beloved colleagues in struggle, listen to the heart of this old soldier. Our lives, our children's lives, the quality of the lives of billions in future generations hangs in the balance. I cry out to you from the depths of my being. Humanity needs you! Lead! Lead! Lead the revolution of empowerment!"

Today, disabled people across the country and around the world will grieve at the passing of Justin Dart, Jr. But we will celebrate his love and his commitment to justice. Please join us at in expressing our condolences to Yoshiko and her family during this difficult time. Keep in mind, however, that it was Justin's wish that any service or commemoration be used by activists to celebrate our movement, and as an opportunity to recommit themselves to "the revolution of empowerment."

maximizing the quality of life of every person, but which still squanders the majority of its human and physical capital on modern versions of primitive symbols of power and prestige.

I adamantly protest the richest culture in the history of the world which still incarcerates millions of humans with and without disabilities in barbaric institutions, backrooms and worse, windowless cells of oppressive perceptions, for the lack of the most elementary empowerment supports.

I call for solidarity among all who love justice, all who love life, to create a revolution that will empower every single human being to govern his or her life, to govern the society and to be fully productive of life quality for self and for all.

I do so love all the patriots of this and every nation who have fought and sacrificed to bring us to the threshold of this beautiful human dream. I do so love America the beautiful and our wild, creative, beautiful people. I do so love you, my beautiful colleagues in the disability and civil rights movement.

My relationship with Yoshiko Dart includes, but also transcends, love as the word is normally defined. She is my wife, my partner, my mentor, my leader and my inspiration to believe that the human dream can live. She is the greatest human being I ever known.

Yoshiko, beloved colleagues, I am the luckiest man in the world to have been associated with you. Thanks to you, I die free. Thanks to you, I die in the joy of struggle. Thanks to you, I die in the beautiful belief that the revolution of empowerment will go on. I love you so much.

I'm with you always. Lead on! Lead on!

-Justin Dart

"WE BELIEVE IN YOU.
WE LOVE YOU.
TOGETHER

WE SHALL OVERCOME."

- Justin and Yoshiko Dart

Photo by Matt Mandelsohn

Your ABA

Left Behind: ABA Says Make Disabilities Part of Diversity Mix on Federal Bench

Posted Apr 1, 2012 1:10 AM CDT
By Mark Hansen

Chief Judge Richard Brown: "I think I've managed to persuade any doubters that a hearing disability is no bar to being a good judge." Photo courtesy of Wisconsin Second District Court of Appeals.

Last August, the White House blog posted an infographic touting the diversity of President Barack Obama's nominees to the federal bench. Those nominees, stated the blog, "embody an unprecedented commitment to expanding the racial, gender and experiential diversity of the men and women who enforce our laws and deliver justice."

The blog posting cited several among the president's nominees, including Sonia Sotomayor, the first Latina on the Supreme Court; the first openly gay man confirmed by the Senate to serve as a district court judge; and the first women of Chinese, Korean and Vietnamese descent to be nominated to the federal bench. The post documented the administration's efforts to add more women, African-Americans, Latinos, Asian-Americans, Native Americans and openly gay people to the federal judiciary.

But the absence of one group—people with disabilities—from the White House posting prompted a strong response from a coalition of 105 disability rights organizations, law firms and individuals representing the interests of those with disabilities. In a joint letter sent in September to White House Counsel Kathryn Ruemmler, they urged the administration to include people with disabilities and individuals from the disability community in its mix of nominees to the federal bench.

"It is as important to have judges who understand and respect the rights of people with disabilities as it is to have judges who understand and respect the rights of women and people of different racial and ethnic backgrounds, different sexual orientations and different experiential backgrounds," stated the letter. "To this end, the federal bench must reflect the diversity of our country, including the millions of Americans with disabilities."

In October, ABA President Wm. T. (Bill) Robinson III—who has made disability rights one of his top priorities—followed up that letter to Ruemmler with one of his own (PDF). In it, he commended the administration on its diversity efforts to date but also urged the White House to evaluate its current vetting procedures to ensure that qualified candidates with disabilities aren't inadvertently being excluded from consideration.

"To build on this administration's successful efforts to diversify the bench, we encourage you to evaluate current vetting procedures to further ensure they fully include disabled individuals seeking a judicial nomination and that there are no barriers or unintended bias that would in any way inhibit the nomination of disabled men and women with stellar professional qualifications to lifetime positions on the federal bench," wrote Robinson, the member in charge of the Florence, Ky., office of Frost Brown Todd.

Robinson also invited the White House to send a representative to the ABA's Third National Conference on Employment of Lawyers with Disabilities "so we may work together to ensure that attorneys with disabilities are full participants in the legal profession." The Commission on Disability Rights will host the conference May 7-8 in Washington, D.C.

NUMBERS COUNT

People with disabilities, their advocates and specialists in the field make up a varied community. A disability is broadly defined as a significant physical, sensory or mental impairment or condition that includes people with diabetes, cancer, multiple sclerosis, bipolar disorder and post-traumatic stress disorder.

But while that segment of the population adds up to millions, the number of federal judges who publicly identify themselves as disabled probably could be counted on the fingers of one hand, says Richard S. Brown, a Wisconsin appellate judge in Waukesha and a member of the Disability Rights Commission.

Brown, for instance, guesses that he may be the only deaf judge in the United States. "I'm one of the very few, that's for sure," he says.

Brown, who lost his hearing after he became a judge—he is now chief judge of Wisconsin's Second District Court of Appeals—says his experience belies perceptions in some quarters that people with disabilities lack the necessary at tributes to be an effective judge. "I think I've managed to persuade any doubters that a hearing disability is no bar to being a good judge," he says.

Brown says there is a simple argument for including people with disabilities in efforts to diversify the judiciary at the federal and state levels. "Everybody has something different to offer," he says.

That's one of the reasons why the Disability Rights Commission changed the language of its voluntary diversity pledge last year.

The pledge, created by the commission in 2009, now has at least 125 signatories. By signing the pledge, law firms and other legal employers affirm their commitment to diversity and to include people with disabilities in those efforts. The changes are designed to make it clear that the pledge applies to the judiciary and court administrators as well as law firms and other legal employers.

ROOM FOR IMPROVEMENT

In a related action, in February the ABA's policymaking House of Delegates approved the commission's resolution calling on the Law School Admission Council, which administers the Law School Admission Test, to provide appropriate accommodations to test-takers with disabilities.

The resolution also urges the LSAC to make sure that the application process, scoring and reporting of test results do not differentiate between test-takers who did and did not receive an accommodation for a disability. The commission's resolution was supported by 35 co-sponsors.

But the ABA still has room for improvement in its own diversity efforts to include those with disabilities, according to the commission's most recent status report on the participation of lawyers with disabilities.

The report, released just before this year's midyear meeting, found that the number of ABA members who identify themselves as disabled dropped since the 2010-11 ABA year—from 6.87 percent to 4.56 percent. The number of lawyers with disabilities in leadership positions also dropped in the past year, from 34 to 23.

In light of those findings, the commission is recommending that ABA entities actively recruit lawyers with disabilities and seek to promote them to leadership positions. Association entities also should seek out lawyers with disabilities

to participate as speakers in legal education programs and other events, as well as ensuring that materials, websites and events are accessible to members with disabilities.

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MODELING JUROR BIAS

Bernard Grofman
University of California, Irvine, Department of Politics and Society
Heathcote W. Wales
Georgetown University Law Center

We consider the implications of the definition of juror bias offered in Schwartz and Schwartz[1] for optimal use of juror challenges to improve the accuracy of the jury process. For them, bias consists of a juror assinging more/less weight to the evidence for guilt than would be assigned by the median juror in a fully representative pool of jurors. When juror assessments of the evidence have a probabilistic component to them, we show that this notion of bias does not imply that we necessarily would wish to use challenges to eliminate the most biased jurors. We also explain how understanding juror verdict accuracy requires an analysis of the interaction between the threshold rule that the juror uses to determine what level of belief in the guilt of the defendant is sufficient for "guilt beyond a reasonable doubt" and the probative force of the evidence in the cases that the prosecution chooses to bring to trial. Whether we use the Schwartz and Schwartz definition or other more standard legal approaches to defining juror bias (and grounds for challenge for cause) we come away highly skeptical of the expanded voir dire and extended use of peremptories that, in a number of recent highly publicized criminal trials, have had the consequences of eliminating from the jury pool the most highly educated and the most knowledgeable jurors.

I. INTRODUCTION

To evaluate the desirability of alternative rules about the use of challenges for cause and the use of peremptory challenges in jury trials we must have both a notion of what the jury is expected to do and of what it means for a juror to be biased. After very briefly discussing the notion of "fair trial," we turn to one generally accepted component of the notion of a "fair trial": trial by a set of jurors who have no particular biases against (or for) the

Professor Grofman is indebted to Dorothy Green, Jesse Knepper and Clover Behrend for library assistance, and to Edward Schwartz and Warren Schwartz for sparking his renewed interest in jury decision making. Professor Wales is indebted to Warren Schwartz, who suggested the collaboration that led to this article.

1. Edward P. Schwartz & Warren F. Schwartz, *The Challenge of Peremptory Challenges*. Paper presented at the annual meeting of the Public Choice Society, Long Beach, California, March 24–26, 1995.

defendant. Of course, exactly how we operationalize the concept of bias is far from clear. Here, we focus on criminal trials and we pay particular attention to the definition of bias offered in Schwartz and Schwartz,[2] in which bias consists of assigning more/less weight to the evidence for guilt than would be assigned by the median juror in a fully representative pool of jurors. This notion of bias seems particularly relevant to the decisions reached by prosecution and defense attorneys in deciding how to exercise their peremptory challenges against jurors who have not already been eliminated for cause.

Then we explicate a general five-part (probabilistic) approach to juror accuracy, in which juror bias is merely one component. Here, juror accuracy in any given trial depends not just on individual characteristics of the juror but also upon the nature of the evidence and upon the decision threshold used for converting the weight of the evidence into a verdict choice. Using this approach, we consider the implications of the Schwartz and Schwartz definition of bias for the likelihood that a given juror will reach a "correct" verdict. When juror assessments of the evidence have a probabilistic component to them, we show that their notion of bias does not imply that we would always wish to use challenges to eliminate the most biased jurors in order to improve verdict accuracy. We conclude the article with a brief discussion of the issues involved in the design of a system of juror challenges that will maximize the likelihood of "correct" verdicts as well as eliminating jurors who are "biased" within the traditional legal definitions of that term.

II. JUROR BIAS

We may think of the modern notion of a "fair (criminal) trial" as having three central components: the first involves basic procedural safeguards, such as the right to confront one's accusers; the second concerns a "fair and impartial" jury in the negative sense of a "representative" jury—one that reflects the distribution of community biases accurately.[3,4] Here, even if there is bias in some fashion it is, if you will, "representative" bias. This negative concept of a fair and impartial jury involves an "inclusive jury." The third component is a fair and impartial jury in the sense of a jury whose members have been selected in such a fashion as to exclude individuals who might be biased against (or for) the accused. This positive notion of the meaning of fair and impartial jury involves an "exclusive" jury.

2. *Id.*

3. Hans Zeisel & Shari Diamond, *The Effect of Peremptory Challenges on Jury Verdicts: An Experiment in Federal District Court*, 30 STAN. L. REV. 491–531 (1978). *See also* James B. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269–327 (1988).

4. A representative jury also serves another purpose. One of the functions of the jury is to protect the people against usurpations of government such as the selective enforcement of laws, and one way to effectuate this end is to allow criminal convictions only if the people—or, at least, a fairly drawn cross section thereof—agree that the evidence so warrants.

Obviously, we can expect conflicts between the second and third desiderata on our list, for it seems impossible to simultaneously satisfy inclusive as well as exclusive notions of what it means for a jury to be impartial, but we shall not deal with issues of jury representativeness here. Instead, our sole focus will be on the notion of juror bias. However, we should note that Schwartz and Schwartz[5] have suggested that, in part at least, we can reconcile representativeness and the absence of bias by thinking of a jury as representative if the median voter on the jury is the same as the median voter in the population (*cf.* Feld and Grofman).[6] As long as we are symmetric in the nature of the exclusion process, we can preserve the median voter while still excluding some jurors (presumably "extreme" ones).[7]

A. Traditional Legal Approaches to the Concept of Juror Bias

The principal mechanism for dealing with juror bias has been the attempt to exclude "outliers" from the jury. This is done through a combination of statutory exclusions (e.g., attorneys barred from jury duty in some states), excusals for cause (with continuing controversies about what constitutes cause, e.g., the debate about exclusion of so-called non-death-qualified jurors), and use of peremptory challenges. It seems to us that fear of juror bias and jury error has been growing. Fear of juror bias is expressed in the jury selection phase of the trial in terms of expanded voir dire, an increase in the number of peremptory challenges, a greater concern for the potential of bias in cases involving extensive pretrial publicity that has led to a loosening of the interpretation of what constitutes a challenge for cause,[8] and a far greater concern for the racial and ethnic composition of juries, one that more frequently than in the past spills over into disputes over change of venue.[9]

Yet there are major problems with the strategy of removing outliers, including (1) the competence of judges to correctly identify those who should be eliminated for cause; (2) the higher costs in jury/attorney/court time in the extensive voir dire that screening for bias is now seen to require, and, perhaps most importantly from our perspective; and (3) the tendency to dumb down the jury both via venire selection and via challenges (especially peremptory challenges) at trial—for example, to have persons with specialized knowledge that may be relevant to understanding case issues

5. Schwartz & Schwartz, *supra* note 1.

6. *See also* Scott L. Feld & Bernard Grofman, *On the Possibility of Faithfully Representative Committees,* 80 AM. POL. SCI. REV. 863–79 (1986); Alan Gelfand & Herbert Solomon, *A Study of Poisson's Models for Jury Verdicts in Criminal and Civil Trials,* 68 J. AM. STAT. ASS'N 271–78 (1973).

7. In so doing, we also presumably reduce the likelihood of hung juries.

8. Jeffrey Abramson, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994).

9. H.W. Wales, *Legal Rules to Effect an Impartial Jury: Something More Than Barstool Justice.* Paper presented at the Conference on the Role of the Jury in Democratic Society, Georgetown University Law Center, October 28, 1995.

more likely to be struck than persons without, and to allow students and other middle-class jurors to avoid service.[10]

The notion of screening for juror "bias" to assure an impartial jury remains one of the murkiest (and most controversial) aspects of the jury selection process.[11] Nonetheless, to model jury decision making, it would seem we need come to grips with how to define the concept of bias.[12] We begin our discussion with three traditional legal approaches to the concept of juror bias.

1. A Personal Interest in the Outcome

Clearly, jurors for whom a verdict may have consequences that would directly affect them should not serve, as their impartiality would be suspect even if they claimed to be unbiased. The principle of juror exclusion here is no different from that governing judicial recusal.

10. In this context it is useful to comment briefly on alternative mechanisms for dealing with juror bias: (1) One such alternative mechanism has been evidentiary rules to control what the jury hears (e.g., excluding evidence that might be prejudicial). However, social science evidence is that jurors are not much affected by instructions informing them to disregard what they have heard or to assign it only limited probative weight, and that even exclusion of evidence risks jurors simply guessing at the nature of what was missing. (We are extremely skeptical of the current exclusionary rules. To us they seem based on outdated notions of human psychology and information processing and paternalistic notions about the competence of jurors to evaluate evidence, but that topic is beyond the scope of this paper.) (2) Manipulating the verdict decision rule (or the size) of the jury might also be a potential means to reduce bias. If the verdict rule is reduced from unanimity to some lesser requirement, then the jury system may be better able to cope with the presence of "outliers" who might otherwise hang a jury. *See* Schwartz & Schwartz, *supra* note 1. Similarly, if we treat outliers as a purely statistical phenomenon, then the impact of the presence of an "outlier" may be mitigated if there are more jurors to "dilute" their effects on jury deliberations and verdict decision making.

11. The rules for challenge for cause in the state of California are "fairly typical." (*See* Donald E. Vinson, JURY TRIALS: THE PSYCHOLOGY OF WINNING STRATEGY 72 [1986].) They provide that "challenges for cause will be entertained if:

1. The juror is related to a party in the litigation.
2. The juror has a unique interest in the subject matter.
3. The juror has served on a related case, or the grand jury which indicted the accused.
4. The juror has a state of mind that will prevent her or him from acting with entire impartiality and without prejudice to the rights of either party."

Item 4 is the critical one. According to Vinson (*see id.* at 72–73), in practice, "Judges have wide latitude in granting challenges for cause. Their practice can be very uneven and subjective. There is much room for discretion and little hard and fast law."

For peremptories, the law is murkier still, with attempts to limit discretion when suspect classifications are implicated (*see* Wales, *supra* note 9).

12. We would, however, emphasize that the statistical model below is not the only way that bias might reasonably be approached in a theoretical fashion. In particular, we might want to draw on the Bennett and Feldman [*see* W. Lance Bennett & Martha S. Feldman, RECONSTRUCTING REALITY IN THE COURTROOM (1984)] "storytelling" model, or the various schema-oriented models to develop a more holistic approach to how jurors fit pieces of evidence into a "convincing" story that contains the critical elements of actor, object, instrument, place and time, and motive. *See* Steven Penrod & Reid Hastie, *Model of Jury Decision-Making: A Critical Review,* 86 PSYCHOL. REV. 462–92 (1979).

2. Absence of Prejudgment

Clearly, too, jurors who had their minds firmly made up in advance of hearing the evidence at trial should be disqualified. But what does it mean to have one's mind firmly made up in advance?

Abramson[13] reviews early attempts to come to grips with the concept of juror "prejudgment." In the federal trial of Aaron Burr at which Chief Justice John Marshall presided as a circuit judge, Marshall took the view that a person who had expressed a decisive opinion on any "essential" element of the crime could be disqualified as jurors. But Marshall drew a distinction between "light impressions which may fairly be supposed to yield to the testimony that may be offered" and "those strong and deep impressions which will close the mind against testimony."[14]

3. Absence of Exposure to Indelibly Etched Prejudicial Information

As Abramson[15] summarizes Marshall's view on the exposure of jurors to prejudicial information in absence of a trial: "The gist of Marshall's reasoning is that having pretrial information does not disqualify a juror, but a predisposition against considering the facts undermines impartiality." However, Abramson[16] observes that modern law, especially since the 1960s, has moved considerably beyond Marshall's opinion in *Burr,* in adding the "concept of inherent, or presumed, bias, as a way of disqualifying potential jurors."

> Media coverage occasionally reaches such levels of revelations and inflammation that bias may simply be presumed in anyone exposed to it; there is no need to uncover particular evidence of prejudice through voir dire questions. Rather, as the Supreme Court put it, "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed."[17]

B. The Schwartz and Schwartz Concept of Juror Bias

Immediately above we have very briefly reviewed the "traditional" legal notions of bias. Recently, however, much weaker notions of juror bias have been proposed. Self-interest, unwillingness to consider the evidence, and fatal exposure to prejudicial information are not the only things that may interfere with impartiality. Jurors may have no foreknowledge of the case facts and be quite willing to consider the evidence, but may still bring into the jury room "biases" that will incline them more to one side of the case than the other or that will cause them to evaluate evidence in what may be seen as a

13. Abramson, *supra* note 8, at 38–44.
14. *Id.* at 43.
15. *Id.* at 43.
16. *Id.* at 47.
17. *Id.* at 47, with internal cite to Patton v. Yount, 366 U.S. 1025, at 1031, referring to Irwin v. Dowd, 366 U.S. 717, 725. See further discussion of this point below.

prejudicial way.[18] Under such definitions virtually all jurors would be biased, at least to some extent. One recent approach along these lines is that of Schwartz and Schwartz,[19] who define juror bias in terms of a divergence between the probability that a given juror confronted with the evidence in the case will convict and the probability of a vote for conviction from the (hypothetical) "median" juror drawn from a fully representative jury pool.

Although we do not believe that this definition of bias is the one that should be used for explicating the notion of the right to a fair and impartial jury,[20] because the Schwartz and Schwartz[21] approach to the idea of juror bias very well captures how defense and prosecution attorneys seek to determine the jurors whom they most wish to see excused from the jury and on whom they are most likely to use peremptory challenges,[22] it is important to see how bias as so defined is related to juror verdict accuracy. To answer this question we need to develop a general model of juror accuracy.

III. MODELING JUROR VERDICT ACCURACY: A FIVE-COMPONENT MODEL

We define juror competence in Condorcetian terms[23] as a probability of reaching a "correct" judgment on a dichotomous choice (conviction or acquittal),[24] not in terms of overall accuracy of probability assessments per se. Our model of juror competence has five components: (1) juror accuracy in evaluating the evidence, (2) juror threshold rule (for determining whether the evidence rises to the level of guilt beyond a reasonable doubt), (3) juror bias, (4) the nature of the pool of cases/defendants brought to trial, and (5) juror verdict variance.[25]

18. There is also a practical issue of how we detect biases. This issue has come up in a variety of contexts—for example, *re* the question of possible verdict differences between so-called death-qualified and not-death-qualified jurors. [*See* Edward P. Schwartz & Warren F. Schwartz, *Deciding Who Decides Who Dies: Capital Punishment as a Social Choice Problem,* 1 LEGAL THEORY 113–48 (1993).] This empirical issue is beyond the scope of this paper.

19. Schwartz & Schwartz, *supra* note 1.

20. We believe that failure to screen out jurors with attitudinal differences from the median juror (*e.g.,* in the a priori credibility attached to police testimony) ought not to give rise to a per se presumption that the right to an impartial jury has been denied. In our view, only when attitudes are "writ in stone" and not amenable to reasoned argument does the right to an impartial jury become implicated. (*See* Wales, *supra* note 9.)

21. Schwartz & Schwartz, *supra* note 1.

22. Vinson, *supra* note 11.

23. Nicolas Caritat Condorcet, *Essai sur l'Application de l'Analyse à la Probabilite des Decisions Rendues à la Pluralite des Voix* (1785). *See also* Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective,* 82 AM. POL. SCI. REV. 567–76 (1988).

24. The meaning we attach to "correct" choices will be explicated below.

25. The approach we take is adapted from Grofman. *See* Bernard Grofman, *Mathematical Models of Juror and Jury Decision Making: The State of the Art, in* PERSPECTIVES IN LAW AND PSYCHOLOGY, VOL. II: THE TRIAL PROCESSES 305–51 (Bruce D. Sales ed., 1981). *See also* Gelfand & Solomon, *supra* note 6; Alan Gelfand & Herbert Solomon, *Modeling Jury Verdicts in the American Legal System,* 69 J. AM. STAT. ASS'N 32–37 (1974); Alan Gelfand & Herbert Solomon, *Analyzing the Decision-Making Process of the American Jury,* 70 J. AM. STAT. ASS'N 3035–3310 (1975); Stuart S. Nagel & Marian Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required*

A. Juror Accuracy in Evaluation of the Evidence

The probability we assign that a juror will reach a correct verdict must depend in some fashion on the *nature of the evidence,* E (where we may take E to range from 0 to 1, with 0 irrefutable evidence of innocence and 1 being irrefutable evidence of guilt). Using probabilistic terms, we will model the relationship between evidence and the force assigned to it by a juror. We posit that any given body of trial evidence, E_g, generates a density function of the probability assigned by some given juror to the defendant's guilt. We may assume nonperversity (i.e., we take the mean of this density function to be monotonic in E). In other words, the stronger the evidence the higher the mean value assigned by the juror to the probability of guilt. The greater the ability of the juror to distinguish between evidence pointing toward guilt and evidence not pointing toward guilt, the greater the juror's accuracy in evaluating the evidence.

However, the juror's ability to evaluate the evidence is not the only component of what we shall call juror "competence." We must examine how jurors convert a probability assessment as to the likelihood of a defendant being guilty into a judgment about what verdict to choose, as *it is the accuracy of the verdict choice, and not the accuracy of the assignment of evidentiary weight, that is our ultimate concern* (i.e., our defining "bottom line" of whether or not a juror is performing satisfactorily).

B. Juror Threshold Rules

Clearly, juror competence will not depend only upon the juror's ability to evaluate evidence and the nature of the evidence available to the juror; it must also depend upon the *threshold rule* (e.g., preponderance of the evidence, guilt beyond a reasonable doubt, etc.) used by the juror to determine whether or not the probability that the juror assigns to the defendant being guilty should result in a decision to vote to convict. That rule will in turn be presumably affected by the way that jurors are instructed (e.g., as to how high a probability of guilt is needed before guilt can be determined "beyond a reasonable doubt"). The threshold used by any given juror, however, may not be that which the law had in mind.

When the trial evidence, E_g, would elicit a probability of conviction at or

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to Convict, 97 WASH. U. L. QUARTERLY. 933–78 (1975); Bernard Grofman, *A Preliminary Model of Jury Decision Making, in* 3 FRONTIERS OF ECONOMICS, 98–110 (Gordon Tullock ed., 1980); Guillermo Owen, Bernard Grofman & Scott L. Feld, *Proving a Distribution-Free Generalization of the Condorcet Jury Theorem,* 17 MATH. SOC. SCI. 1–6 (1989); David Estlund, Jeremy Waldron, Bernard Grofman & Scott Feld, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited,* 83 AM. POL. SCI. REV. 1328–40 (1989); and, of course, Condorcet, *supra* note 23, and Simeon-Davis Poisson, RECHERCHES SUR LA PROBABILITE DES JUGEMENT EN MATIERE CRIMINAL ET EN MATIERE CIVILE: PRECEDEES DES REGLES GENERALES DU CALCUL DES PROBABILITES (1837). An historical exposition of the Condorcetian approach is found in Duncan Black, THE THEORY OF COMMITTEES AND ELECTIONS (1958; reprinted in 1992).

above the specified threshold level in an ideal observer (if we take the Platonic view of guilt/innocence) or in the majority of the population were the whole population exposed to the evidence (if we take a "sampling bias elimination" view à la Schwartz and Schwartz),[26] we shall say that the evidence "supports a verdict of guilty." Otherwise we shall say that the evidence "supports a verdict of not guilty."[27]

In a given trial (i.e., for a given E_g) we may take the proportion of the juror's probability density function that exceeds the value of E required by the threshold rule as the probability that the juror will convict.[28] We shall say that a juror is "correctly doing his or her job," if, when the actual trial evidence, E_g, supports a verdict of guilt, the juror votes to convict, and when the evidence does not support a verdict of guilty, the juror votes to acquit.[29] It is very important to recognize that "correct" verdicts as we have now defined them are not the same thing as convicting the "guilty" and freeing the "innocent." Instead, we evaluate the juror's task in terms of whether the juror votes to convict those *for whom the evidence supports a verdict of guilt* and acquits those for whom this is not true.[30]

C. Juror Bias

The *mean* probative weight assigned by the juror to the evidence need not be the "true" weight of that evidence. There are five ways a juror can, in general, go wrong.

26. Schwartz & Schwartz, *supra* note 1.

27. Note that in the sampling bias elimination view we take the "true" weight of the evidence to be whatever the majority of the community would have found it to be. This "privileges" the majority view. What most would see as bias or incompetence in evaluating the probative weight of evidence may be taken by others, instead, as proof of superior insight. For example, in a posttrial press conference, a black woman juror in the Simpson case stated that the fact that O.J. Simpson engaged in repeated wife-beating was irrelevant to her in judging the credibility of the scenario that involved him killing his ex-wife in anger. Was this a reflection of the cultural insight she had into the lack of relationship between wife-beating and killing rages among black men, or was she merely being obtuse? That same juror took the fact that the socks found on the scene had lots of blood but there were no blood spots in the area leading to the socks, as evidence that the socks had been "planted." Was she simply making a mistake about the viscosity of blood, or had her experiences with the Los Angeles criminal justice system imbued her with a more realistic view of the possibility that there might have been a conspiracy to frame O.J. than that of more naive whites? In the Bayesian approach, the weight of the evidence cannot be separated from the (prior) probabilities attached to certain types of events.

28. We have treated the juror information evaluation process as *probabilistic* in nature in order to be consistent with our earlier treatment of juror competence as a probability value (*see* Grofman, *supra* note 25; and Grofman & Feld, *supra* note 23) while we have treated the probative weight of evidence in *deterministic* terms. At the cost of further mathematical complexity, we could have treated the probative weight of evidence as probabilistically related to the "true" likelihood of guilt.

29. In this respect the model here is different from that given in Grofman, *supra* note 25.

30. The focus on the preferences of a hypothetical representative median juror (or on a hypothetical fully representative group majority verdict preference, as in Grofman, *id.*) avoids the need to assert what constitutes the "correct" verdict from a Platonic standpoint. Schwartz and Schwartz (*see supra,* note 1) take the view that, in general, chasing such a Platonic essence is

The first is to have a mapping that consistently understates the mean probability of guilt relative to the evidence for guilt. The second is to have a mapping that consistently overstates the mean probability of guilt relative to the evidence for guilt. The third and fourth types of error involve misapplying the legal threshold rule. The third type of error is to consistently use too low a threshold rule. The fourth type of error is to consistently use too high a threshold rule. The fifth source of potential error is for a juror to have a very high variance in his or her probability density function. Here, even a juror who, on average, always perfectly assesses the probative weight of the evidence, and uses the correct threshold rule, may still be wrong—in those situations where a portion of the juror's probability density function leads him or her to erroneous judgments.[31]

The five generic types of error identified above are, of course, simplifications. For example, we might imagine that some jurors underestimated the probative force of the evidence for conviction when it was weak, but overestimated its probative force when it was strong, or conversely. Or, to add even more complexity, we can also consider each type of bias/flaw in juror information processing skills in the context of the evidence in any given trial. For example, we might imagine that the probable direction of juror error might be a function of the nature of the crime, and/or of the race/gender of the defendant, and/or of the race/gender of the victim, etc.

Note also that the expected consequences for juror competence (i.e., verdict accuracy) of the fourth and fifth types of error are dependent in part on the extent to which biases of either the first or second type occur. If a juror consistently underestimates the evidence of guilt, the juror's verdict accuracy (competence) might actually be improved if he or she uses a threshold rule for one's own conversion from "probability of guilt" to "vote to convict" that is lower than the law requires. Similarly, if a juror consistently overestimates the evidence of guilt, the juror's verdict accuracy (competence) might actually be improved if the juror uses a threshold rule for his or her own conversion from probability assigned to guilt to the decision to vote for conviction that is higher than the law requires. In other words, errors of the first type might in part be compensated for by errors of the third type, whereas errors of the second type might in part be compensated for by errors of the fourth type, and conversely.

Still, in general, we may think of jurors who fall prey to errors of the first or fourth types as biased in favor of the defense, and jurors who fall prey to errors of the second or third types as generally biased in favor of the prosecution. Indeed, biases may be reinforcing. That is, individuals who

misguided. As noted earlier, we shall call their approach (and a similar approach in Grofman, *id.*) a "sampling error reduction" notion of individual judgmental accuracy.

31. We will illustrate this point below. For a related discussion of competence, see Grofman, *supra* note 25; Grofman & Feld, *supra* note 23; and Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler,* 71 TEXAS L. REV. 1541–87 (1993).

over-credit believe police witnesses, think black males brought to trial are almost certainly guilty, believe defense lawyers are shysters, think a defendant who chooses not to take the stand is probably guilty, and so forth, may also be persons (e.g., perhaps "authoritarian personalities") who make use of a low threshold of proof for guilt.

D. The Expected Probative Weight of the Evidence in the Types of Cases That Actually Come to Trial

Evidence will vary in different trials; and the expected strength of the evidence in the trials that juries actually hear will depend upon prosecutorial decisions (as well as plea-bargaining choices made by defendants). It is important to recognize that, even in the absence of compensating biases, if the magnitude of juror bias of any of the first four types is slight, its consequences for juror competence may not be that severe when the evidence is clear-cut and/or the decision threshold rule sets a high hurdle. For example, if the evidence points overwhelmingly to guilt, even if jurors slightly underestimate or overestimate the probative weight of that evidence they are still likely to conclude (correctly, in our terms) that the defendant was guilty. Similarly, if the evidence for conviction is weak, and especially if the threshold for a guilty conviction is also high, even jurors who substantially overestimate the probative weight of the evidence are unlikely to reach an erroneous verdict. Thus, the choices made by litigants (and *especially, the choice made by the prosecution as to which cases to bring to jury trial*) will have a major impact on the likely accuracy of juror (and ultimately jury) judgments. The weight of the social science evidence is that jury verdicts are heavily evidence driven.[32]

E. Juror "Verdict Variance" (a Measure of the Juror's Consistency in Matching Evidence to Verdict)

Schwartz and Schwartz[33] suggest that we can improve jury accuracy by obtaining jurors whose verdict judgment mimics as closely as possible the preference of the median representative juror. This can be done by eliminating "extremist" jurors—that is, ones who are, on average, either much more likely to convict (given the evidence) or much less likely to convict (given the evidence) than the hypothetical median juror. However, in our more general probabilistic framework, once we take into account error variance, we shall show that jurors who attach the same *mean* probative

32. *See, e.g.,* Michael Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?* Paper presented at the Conference on the Role of the Jury in Democratic Society, Georgetown University Law Center, October 28, 1995.

33. Schwartz & Schwartz, *supra* note 1.

weight to the evidence as that evidence warrants (judged from the perspective of the median representative juror), and thus are "unbiased" in the Schwartz and Schwartz definition, need not be equally likely to reach the "correct" verdict.[34] Indeed, it is easy to show that there are circumstances where a biased but low-variance juror may be more likely to reach a correct verdict than an unbiased juror with higher variance—a result well known in the statistical literature and one that considers the trade-offs between bias and consistency in terms of the properties of statistical estimators.[35]

Consider Figure 1. The decision threshold, *t*, is assumed the same for both jurors. A perception of values of E to the right of the threshold will result in a vote to convict. Juror I has a symmetric probability distribution centered on E (i.e., Juror II exhibits no bias in evaluating the evidence). Juror I's mean assessment of E is too high, but his variance is low.

Because E is to the left of *t*, a vote to convict is an "incorrect" verdict under our assumptions. Yet the "unbiased" juror, Juror II, is more likely to convict than is Juror I. Even if, as well as committing an error of the first type, we have Juror I engaged also in an error of the third kind, by using too low a threshold value for *t*, as long as he or she uses a threshold reasonably close to the true value of *t*, Juror I can still be more likely to reach a correct verdict than the unbiased but less discriminating[36] Juror II.[37]

The link between a juror's accuracy in assigning probative weight to the evidence and accuracy in reaching the "correct" verdict is very much contingent on the threshold *t*. Consider again the example in Figure 1, but now move the threshold *t* considerably to the left. Now, the unbiased juror *is* the more accurate. Another interesting and rather counterintuitive result is that it is possible for a juror to be biased everywhere except at $E = t$ and still reach the correct verdict all the time. Imagine, for example, a juror who, for all values of E other than $E = t$ always underestimates the mean probative weight of the evidence, but who correctly assesses the weight of the evidence for $E = t$. Despite errors in judging evidence almost everywhere, such a juror will still be unbiased as we have defined that term. Moreover, if we also posit that juror to have a deterministic choice rule, the juror will also always be accurate. For that juror, values of E below *t* will correctly lead to a verdict of innocence as the weight of the evidence is being *under*estimated for values of E below *t*. On the other hand, that juror's perceived values of E for E greater

34. Recall that by accuracy we do not mean convicting the "truly" guilty or freeing the "truly" innocent, even assuming that a clear meaning could be given to those ideas; rather, we mean the likelihood of a juror reaching the same verdict as would be reached, hypothetically, by a majority of the entire population, based on the evidence presented and the jury instructions given.

35. *See, e.g.*, Gary King, Robert Keohane and Sidney Verba, DESIGNING SOCIAL INQUIRY (1995).

36. The discriminability of a juror's information processing can be made more precise in the context of a signal detection model. (*See, e.g.*, Grofman, *supra* note 25, at 315–17.)

37. Of course, if Juror II sets the threshold too high, that acts to compensate for that juror's having overstated the probative weight of the evidence; thus, under the hypothesized circumstances, this type of error actually raises Juror II's competence.

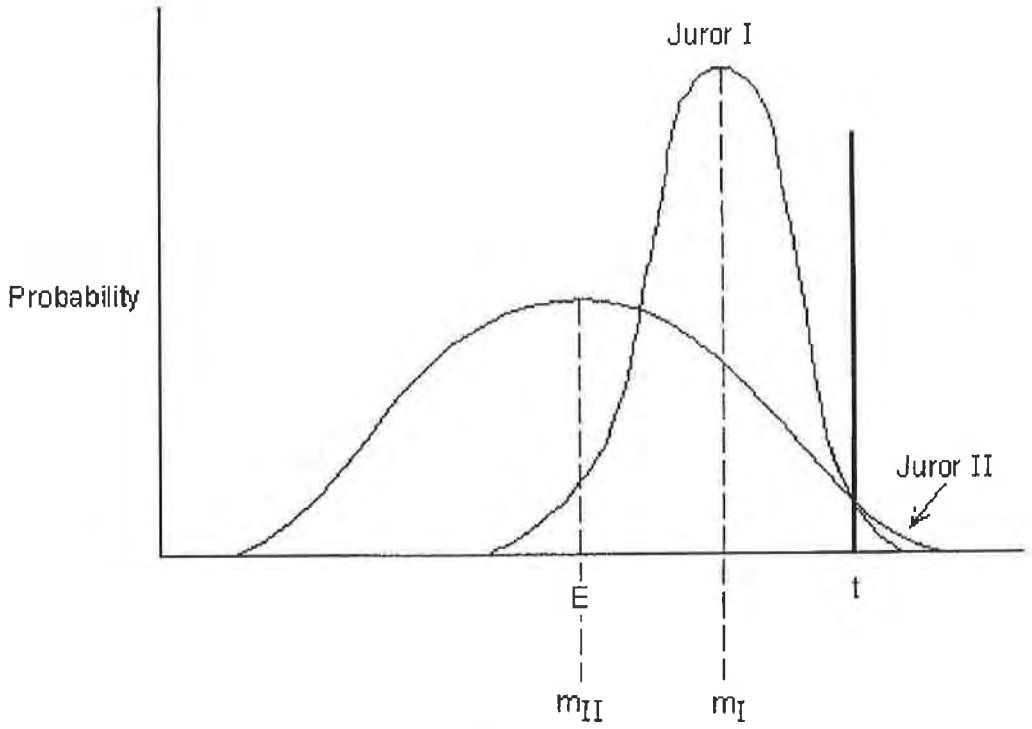

FIGURE 1.

than t will be above t, and thus the juror will correctly vote to convict (recall that we assumed monotonicity; and we assumed that the juror's evidence assessment of E at the value E = t was accurate).

IV. DISCUSSION

We first considered the implications of the definition of bias used in a recent model of peremptory challenges[38]—a definition couched in terms of the likelihood that some particular body of evidence will give rise to a given juror's probability that the defendant is guilty that is either too high or too low, given that evidence in comparison to the probative weight (probability of guilt) attached to that evidence by a hypothetical median member of a fully representative jury pool.[39] We then expanded this approach in terms of a model with a probabilistic component to it, and then we related bias to juror accuracy/competence. We showed that juror bias is not necessarily the most important element of a juror's verdict determination calculus. More specifically, we show how juror verdict accuracy depends not only upon juror competence, and the biases of the juror, but also on what we may call the juror's "verdict variance" (a measure of the juror's

38. Schwartz & Schwartz, *supra* note 1.

39. Note that his definition of juror bias is quite different from the legal definition of types of prejudices that are appropriately screened out via challenges for cause. *See* Wales, *supra* note 9.

consistency in matching evidence to verdict), as well as depending upon the interaction between the threshold rule that jurors are instructed to use as to how high a probability of guilt is needed before guilt can be determined "beyond a reasonable doubt," and the expected probative weight of the evidence in the types of cases that actually come to trial.

In particular, we showed (a) that unbiased jurors need not always be more accurate than biased ones when we take into account the variance component of juror verdict preference that is related to jurors' ability to discriminate the probative value of evidence, and (b) that juror verdict accuracy may be determined more by the location of the cutoff used for determining when the evidence amounts to guilt beyond a reasonable doubt and/or the probative weight of the evidence in the cases that are actually brought for jury trial than by the nature and level of juror bias per se. Indeed, we provided an example to show that even a juror who almost always either underestimates or overestimates the probative weight of the evidence can be correct in his verdict judgment all (or just about all) of the time.

We have shown that juror verdict accuracy is determined in large part by the interaction between the threshold rule that the juror uses to determine what level of belief in the guilt of the defendant is sufficient for "guilt beyond a reasonable doubt" and the probative force of the evidence in the cases that the prosecution chooses to bring to trial. We have argued that juror bias, in the sense of disagreement between the mean probative weight to be attached to the trial evidence by a given juror and that attached by a hypothetical "ideal" juror (in the Platonic view) or with the weight attached by a hypothetical "median juror from a fully representative jury pool" (in the sampling error reduction view), may not be as important a factor in affecting the accuracy of jury verdicts as juror variance in probability assessment.

One way in which the jury process tries to permit the screening out of attitudinal biases too subtle to result in appropriate challenges for cause is via the mechanism of peremptory challenges. There has been much criticism of peremptories lately, and the results above suggest reasons to be highly skeptical about the use of peremptories as a mechanism to improve jury accuracy. Our results suggest that, instead, we should be more concerned about obtaining "competent" jurors, in the sense of those who can reliably assess the evidence (i.e., with low variance) and be less concerned about eliminating jurors with attitudinal biases that may lead them to overestimate or underestimate certain evidentiary factors when the price is obtaining jurors with a high verdict variance.

Moreover, because we all differ in our life experiences and values, by seeking to eliminate jurors who differ from the hypothetical median juror we embark on a quest that would justify the elimination of virtually all jurors. We believe that the only jurors whose biases are such that they *must*

40. *See* Wales, *supra* note 9.

be eliminated from a jury if we are to have a fair and impartial jury are those who either have a personal interest in the case or those who have their mind made up in advance and will be unwilling to listen to the evidence.[40] Thus, like Abramson,[41] we are highly skeptical of the expanded voir dire and extended use of peremptories that, in a number of recent highly publicized criminal trials, have had the consequences of eliminating from the jury venire the most highly educated and the most knowledgeable jurors.

Given likely trade-offs between bias and competency, the United States needs to consider a strategy more like English jury practices, where the effort is to create a good random sampling with only minimal strikes/excusals (e.g., close relatives, persons truly unable or unwilling to participate). Not only may the English jury actually produce more accurate results, but it may also create a greater appearance of fairness in that the system is not seen as being as open to manipulation by lawyers (the best of whom are being hired by the rich).

41. Abramson, *supra* note 8.

EMPLOYMENT LAW

Partial Deafness Found to Not Be a Disability Under the ADAAA

BY SID STEINBERG
Special to the Legal

There is a perception that since the passage of the Americans with Disabilities Act Amendments Act in 2008 and the issuance of the U.S. Equal Employment Opportunity Commission's guidelines in 2011, virtually any physical or mental condition will rise to the level of an actionable disability. The recent case of *Mengel v. Reading Eagle*, No. 11-6151, (E.D. Pa. Mar. 29, 2013), belies this perception. The case also is notable for its finding that the employee's complaint about a single potentially racist remark was not an objectively reasonable complaint of discrimination.

SID STEINBERG *is a partner in Post & Schell's business law and litigation department. He concentrates his national litigation and counseling practice in the field of employment and employee relations law. Steinberg has lectured extensively on all aspects of employment law, including Title VII, the FMLA and the ADA.*

TOTALLY DEAF IN ONE EAR

Christine Mengel was a page designer for the *Reading Eagle*, the principal newspaper of Berks County, Pa., owned by Reading Eagle Co. Mengel had satisfactory evaluations from 2001 to 2008. In 2007, Mengel had surgery for a brain tumor and, as a result, became totally deaf in one ear and began to experience balance problems. Her 2008 evaluation was completed shortly after she began to experience these problems and, as noted, it was satisfactory.

In September 2008, Mengel had a meeting with her supervisors and a co-worker, Bill Reber, during which Reber complained that Mengel had not followed his instructions and referred to her as a "tar baby," according to the opinion. Mengel testified in her deposition that she believed the term was used to "demean" her and to "make [her] feel small."

SELECTED FOR LAYOFF

In January 2009, the paper began to evaluate employees in preparation for a reduction in force (RIF). Managers were to use a matrix rating employees in seven categories. It was understood that the lowest-rated employees would most likely be affected by the RIF although, at the time the evaluations were performed, the number of employees to be affected had not been determined.

Mengel's RIF matrix was completed in March 2009. She received a score of 13 out of a possible 42 points, including a score of two (out of a possible score of six) in the "performance evaluation" category. Mengel's overall score was 11 points lower than the next-lowest-rated employee in her department.

It is not clear from the decision whether Mengel was aware of the impending RIF and her relatively low matrix score. It is notable, however, that she formally complained about the "tar baby" comment in April 2009, eight months after it was made. When the company did not investigate her complaint to her satisfaction, she filed an EEOC charge claiming that she was discriminated against in retaliation for her complaint, as well as on the basis of her gender and alleged disability. Ten days after Mengel filed her charge, she was laid off, along with two other employees in her department, both male. She brought suit after the EEOC concluded its investigation and Reading Eagle moved for summary judgment at the conclusion of discovery.

> *Mengel's ADA claim failed because she was unable to establish a causal connection between being regarded as disabled and the termination decision.*

NOT SUBSTANTIALLY LIMITING

The court first considered whether Mengel had set forth a prima facie claim of disability discrimination. The EEOC's regulations to the ADA state that "deafness substantially limits hearing" and that hearing is a major life activity. As such, deafness is a disability covered by the act. However, the evidence testified that she "didn't hear some things," she was not able to cite any specific instance where her hearing loss caused a problem. As such, the court found that Mengel was not "disabled" as a matter of law.

'REGARDED AS' CLAIM FAILS

The company's knowledge that Mengel had "balance problems" related to her brain surgery was sufficient to establish a prima facie claim that she was "regarded as" disabled under the ADAAA. This is because "the ADAAA no longer requires a showing that [the plaintiff's] impairment was perceived to substantially limit a major life activity." Mengel's ADA claim failed, however, because she was unable to establish a causal connection between being regarded as disabled and the termination decision. This was largely because the company had learned of her balance problems well over two years before her termination and her supervisors had given her a satisfactory evaluation shortly after her surgery.

NO OBJECTIVE BELIEF IN ILLEGAL CONDUCT

Mengel also claimed that she was retaliated against for complaining about her co-

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NO OBJECTIVE BELIEF IN ILLEGAL CONDUCT

Mengel also claimed that she was retaliated against for complaining about her co-worker's use of the term "fat baby." The court observed that the first element of a prima facie retaliation claim is having engaged in "protected activity." The standard is both objective and subjective, requiring that the employee establish that he or she "held an

Employment continues on 8

Employment

continued from 5

objectively reasonable belief, in good faith, that the activity [he or she] opposed is unlawful under Title VII."

In this case, it would be without dispute that the single use of an ambiguous term that sometimes (but not always) has racial connotations would not be severe or pervasive enough to create a hostile work environment. But the question was whether it was objectively reasonable for Mengel to have believed that she had been discriminatorily harassed. To this, the court found that "it is not reasonable for an employee to believe that a single, potentially racist remark could violate Title VII."

Moreover, the court found that Mengel did not have a good-faith belief that the comment was unlawful, as she complained only that the term made her "feel small."

The case is useful to counsel and their clients in considering whether a particular condition is covered by the ADA, even after the act was amended. While most conditions will still warrant such coverage, it remains important to analyze each condition, whether at the accommodation stage or in litigation, carefully in order to determine whether it does, in fact, substantially limit a major life activity.

GC Mid-Atlantic

continued from 7

covenants, but New York will uphold restrictive covenants in appropriate circumstances. Employers that have all of their operations and employees in a single state typically apply the law of that state in their restrictive covenants. Employers with employees in several states, however, may be able to choose the law to apply. This requires analyzing the laws of the potentially applicable states and including an appropriate choice-of-law clause in the agreement.

In addition, restrictive covenants typically should contain choice-of-forum clauses requiring that disputes must be litigated in the state whose law was chosen. Courts in some states may ignore provisions choosing the law of a different state on the theory that their state's public policy or interest in restrictive covenants overrides the parties' choice of law. Many courts, however, will enforce choice-of-forum provisions and leave it to the forum state to determine which law to apply. Thus, if a restrictive covenant provides for Florida law, the agreement should also require that disputes be litigated in Florida.

To further increase the likelihood that choice-of-law and choice-of-forum clauses

should be supported by valid consideration at the time of the agreement. Where a restrictive covenant is part of an employment agreement with a new employee, the offer of employment is often sufficient consideration. What constitutes valid consideration for a restrictive covenant with an existing employee can be a thornier issue.

In some states, continued employment of an at-will employee is valid consideration for a restrictive covenant. In other states, more tangible consideration — such as a raise or promotion — may be needed to support a restrictive covenant with an existing employee.

DECIDE WHETHER TO PAY DURING RESTRICTION PERIOD

The company should decide whether to pay the employee during the post-employment restriction period and, if so, how much. Paying the departing employee may enhance the likelihood of a court enforcing the restrictive covenant, because, among other things, payments lessen the potential harm to the employee from enforcement of the covenant.

If payments will be made, the company should examine whether to pay only base salary or to also pay commissions or bonuses. The company should consider whether the agreement should permit payments to end if the employee violates the restrictions or should allow the company to continue pay-

Similarly, garden leave provisions require an employee to stay home from the office while remaining an employee in all other respects. This provides the employer with an opportunity to transition the departing employee's responsibilities to a new employee before the departing employee begins working for a competitor. In practice, however, some courts enforce garden leave provisions only if they meet the criteria for enforcement of restrictive covenants.

Notice provisions, garden leave and post-employment restrictions are all potentially useful tools, but it is important to understand their benefits and limitations and to consider which of these tools provides the best protection in each situation.

PREPARE TO ENFORCE BEFORE EMPLOYEES LEAVE

Employers often seek to enjoin departing employees from breaching (or continuing to breach) their restrictive covenants. Seeking injunctive relief requires moving deliberately and quickly once an employee leaves. It is helpful for the employer and its counsel to identify in advance the steps they will take when employees breach their restrictive covenants. Steps could include ensuring that the company maintains files for each employee with copies of contracts and other key in-

THE PHILADELPHIA LAWYER

Business Law: Serving the Deaf Client

by Victoria Chase and Kate Reznick

Summ

In January, the Department of Justice (DOJ) settled a claim of discrimination under the Americans with Disabilities Act (ADA) with an attorney who did not provide a qualified sig interpreter for a deaf client. The settlement has generated concern among attorneys, but we should be neither surprised nor panicked. While there are some additional costs as sign-language interpreters, complying with the ADA is simple and usually not onerous.

The Settlement

The DOJ action against a New York family law practitioner stemmed from an ADA claim filed by a woman with a hearing disability who communicates by sign language and lip attorney refused to hire sign-language interpreters despite the client's requests and insisted on communicating via lip-reading, note writing and conversation interpreted by one members. The family member giving assistance was hearing impaired as well, but used a different form of sign language. The complainant alleged that she did not understand conveyed to her and that the communications took longer than if an interpreter had been used, resulting in higher fees.

In settlement of these claims, which may have carried a civil penalty if proven, the attorney agreed to post a notice in a local paper concerning his willingness to provide sign-lar upon request, to return $2,200 in fees, and to forego any fees owed by this client. Settlement Agreement Between United States of America and Gregg Tirone, Esq. DOJ Comp

The parties settled without court involvement, and the settlement does not constitute controlling legal precedent. It does, however, indicate the DOJs interpretation of the ADA a take action against attorneys who refuse to provide sign-language interpreters to clients requesting them. The settlement also serves to draw attention to the arguably clear req Americans with Disabilities Act.

Title III of the ADA prevents discrimination against people with disabilities by public accommodations, which are private entities that do business with the public. See 42 U.S.C. Attorneys are specifically defined as public accommodations under Title III. See 42 U.S.C. §12181(7)(f). Although the recent settlement is the first publicly released proceeding It follows several Title III cases against physicians and other professionals. See, e.g., *Majocha v. Turner*, 166 F.Supp.2d 316 (W.D.Pa. 2001); *Meyberry v. van Vatter*, 843 F.Su Mich. 1994). Public accommodations, including lawyers, must provide auxiliary aids and services to assure that clients with disabilities can communicate as effectively as anyor C.F.R. §36.303(a). The commentary to this section suggests that communication without interpreters is likely to be ineffective in legal matters where complex information is beir

Attorney Responsibilities

What does this mean in practical terms? The practical consequences of ADA compliance are best considered in relationship to three issues:

1. Who can act as a sign-language interpreter?
2. How should the costs be handled?
3. When is an interpreter necessary?

These practical considerations summarize our experience at Legal Clinic for the Disabled, Inc., a not-for-profit public interest law firm that provides free legal services to people represents many clients who require interpreters.

Who should an attorney use to interpret? The ADA requires the use of qualified interpreters who have been trained in the terminology being communicated. See 28 C.F.R. §36. who are trained in legal terminology should be used in most instances. Also, the interpreter must be impartial. See id. According to the commentary to this section, a client's frie member may not be considered qualified in some cases even with the proper training. For example, the attorney in the DOJ settlement used the client's sister to interpret in an case involving custody, divorce and abuse. Even if the sister had been certified, she probably would not have been qualified due to lack of impartiality.

The Costs Involved

How should an attorney handle the costs of interpreting services? An attorney cannot pass on the costs of an interpreter to a client, either as a cost of litigation or by charging a C.F.R. §36.301(c). As a practical matter, the profit margin in working with a client with a hearing disability may be lower. The statute does provide a defense to furnishing the re accommodation if it will be unduly burdensome. See 28 C.F.R. §36.303(f). This defense, however, is extremely difficult to prove. Undue burden does not mean simply that the r not be very profitable because of interpreter costs, or even that a lawyer may lose money; the cost must have a significant negative impact. See 28 C.F.R. §36.104. Undue burd measured against the financial situation of the organization as a whole, not on a case-by-case basis. See id. This suggests that profitable firms cannot successfully use the und

The cost issue probably is not worthy of the alarm it has generated. If you are a small business, you may also be able to take advantage of a federal tax credit for interpreters a communication aids. See 26 U.S.C. §44. Also, of course, the client must have the ability to pay the standard fee for the work; the ADA does not require that an attorney provide or reduced fees just because a client has a disability. In certain scenarios, other parties will provide the sign-language interpreters, including courts or other government bodies Title II. You will, however, be responsible for arranging interpreting services in court, although you are not required to pay.

Most importantly, cost issues should not produce serious alarm because attorneys will never spend all billable hours on a given matter communicating with the client, nor will ar interpreter for every communication. An attorneys hourly rate will exceed the interpreters by far in most instances, so most attorneys work will remain profitable.

If an attorney does not use an interpreter for all communications, when is it necessary? The ADA actually states that public accommodations must provide auxiliary aids and se necessary to ensure effective communication 28 C.F.R. §36.303(c). Accordingly, attorneys must exercise their best judgment about when the interpreter is necessary and wher suffice.

For instance, if a potential client calls using the Pennsylvania Relay Service and requests legal assistance, an attorney probably can use the relay service to ask the caller for s information to determine whether the potential matter is within the scope of his or her practice. If it is, the attorney would then interview the client with a sign-language interprete case. The potential client may be denied services without running afoul of the ADA if the claim has no merit. The denial of services cannot be predicated on a pretext, however, good practice to document the reason for denying service.

After commencing the representation, many simple communications can occur using the relay service, a TTY machine if available, facsimile or email. If the communication conc matter, then an interpreter may be preferable. Often, the client will request a meeting with an interpreter when the client is having trouble understanding.

The extent to which you communicate with your client using these other methods will depend in part on what is mutually comfortable and upon your client's English proficiency. Language (ASL) is actually a different language system than English, and clients familiarity with ASL or English will vary greatly depending upon their education and history. In with hearing disabilities do not know ASL, so ask about the preferred form of communication before hiring an interpreter.

Work-Life Balance

Speaking Up: Helping Law Students Break Through the Silence of Depression

Posted Feb 1, 2012 3:50 AM CDT
By Hollee Schwartz Temple

Photo of Marjorie Silver and Wynne Kelly by Len Irish.

While vacationing with his family in the summer of 2005, Bill Treanor got the call every law school dean dreads. One of his most promising recent students, Fordham University School of Law grad Dave Nee, had taken his own life.

"People were just devastated by his death," says Treanor, now dean at Georgetown Law Center. "Depression is a real blight on so many law students, and part of the reason why it's so painful and can lead to such terrible consequences is that people who are depressed think they're alone."

After Nee's death, a group of his friends developed a program to fight depression and prevent suicide among law students. This school year, the Dave Nee Foundation has brought its Uncommon Counsel program to more than 1,000 students across the country, educating the newest members of the profession about depression, its prevalence in the law and the effectiveness of treatment.

"We realized that law school is a hotbed of untreated depression," says Wynne Kelly, a friend of Nee's and an Uncommon Counsel volunteer. "We want law students to know that they are at higher risk for depression than the general population, and that there are treatments and resources that can really help them to be better and happier law students."

The statistics on law student depression merit concern. Law professor Larry Krieger of Florida State University studies how the law school experience affects students' mental health. He has reported that between 20 and 40 percent of law students suffer from clinical depression by the time they graduate; that the incidence of clinically elevated anxiety, hostility and depression among students is eight to 15 times that of the general population; and that, out of 104 occupational groups, lawyers rank the highest in depression and fifth in incidence of suicide.

The reasons for law student depression are well-documented. Marjorie Silver, a professor at Touro Law Center in Central Islip, N.Y., who speaks to students about her own struggle with depression, notes several contributing factors. First, law students come into the profession expecting success—and then 90 percent are disappointed when they don't rank in the top 10 percent. Further, Silver says, students are thrust into an unfamiliar learning environment in which the predominant Socratic teaching method undermines self-esteem.

"We're dealing with students who all expect to do well, who have never gotten lower than a B before," says Silver, who has been active in expanding mental health programming offered through the New York Lawyer Assistance Trust. "Depending upon how much the law school is doing to help students put that in perspective, it can really undermine them."

WELL-KNOWN REASONS

The economic downturn has complicated life for law students, who feel tremendous pressure to succeed and worry that they will never see a return on their hefty investment, Treanor adds.

But law schools are stepping up. Ten years ago professors wouldn't hound students who stopped showing up for class on the theory that adults could make that choice, Treanor says. Today's professors are taking a different tack.

"Now what we're realizing is that often when students aren't coming, it's not necessarily a choice but because they are in pain in some way, suffering from depression," says Treanor, who has expanded the counseling services available to Georgetown law students.

Uncommon Counsel is bringing that message to law students through on-campus programs and literature left in popular gathering spots. The Dave Nee Foundation recently aired a public service announcement about untreated depression on the CBS Super Screen on 42nd Street in New York City.

"Since we lost a friend, our message is not only to be vigilant about yourself but to look out for your friends," says Kelly, an assistant U.S. attorney in Washington, D.C. "We need to look out for each other because of the idiosyncrasies of this profession. We're at a higher risk than the general population; but with treatment, lawyers can get back on the right track."

Michael Lane, a shareholder with New York City-based Anderson Kill & Olick and an adjunct professor at Fordham, received the foundation's 2011 Uncommon Counselor Award for his commitment to the betterment of the profession and concern for fellow attorneys and law students. Lane was one of Nee's professors and has witnessed firsthand how the foundation's programs have helped young lawyers.

"When these young attorneys come in and talk about it so earnestly," Lane says, "it really breaks down the walls. There's no need to suffer."

Hollee Schwartz Temple, co-author of Good Enough Is the New Perfect, directs the legal writing program at West Virginia University College of Law.

The ADA Amendments Act Three Years After Passage: The EEOC's Final Regulations and the First Court Decisions Emerge at Last

By Jana K. Terry

It has been more than three years since the amendments to the Americans With Disabilities Act (ADA) became law. The ADA Amendments Act (ADAAA) was enacted to overrule Supreme Court precedent that had resulted in sharply narrowing the definition of disability to the point that people with epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder had been unable to bring claims because courts found that they did not meet the ADA's definition of disability. The narrow definition of "disability" under pre-ADAAA jurisprudence had the effect of creating a body of law in which the merits of disability discrimination claims were often not reached because, as a threshold matter, the plaintiffs were determined to be not "disabled" under the ADA.

Signed into law in September 2008, the ADAAA was meant to dramatically expand the "tent" of ADAAA coverage. It was not until March 25, 2011, however, that the Equal Employment Opportunity Commission (EEOC) published final regulations implementing the amendments. Court decisions interpreting the ADAAA have also been slow to arrive. Because the ADAAA applies to adverse employment actions occurring only after the law's effective date of Jan. 1, 2009, it has taken a long time for the first ADAAA cases to make their way into litigation, past Federal Rule of Civil Procedure 12(b)(6) motions to dismiss, through discovery, and all the way to motions for summary judgment, where, at last, written rulings are now reaching publication.

So what are the new developments in the EEOC regulations that took so long to be finalized? How are courts deciding the first of the cases to reach rulings on motions to dismiss and for summary judgment? Perhaps most important, are ADA cases getting easier for plaintiffs? Although the court decisions are still not plentiful, interesting trends are emerging.

The ADAAA: Casting a Broad Net to Determine "Disability"

"Disability" under the ADAAA means "with respect to an individual—(A) a physical or mental *impairment* that *substantially limits* one or more of the *major life activities* of such individual [the 'actual impairment' prong]; (B) a record of such impairment [the 'impairment record' prong], or (C) being regarded as having such an impairment [the 'regarded as' prong]."[1] The ADAAA did not change this basic definition, but the highlighted component terms have now been fleshed out in an effort to overturn federal court precedents and EEOC regulations that, in Congress' view, incorrectly narrowed the scope of the ADA. In particular, the ADAAA was meant to overturn two Supreme Court cases holding that (1) the terms of the ADA must be "interpreted strictly to create a demanding standard for qualifying as disabled," (2) an impairment is not substantially limiting unless it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives,"[2] and (3) a person whose impairment is corrected by mitigating measures does not have an impairment that "substantially limits" a major life activity. Rejecting narrow interpretations of "disability," Congress amended the ADA to provide "broad coverage" of individuals "to the maximum extent permitted" by the ADAAA. Specifically, in addition to the basic definition of "disability," the ADAAA now provides guidance as to how courts should construe the terms "impairment," "substantially limits," and "major life activities." A few of the significant changes in the statute include the following:

- The term "major life activities" now explicitly includes (but is not limited to) all of the activities and major bodily functions in the chart below. Importantly, a person may have a disability even if he or she has an impairment that substantially limits only one major life activity.
- A person may satisfy the "regarded as" prong if the person has been subjected to a prohibited action "because of an actual or perceived impairment," even if the impairment does not limit or is not perceived to limit a major life activity.
- Although for purposes of the "regarded as" prong of the disability definition the term "impairment" does not encompass impairments that are "transitory [lasting six months or less] and minor," the ADAAA does *not* provide that impairments must have an expected duration longer than six months in order to constitute a disability under the "actual impairment" and "impairment record" prongs of the definition. Further, "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."
- The determination of whether an impairment "substantially limits" a major life activity is to be made without

regard to "the ameliorative effects of mitigating measures," such as medication, medical devices, prosthetics, hearing aids, accommodations, auxiliary aids or services, or learned behavioral or adaptive neurological modifications."[3]

Guidance from the EEOC

On Sept. 23, 2009, the EEOC published proposed regulations to implement the ADAAA. After a 60-day comment period and a long delay, the EEOC published its final regulations on March 25, 2011. The highlights are listed below:

- To the list of the "major life activities" identified by the statute, the EEOC regulations add the activities and major bodily functions as set forth in Table 1.
- "Regarded as" coverage can be established regardless of whether the employer is motivated by fears, myths, or stereotypes. Moreover, evidence that the employer believed that the individual was substantially limited in any major life activity is not required. For example, if an employer refuses to hire an applicant because of skin graft scars, the employer has regarded the applicant as disabled. Also, if an employer terminates an employee because he or she has cancer, the employer has regarded the employee as an individual with a disability.
- An exception to coverage exists under the "regarded as" prong such that an employer cannot "regard a person" as disabled if the impairment the employer believes to affect the person is objectively both transitory and minor. The employer's subjective belief as to whether the impairment is transitory and minor is not relevant. For example, if an employer terminates an employee who the employer believes has bipolar disorder, the employer has regarded the employee as disabled and cannot take advantage of the "transitory and minor" exception, because bipolar disorder is not objectively transitory or minor. However, if an employer terminates an employee with an objectively transitory and minor hand wound, mistakenly believing that the hand wound is symptomatic of HIV infection, the employer has "regarded" the employee as disabled because the perceived impairment (that is, HIV infection) is not "transitory and minor."
- The regulations establish nine "rules of construction" to determine whether an "impairment" "substantially limits" an individual in a "major life activity." Importantly, these rules apply only to the "actual impairment" prong and the "impairment record" prong (the prongs to be used primarily by plaintiffs seeking reasonable accommodation), because there is no need to determine whether an individual is substantially limited in a major life activity under the "regarded as" prong.[4]

The EEOC's Rules of Construction

Rule 1. An impairment is a "disability" if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." The term "substantially limits" should be construed broadly in favor of "expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."

Rule 2. Not every impairment will constitute a disability under the ADA, but an impairment does not have to

Table 1. Major Activities and Bodily Functions Identified in the ADAAA

Major Life Activities and Functions Identified in ADAAA		***Major Life Activities and Functions Added by Regulations***	
Activities such as:	**Major bodily functions such as:**	**Activities such as:**	**Major bodily functions such as:**
• caring for oneself • performing manual tasks • seeing • hearing • eating • sleeping • walking • standing • lifting • bending • speaking • breathing • learning • reading • concentrating • thinking • communicating • working	• immune system • normal cell growth • digestion • bowel and bladder functions • neurological and brain functions • respiratory functions • circulatory system • endocrine functions • reproductive functions	• sitting • reaching • interacting with others • special sense organs and skin	• genitourinary system • cardiovascular system • hemic system • lymphatic system • musculoskeletal system

"prevent" or "significantly or severely restrict" a major life activity in order to be "substantially limiting."

Rule 3. The primary focus in ADA cases should be "whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

Rule 4. Although the determination of whether an impairment "substantially limits" requires an individualized assessment, the term "substantially limits" should be interpreted and applied to require a degree of limitation that is lower than the standard applied prior to the enactment of the ADAAA.

Rule 5. The comparison of an individual's performance of a major life activity as compared to the performance of that activity by most people in the general population "usually will not require scientific, medical, or statistical analysis." However, use of scientific evidence to make the required showing is not prohibited.

Rule 6. The determination of whether a person is "disabled" under the statute should be made without regard to the "ameliorative effects of mitigating measures," such as medication, medical equipment, prosthetics, hearing aids, reasonable accommodations, and compensatory strategies such as learned behavior. The determination of whether an individual has a disability does not depend on what an individual is able to do in spite of the impairment. The only exceptions to Rule 6 are eyeglasses and contact lenses that are intended to fully correct vision.

Rule 7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when the impairment is active.

Rule 8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered "substantially limiting." Furthermore, contrary to pre-ADAAA precedent, a person whose impairment substantially limits a major life activity does not have to demonstrate a resulting limitation in the ability to perform "activities of central importance to daily life" in order to be considered a person with a disability.

- Example 1: A person with diabetes is substantially limited in endocrine function and does not need to show that his or her eating is substantially limited. Similarly, a person whose normal cell growth is substantially limited by lung cancer does not need to show that his or her respiratory function is also substantially limited.
- Example 2: A person with an impairment resulting in a long-term 20-pound lifting restriction is substantially limited in the major life activity of lifting regardless of whether he or she actually performs activities of central importance to daily living that require lifting.

Rule 9. Although a person cannot be disabled under the "regarded as" prong of the disability definition if the perceived or actual disability is "minor" *and* expected to last fewer than six months, this "transitory and minor" exception pertains only to the "regarded as" prong. A severe impairment expected to last a short time or an impairment expected to last several months can still be "substantially limiting" for purposes of satisfying the "actual impairment" prong as well as the "impairment record" prong.[5]

Finally, the EEOC has offered guidance on whether certain impairments can generally be considered "disabilities" under the new ADAAA definition. In the proposed regulations published in fall 2009, the EEOC classified example impairments into three categories: impairments that will (1) almost always, (2) sometimes, and (3) never constitute a disability under the ADAAA. The "sometimes" list included asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism. The "never" list included the common cold, seasonal or common flu, sprained joints, minor nonchronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.[6]

In the final regulations, the EEOC deleted these lists but explained that, based on the nine rules of construction, "it should be easily concluded" that the impairments listed in Table 2 (identical to the "almost always" list in the proposed regulations) will, "in virtually all cases," give rise to a substantial limitation of a major life activity.[7]

Trends Emerging From the First Court Decisions Interpreting the ADAAA

The ADAAA Results in a Relaxed Pleading Standard.

Several court decisions indicate that it will be easier for ADAAA plaintiffs to withstand motions to dismiss for failure to sufficiently allege a substantial limitation on a major life activity.

- *Gil v. Vortex LLC* (monocular vision): Even though the Supreme Court has held that courts must conduct "case-by-case" analyses to determine whether individuals with monocular vision have an impairment that is substantially limiting, the *Gil* court held that the plaintiff's failure to describe the precise nature of his substantial limitations should not result in dismissal. The plaintiff had pled enough to satisfy the "relaxed disability standard" of the ADAAA.[8]
- *Franchi v. New Hampton School* (eating disorder): A complaint alleging that the plaintiff continued to drop weight in the days following six weeks of outpatient and inpatient treatment at clinics that deal with eating disorders was sufficient to state a claim that the plaintiff's eating disorder substantially limited the major life activity of eating, particularly under the broad construction dictated by the ADAAA.[9]
- *Horgan v. Simmons* (HIV infection):The plaintiff's complaint alleged that he had been HIV positive for 10 years and that his employment was terminated one day after the company president compelled him to disclose

Table 2. Impairments that Substantially Limit Major Activities or Functions	
These impairments will, "in virtually all cases,"	***substantially limit these functions:***
• deafness	• hearing
• blindness	• seeing
• intellectual disability	• brain function
• partially or completely missing limbs or mobility impairments requiring use of a wheelchair	• musculoskeletal function
• autism	• brain function
• cancer	• normal cell growth
• cerebral palsy	• brain function
• diabetes	• endocrine function
• epilepsy	• neurological function
• HIV infection	• immune function
• multiple sclerosis	• neurological function
• muscular dystrophy	• neurological function
• major dperessive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia	• brain function

his HIV status, and the complaint was not subject to dismissal. Although defendant argued that the plaintiff had failed to plead that the HIV impairment substantially limited a major life activity, the court denied the defendant's motion to dismiss and noted that it was "certainly plausible—particularly under the amended ADA—that Plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system."[10]

- *Feldman v. Law Enforcement Associates Corp.* (multiple sclerosis and ministroke): This case involved two plaintiffs who suffered from separate medical conditions. One suffered a stress-related exacerbation of previously diagnosed multiple sclerosis, which caused him to be hospitalized for several days. Notwithstanding three requests for medical leave, his employment was terminated for job abandonment. The other plaintiff suffered a transient ischemic attack (TIA, also known as a "ministroke") that resulted in hospitalization for two days and required recovery at home for several additional weeks. This plaintiff was terminated the day following his stroke. The court rejected the defendant's argument that the impairments were not "disabilities" because they were "temporary and not severe." Even though the TIA impairment was not chronic, the duration of the impairment was relatively short and there was no allegation that the residual effects of the TIA would be permanent, the court found that the effects of the TIA were significant and both plaintiffs had alleged sufficient facts to show that they had suffered from a disability under the ADAAA.[11]
- *Fleck v. Wilmac Corporation* (chronic ankle injury): The plaintiff alleged that she had an ongoing ankle condition that substantially limited the major life activities of standing and walking (by preventing her from standing for more than an hour or walking for more than half a mile), that she was plagued with the condition throughout her employment with defendant, that the defendant was aware of the ankle injury because she wore a visible cam boot to aid her in standing and walking, that she had notified her employer of the need for additional surgery on the ankle, that she had requested leave as provided by the Family Medical Leave Act (FMLA) as well as short-term disability, and that she was fired at the end of her leave period after she notified her employer of work limitations, the court found that she had asserted allegations sufficient to raise an inference that she was disabled. The court also found that the plaintiff's allegations raised a plausible inference that the defendants had regarded her as disabled when they terminated her employment because, "[i]n contrast to the pre-amendment ADA, an individual is 'regarded as' disabled under the ADAAA 'whether or not the impairment limits or is perceived to limit a major life activity.'"[12]
- *Lowe v. American Eurocopter LLC* (obesity): The plaintiff alleged that she was disabled because of her weight and that her disability made her "unable to park and walk from the regular parking lot." The court refused to dismiss the case despite the existence of pre-ADAAA cases and EEOC interpretive guidance providing that obesity is not a disabling impairment, except in rare circumstances. The court found such pre-ADAAA guidance irrelevant and held that the plaintiff had stated a claim for relief for purposes of Rule 12(b)(6) by asserting that her obesity affected her major life activity of walking.

By alleging merely that her employer harassed her for parking in a parking spot reserved for the handicapped, treated her "differently," and forced her to perform "more and additional work" than others due to her obesity, the court found that she also stated a claim for disability-based workplace harassment.[13]

- *Chalfont v. U.S. Electrodes* (heart condition and leukemia): Because the plaintiff alleged that he had leukemia and heart disease, that he was on medical leave for seven months to undergo chemotherapy, that his cancer was in remission but was a lifelong condition that at times caused him to be fatigued and subject to easy bleeding and bruising, and that he was substantially limited in the major life activity of normal cell growth and circulatory function, the court refused to dismiss the plaintiff's ADA claim.[14]

Impairments on the EEOC's "Always" List Create a Fact Issue on Disability.

Courts are generally finding that when plaintiffs have impairments that are included on the list of impairments that will, in virtually all cases, substantially limit certain functions (as listed in Table 2), defendants cannot obtain summary judgment on the ground that the plaintiff is not disabled under the ADAAA. These cases include the following:

- *Meinelt v. P.F. Chang's China Bistro* (brain tumor with no symptoms): A plaintiff alleged that he had been fired three days after telling his supervisor that he had a brain tumor that would require both surgery and a leave from work for six to eight months. The court held that the defendant was not entitled to summary judgment on the theory that the impairment was not a "disability," because it did not substantially limit a major life activity. The court rejected the defendant's reliance on pre-ADAAA case law and noted that major life activities included "normal cell growth" and "brain functions."[15]
- *Cohen v. CHLN Inc.* (back pain, sciatica, and ruptured disc): A restaurant general manager who presented evidence that he had suffered for four months from debilitating back and leg pain that prevented him from walking more than 10 to 20 yards at a time and affected his ability to climb stairs and sleep was fired one day after telling his employer that he had an appointment with a surgeon to discuss surgery for his back condition. The court ruled that the plaintiff had offered sufficient evidence to raise a genuine issue of fact as to whether he was disabled under the ADAAA at the time of his termination. The court also found that he had offered sufficient evidence under the "regarded as" prong that he had been perceived to have a severe, ongoing impairment because, for months before his termination, he walked with a cane and was often seen "limping slowly" or "doubled over with pain" and he discussed his back condition with his supervisor on multiple occasions.[16]
- *Naber v. Dover Healthcare Associates Inc.* (work-related anxiety and depression): In this case, the plaintiff had significant work-related grievances with her supervisor, and these probably played a significant role in the development of her depression. She testified that her depression limited her ability to sleep, eat, and concentrate. In particular, she stated that she got no sleep one or two nights per week. Although the defendant argued extensively from pre-ADAAA case law that the plaintiff's disability claim was flawed because it was "entirely related to her strained relationship with [her supervisor]," the court refused to grant summary judgment on the plaintiff's ADA discrimination claim for failure to set forth a prima facie case of disability.[17]

Impairments on the "Always" List May Be Disabilities as a Matter of Law.

Some courts are finding, especially in connection with Federal Rule of Civil Procedure 56(f), that impairments included on the EEOC's list of impairments that will, in virtually all cases, substantially limit certain functions are disabilities under the ADAAA as a matter of law. These decisions include the following:

- *Hoffman v. Carefirst of Fort Wayne Inc.* (cancer in remission): The plaintiff claimed that he had been terminated without reasonable accommodation and because his employer regarded him as disabled. The court found that the plaintiff's Stage III renal cancer was a disability even though, at the time of the adverse employment action, the cancer was in remission and the plaintiff was able to carry out his regular job duties as a service technician 40 hours per week. The court found that its conclusion followed "the clear language of the ADAAA" and refused to certify its order denying the defendant's motion for summary judgment for interlocutory appeal.[18]
- *Norton v. Assisted Living Concepts Inc.* (kidney cancer): In this case, the plaintiff argued that his kidney cancer was a "disability" under the "actual impairment" prong, and the court agreed. Emphasizing that the plaintiff's renal cancer qualifies as a "disability" under the ADAAA, even if the only "major life activity" it "substantially limited" was "normal cell growth," the court denied the defendant's motion for summary judgment. Noting the changes to Federal Rule of Civil Procedure 56(f), which was amended effective Dec. 1, 2010, to permit motions for summary judgment on *parts* of claims or defenses, the court also granted the *plaintiff's* motion for partial summary judgment that the renal cancer was a disability under the ADAAA *as a matter of law.*[19]

Sometimes Courts "Assume" Disability but Express Doubt.

In some cases, courts "assume" that plaintiffs are disabled under the expanded ADAAA definition but express strong doubt about the disability even when the impairment at issue is on the EEOC's list of impairments that will, in virtually all cases, substantially limit certain functions. The relevant cases include the following:

- *Gesegnet v. J.B. Hunt Transport Inc.* (bipolar and anxiety disorders, aversion to small spaces): In this case, the plaintiff, who was applying to be a tractor trailer driver,

was required to undergo screening for drugs. He and the other applicants were told that they could not leave the clinic area until they had given their urine sample for the drug test. Because the plaintiff allegedly suffered from bipolar and anxiety disorders, the plaintiff told the defendant that he had difficulty with confined spaces. Nevertheless, the defendant's employee requested that he remain in the small, L-shaped waiting room. The plaintiff apparently managed to stay in the waiting room for two or three hours, but when someone closed the blinds, he felt that the room had "slammed shut" and he hurriedly left the room, took anxiety medication, and called the employee in charge of the drug screening. That employee said that the plaintiff was considered to have refused the drug screening and, therefore, the defendant not only would not hire the plaintiff but also would publish the employee's drug screening failure in a report available to other major freighting companies. The plaintiff claimed that he had explained his medical condition but was told that nothing could be done. He filed suit, claiming that the defendant had discriminated against him in refusing to reasonably accommodate his disabilities. Citing deficient medical evidence, but not referring to the EEOC's proposed regulations classifying bipolar disorder as an impairment that would almost always constitute a disability, the court expressed "doubt" that the evidence was sufficient to show "an actual inability to perform a basic function of life." However, the court "assumed" that the plaintiff met the definition of disability before finding that the defendant was entitled to summary judgment, because the plaintiff did not propose a reasonable accommodation with "sufficient specificity" and did not supply enough information upon which the defendant could infer the link between his statements and his psychiatric diagnoses.[20]

- *Bliss v. Morrow Enterprises Inc.* (badly broken arm): The plaintiff in this case had a badly broken arm resulting from a car accident and wore a brace throughout her term of employment with the defendant. For purposes of ruling on the motion for summary judgment, the court stated that it would "assume[]" that the plaintiff was disabled under the ADAAA "even though it ha[d] its doubts." The court did not offer any further explanation and none was required, because the court found that there was not a causal connection between her termination and her broken arm that would enable her to prevail on an ADA claim.[21]

Some Courts Continue to Cite Pre-ADAAA Cases and Find that Plaintiffs Are Not Disabled as a Matter of Law.

In some cases, and without much explanation, courts continue to rely on pre-ADAAA rulings to hold that plaintiffs are not disabled, even though it is likely that their impairments would be substantially limiting if analyzed under the terms of the statute and the EEOC's regulations.

- *Wurzel v. Whirlpool Corp.* (Prinzmetal angina): A plaintiff with Prinzmetal angina, which causes unpredictable coronary artery spasms, failed to make a prima facie claim under the ADAAA because his angina was intermittent. Without citing the ADAAA's provision including episodic impairments within the definition of "impairment" and without consulting the EEOC's proposed regulations, the court found that, based on the ruling handed down in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, "[t]he princip[le] that intermittent impairments, such as those resulting from plaintiff's sporadic angina spasms, are not deemed disabling remains good law."[22]
- *Noriega-Quijano v. Potter* (arched feet, plantar fascitis, and chronic lower back pain): In this case, the plaintiff had two service-related disabilities (highly arched feet with plantar fascitis and chronic lower back pain), and the Department of Veterans Affairs had assigned the plaintiff a disability rating of 60 percent. Doctors had limited the plaintiff to an eight-hour workday and 40-hour workweek and had restricted him from running, jumping, marching, lifting, and prolonged standing. The court found that the plaintiff did not qualify as disabled "even under the newly broadened standards set forth in the ADAAA," because the restrictions did not rise to the level of a substantial limitation on a major life activity, "even when those terms are broadly construed."[23]
- *Griffin v. Prince William Health System* (unspecified permanent condition resulting in 25-pound lifting restriction): This case involved a nurse's aide who was restricted from lifting more than 25 pounds. The court found as a matter of law that she was not disabled under the ADAAA, citing no post-ADAAA cases or regulations but quoting a pre-ADAAA decision that held that "a twenty-five pound lifting restriction ... does not constitute a significant restriction on one's ability to lift, work or perform any other major life activity."[24]
- *Rumbin v. Association of American Medical Colleges* (convergence insufficiency that causes difficulty seeing and reading): The plaintiff in this case, a college graduate who had studied at Harvard University and the University of Chicago, sought MCAT testing accommodations from 2001 to 2009. Claiming that he had suffered from "convergence insufficiency," a condition resulting in difficulty focusing on close-in objects and causing headaches, fatigue, eye strain, and double vision, he requested the following accommodations: (1) three days to take the test, which lasted five hours and 20 minutes and (2) submission of his practice test results to medical schools. Although the court noted that the ADAAA applied to defendant's denial of accommodations after Jan. 1, 2009, the court exclusively cited pre-ADAAA case law when holding, after a bench trial, that the plaintiff had failed to prove that he was substantially limited in his ability to see, learn, and read vis-à-vis the general population.[25]

Some Cases Involve Interactions Between the ADAAA and the FMLA.

There are a few cases showing that the amendments to the ADA will have an impact on the Family Medical Leave Act and accommodations that employers may need to provide to employees who return from FMLA leave. For example, in one case, the court explained that the

ADAAA's expanded definition of "disability" governs whether an employee is entitled to FMLA leave in order to care for an adult child with a disability.

- *Patton v. Ecardio Diagnostics LLC*: In this case, the plaintiff, a staff accountant, took approximately one week off from work when her daughter was seriously injured in a car accident in which the driver was killed. The plaintiff's daughter had two broken femurs, a small hole in her lung, and a small hole in her bladder. During the plaintiff's weeklong leave from work, the defendant hired someone to work at the company as the plaintiff's replacement and conducted training for a new accounting software program. Upon the plaintiff's return to work, she requested that she be allowed to train herself on the new software program. Her request was denied and, approximately two weeks later, she was fired. In a motion for summary judgment, the defendant argued that the plaintiff did not qualify for FMLA leave, because her daughter was 18 years old and did not suffer from a physical disability that rendered her unable to care for herself. Specifically, the defendant argued that the plaintiff's daughter's broken femurs did not substantially limit the daughter's major life activity of walking, because she was unable to walk for only a few months. Because for FMLA purposes, a physical disability is a physical impairment "that substantially limits one or more of the major life activities of an individual" *as these terms are defined by the ADAAA*, the court found that the plaintiff had raised a genuine issue of material fact regarding whether her daughter's condition during her one-week leave satisfied the ADAAA's definition of "physical disability" for purposes of the plaintiff's FMLA claim.[26]

In another case, the court explained that, although an employer did not need to accommodate an employee returning from FMLA leave under the FMLA, the employer may be required to make a reasonable accommodation under the Americans With Disabilities Act.

- *Fleck v. Wilmac Corporation*: In this case, the plaintiff, who suffered from a chronic ankle condition, took FMLA leave from work in order to undergo surgery on her ankle. The plaintiff claimed that, when she returned from leave, she submitted a note from her doctor indicating that she was able to return to work at a schedule of four hours per day and the number of hours could be gradually increased over a six-week period. When the defendant told her that she was terminated because she could not work eight hours per day, the plaintiff allegedly submitted an alternative order from her doctor stating that she could work an eight-hour day if she had a break every hour. The plaintiff claimed that the defendant had refused to discuss any alternative work schedules. In response to plaintiff's claim that she had been discriminated against on the basis of disability because the defendant had failed to make reasonable accommodation, the defendant argued on summary judgment that the plaintiff's inability to return to full-time employment after surgery during FMLA leave rendered her unqualified for ADA protection. The court rejected this position and held that, although the FMLA does not require an employer to provide a reasonable accommodation to an employee to facilitate her return to the same or equivalent position at the conclusion of her medical leave, the employee may, nevertheless, be able to state a valid claim for accommodation under the ADAAA because the term "reasonable accommodation" may include "part-time or modified work schedules." Because the plaintiff had raised fact issues both as to whether she was "disabled" under the ADAAA as well as whether her requested accommodations were reasonable, the court refused to grant summary judgment on the plaintiff's ADA claim.[27]

Implications for Practice

Since the Americans With Disabilities Act was first passed in 1990, much of ADA jurisprudence has centered on the question of whether a plaintiff was "disabled" for purposes of the statute. All indications are that those days are over and impairments ranging from depression to cancer in remission may now be disabilities virtually per se. Moving forward, there is little doubt that cases will start to turn on the defendant's conduct rather than on the plaintiff's health. With the amendment to Federal Rule of Civil Procedure 56(f), which now permits plaintiffs to move for partial summary judgment on parts of claims, plaintiffs' attorneys are likely to begin filing motions for partial summary judgment on the issue of disability so as to streamline the issues for trial and eliminate the need for expensive expert testimony. The changes to the ADA will also have an impact any other areas of law (such as the Family Medical Leave Act) as well as state versions of the ADA that depend on the new definition of disability included in the ADA Amendments Act. **TFL**

Jana Terry has a litigation practice in Greenberg Traurig's Austin, Texas, office, where she focuses on bankruptcy, employment law, and general litigation. She has litigated cases before state courts; federal district, bankruptcy, and appellate courts; and the American Arbitration Association. Terry also has significant experience in litigation management, having managed a nationwide litigation and bankruptcy docket for a global health care company for three years. A former clerk for U.S. District Judge John D. Rainey in the Southern District of Texas, Terry graduated with honors from the University of Chicago Law School.

Endnotes

[1]42 U.S.C.A. § 12102(1)(A)–(C) (citations omitted) (emphases added to reflect key terms).

[2]*See Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184, 197–98 (2002); *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 482–83 (1999).

[3]42 U.S.C.A. § 12102(2)(A), (2)(B), (3)(A), (3)(B); (4)(A), (4)(C), (4)(D), and (4)(E).

[4]Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 29 C.F.R. § 1630.2(g)(3); § 1630.2(i)(1)(ii); *see also* Appendix to Part 1630: Interpretive Guidance) (Congress anticipated that "'[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation ... —should be bringing a claim under the ["regarded as" prong] which will require no showing with regard to the severity of his or her impairment.'") (quoting Joint Hoyer–Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 at 4).

[5]29 C.F.R. § 1630.2(j)(1)(i)–(ix); *see also* Appendix to Part 1630.2(j)(1)(viii–ix): Interpretive Guidance.

[6]Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48441–42 (proposed Sept. 23, 2009).

[7]29 C.F.R. § 1630.2(j)(3).

[8]697 F. Supp. 2d 234, 239–40 (D. Mass. 2010).

[9]656 F. Supp. 2d 252, 258–59 and n.4 (deciding case involving pre-ADAAA conduct under ADAAA as defendant did not question that the ADAAA's provisions applied).

[10]704 F. Supp. 2d 814, 818–19 (N.D. Ill. 2010) (citing the EEOC's proposed regulations that list HIV as an impairment that will consistently meet the definition of disability).

[11]No. 5:10-CV-08-BR, 2011 WL 891447, at *5–8 (E.D.N.C. March 10, 2011).

[12]Civil Action No. 10-05562, 2011 WL 1899198, at *1–6 (E.D. Pa. May 19, 2011).

[13]No. 1:10CV24-A-D, 2010 WL 5232523, at *6–9 (N.D. Miss. Dec. 16, 2010).

[14]Civil Action No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010).

[15]Civil Action No. H-10-0311, 2011 WL 2118709, at *1–2, 6–7 (S.D. Tex. May 27, 2011).

[16]Civil Action No. 10-00514, 2011 WL 2713737, at *3 and 6–8 (E.D. Pa. July 13, 2011) (noting that the inability to walk more than 10 or 20 yards at a time "easily passes muster under the more inclusive standards of the ADAAA").

[17]765 F. Supp. 2d 622, 643–47 (D. Del. 2011) (noting, however, that summary judgment was nevertheless appropriate because she could not show that the defendant's legitimate, nondiscriminatory reason for her termination was pretextual).

[18]737 F. Supp. 2d 976, 985 (N.D. Ind. 2010); No. 1:09-CV-251, 2010 WL 3940638 (N.D. Ind. Oct. 6, 2010).

[19]No. 4:10-cv-00091, 2011 WL 1832952, at *7–9 (E.D. Tex. May 13, 2011).

[20]Civil Action No. 3:09-CV-828-H, 2011 WL 2119248, at *1–6 (W.D. Ky. May 26, 2011).

[21]No. 09-CV-3064C PJS/JJK, 2011 WL 2555365, at *1,d2a & 6 (D. Minn. June 28, 2011).

[22]No. 3:09CV498, 2010 WL 1495197, at *7 and n.5 (N.D. Ohio April 14, 2010).

[23]No. 5:07-CV-204-FL, 2009 WL 6690943, at *5 (E.D.N.C. March 31, 2009) (declining to decide whether the ADAAA applied retroactively because the plaintiff did not qualify as disabled under the revised standard).

[24]Civil Action No. 01:10-cv-359, 2011 WL 1597508, at *3 (E.D. Va. April 26, 2011). This holding was not necessary to the ruling as lifting up to 40 pounds was an essential function of plaintiff's job and the requested accommodation (which would have eliminated the essential job function) was not reasonable. *See id.* at *3-5.

[25]Civil No. 3:08cv983, 2011 WL 1085618, at *8-10 (D. Conn. March 21, 2011).

[26]Civil Action No. H-10-1847, 2011 WL 2313211, at *1-4 (S.D. Tex. June 9, 2011).

[27]Civil Action No. 10-05562, 2011 WL 1899198, at *1, 2, 4-7 (E.D. Pa. May 19, 2011).

RULEMAKING *continued from page 45*

Endnotes

[1]The most recent significant amendment to representation case rules was the 1987 notice regarding the determination of appropriate bargaining units in the health care industry. On Dec. 22, 2010, the NLRB published a Notice of Proposed Rulemaking in the *Federal Register* proposing a regulation requiring employers, including labor organizations in their capacity as employers, subject to the NLRA, to post notices informing their employees of their rights as employees under the NLRA. The comment period closed on Feb. 22, 2011. More than 7,000 comments were sorted and evaluated. On Aug. 25, 2011, the NLRB issued a Final Rule requiring private-sector employers (including labor organizations acting as employers) to post a notice informing employees of their rights under the NLRA, effective Nov. 14, 2011. On Oct. 5, 2011, the NLRB issued a press release postponing the effective date of the employee rights notice rule to Jan. 31, 2012. Copies of this notice may be downloaded from the agency website at www.nlrb.gov.

[2]All dates are for calendar year 2011 unless otherwise noted.

[3]76 Fed. Reg. 36812 (June 22, 2011).

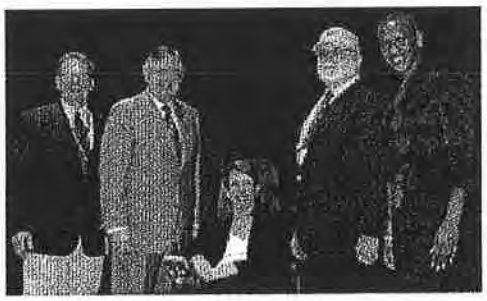
[4]Transcripts and video of the NLRB's July 18–19, 2011, public meeting on proposed amendments to election rules and regulations are posted on the NLRB's public website at www.nlrb.gov.

[5]*See Bally's Atlantic City*, 338 NLRB 443 (2002). *See generally* Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* 39 Lab. L.J. 651 (1988).

President's Message

Time to Reject Perception that Disabilities Are Barriers to Productive Legal Careers

Posted Jul 1, 2012 4:30 AM CDT
By Wm. T. (Bill) Robinson III



(L-R) Judge Richard Brown, Bill Robinson; Lauren DeBruicker, Randy Farber and Claudia Gordon in Washington, D.C. (Photo by Mitch Higgins)

Be sure everybody knows you are special, but be sure nobody treats you like it.

That is how Lauren DeBruicker, a partner at Duane Morris, describes the challenge for lawyers with disabilities. Her words remind us that our profession must change the perception that a disability is a barrier to a productive and successful legal career.

Lauren, Randy Farber and Claudia Gordon shared their stories at the Third National Conference on Employment of Lawyers with Disabilities, at which I delivered remarks several weeks ago in Washington, D.C. Their experiences demonstrate that lawyers with disabilities are a talented but underrepresented and underutilized group within our profession.

Fewer than one-quarter of 1 percent of law firm partners in the U.S. have a disability, according to a 2011 report. The percentage of associates with disabilities is even lower. Recent data from the U.S. Department of Labor confirms that people with a disability who are highly educated are much less likely to be employed than their counterparts with no disability.

Why? Bias, stereotypes and assumptions continue to impede the hiring, retention and promotion of lawyers with disabilities. Employers are too often skeptical that they can deliver high-quality work in a timely manner.

Lauren, who uses a wheelchair, says she wants the same standards applied to her as are applied to every other lawyer. "If I get in front of them, I can show them what I can do," she adds. "I don't want them to treat me like a hero. I want to know what they think of my brief."

Randy agrees. He has heard clients say, " 'You did a great job for being a blind guy.' I just want clients to say I did a great job as a lawyer."

The ABA is committed to creating a culture in which lawyers are valued equally for their abilities. One of our goals is eliminating bias and enhancing diversity; greater diversity and inclusion is one of my presidential priorities.

We must respect every person as an individual and recognize the unique contributions each of us has to offer. Toward achieving that, we share strategies and success stories like those of Lauren, Randy and Claudia.

Lawyers with disabilities enrich the legal profession in many ways. They provide unique perspectives based on their backgrounds and life experiences, bring innovative solutions and ideas to the table, and help to attract and serve a diverse client base.

At the conference, we discussed how to achieve inclusion and diversity for lawyers with disabilities. These best practices include: increasing awareness of this untapped pool of talent, designing effective training initiatives, and establishing more mentoring and networking programs.

We must encourage the public and the private sectors—including law firms—to develop diversity plans. The ABA is asking all employers in the field of law to sign the Commission on Disability Rights' Pledge for Change, which would formally commit them to disability diversity and more inclusion for lawyers with disabilities.

The ABA Board of Governors has also approved the commission's new award that recognizes law firms and corporations that have made measurable progress for legal professionals with disabilities.

As president of the ABA, I can assure you that we will continue to cultivate and promote full inclusion of lawyers with disabilities in our leadership and beyond.

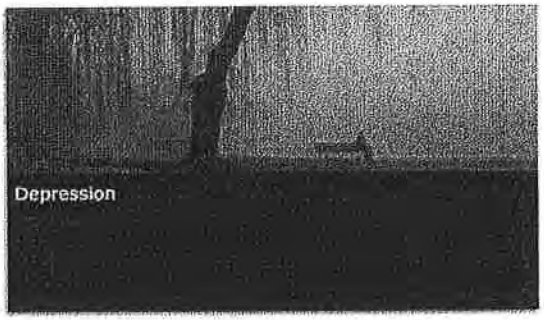
As Claudia says, "We have to sell ourselves to show that we are on par with lawyers who do not have a disability." Lawyers with disabilities simply want the opportunity to be recognized as good lawyers. Anything less than equal opportunity for all lawyers is unacceptable.

Wm. T. (Bill) Robinson III, Frost Brown Todd LLC, is a civil litigator and member-in-charge of FBT's office in Florence, Ky., and also has an office with FBT in Cincinnati.

Commission on
Lawyer Assistance Programs

Depression

American Bar Association › ABA Groups › Commission on Lawyer Assistance Programs › Resources



What is Depression?

Depression is the most common mental health concern, affecting 10% of the general population. Although everyone feels down or blue at some point, depression is different. It occurs when those feelings last longer than two weeks. Depression interferes with daily life and normal functioning. No one is immune from depression, although women are diagnosed with depression more often than men. The good news is that depression is treatable, and resources exist to help individuals experiencing depression.

Symptoms of Depression

- Persistent sad, anxious or "empty" feelings
- Feelings of hopelessness and/or pessimism
- Feelings of guilt, worthlessness and/or helplessness
- Irritability, restlessness
- Loss of interest in activities or hobbies once pleasurable, including sex
- Fatigue and decreased energy
- Difficulty concentrating, remembering details and making decisions
- Insomnia, early-morning wakefulness, or excessive sleeping
- Overeating, or appetite loss
- Thoughts of suicide, suicide attempts
- Persistent aches or pains, headaches, cramps or digestive problems that do not ease even with treatment

Resources

Lawyers With Depression

Medline Plus: Depression

Depression and Bipolar Support Alliance

National Institute of Mental Health

National Alliance on Mental Illness

Video

Please visit the Texas Lawyers Assistance Program website for the *Practicing from the Shadows* video.

Articles

Assisting the Depressed Lawyer (Texas Bar Journal)

Depression (GPSolo Magazine)

Depression Stalks the Legal Profession (National Law Journal)

Help Me, I'm Depressed (Michigan Bar Journal)

Treatment of Depression

Depression is treatable. A doctor or other mental health professional will determine the most appropriate form of treatment, which may include psychotherapy (talk therapy) or medication. Treatment is most effective when sought early, but the vast majority of individuals, even those with severe depression, benefit from treatment.

How Depression Affects Lawyers

Some studies suggest that lawyers experience depression at higher rates than the general population. While there's no way to determine exactly why this occurs, demanding schedules and other stresses inherent in the practice of law may contribute to higher rates of depression.

Lawyer assistance programs (LAPs) are here to support lawyers, judges, students and other legal professionals who suffer from depression. Contact your state or local LAP.

How to Help a Colleague Who is Depressed

If you believe a colleague may have depression, encourage him/her to seek help. Contact a LAP for additional support and resources.

Major Depression: Signs within the Workplace (West Virginia Lawyer)

Perfectionism, 'Psychic Battering' Among Reasons for Lawyer Depression (ABA Journal)

Why Are So Many Lawyers Depressed (Utah Bar Journal)

Lawyer Wellness

CoLAP is committed to promoting both the physical and mental wellness of legal professionals. View the resources below for information and support.

Alcohol Abuse & Dependence

Compassion Fatigue

Compulsive Behaviors

Depression

Drug Abuse & Dependence

Stress

Suicide

http://www.ada.gov/qandaeng.htm

U.S. Equal Employment Opportunity Commission

U.S. Department of Justice
Civil Rights Division

Americans with Disabilities Act

Questions and Answers

Barriers to employment, transportation, public accommodations, public services, and telecommunications have imposed staggering economic and social costs on American society and have undermined our well-intentioned efforts to educate, rehabilitate, and employ individuals with disabilities. By breaking down these barriers, the Americans with Disabilities Act (ADA) will enable society to benefit from the skills and talents of individuals with disabilities, will allow us all to gain from their increased purchasing power and ability to use it, and will lead to fuller, more productive lives for all Americans.

The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

Fair, swift, and effective enforcement of this landmark civil rights legislation is a high priority of the Federal Government. This booklet is designed to provide answers to some of the most often asked questions about the ADA.

For answers to additional questions, call the ADA Information Line

800-514-0301 (voice)

800-514-0383 (TTY)

Additional ADA resources are listed in the Resources section of this document, page 29.

February 2001

Employment

Q. What employers are covered by title I of the ADA, and when is the coverage effective?

A. The title I employment provisions apply to private employers, State and local governments, employment agencies, and labor unions. Employers with 25 or more employees were covered as of July 26, 1992. Employers with 15 or more employees were covered two years later, beginning July 26, 1994.

Q. What practices and activities are covered by the employment nondiscrimination requirements?

A. The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities.

Q. Who is protected from employment discrimination?

A. Employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected.

The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.

The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness.

The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the "negative reactions" of customers or co-workers.

Q. Who is a "qualified individual with a disability?"

A. A qualified individual with a disability is a person who meets legitimate skill, experience, education, or other requirements of an employment position that s/he holds or seeks, and who can perform the oeessential functionsî of the position with or without reasonable accommodation. Requiring the ability to perform "essential" functions assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions. If the individual is qualified to perform essential job functions except for limitations caused by a disability, the employer must consider whether the individual could perform these functions with a reasonable accommodation. If a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job.

Q. Does an employer have to give preference to a qualified applicant with a disability over other applicants?

A. No. An employer is free to select the most qualified applicant available and to make decisions based on reasons unrelated to a disability. For example, suppose two persons apply for a job as a typist and an essential function of the job is to type 75 words per minute accurately. One applicant, an individual with a disability, who is provided with a reasonable accommodation for a typing test, types 50 words per minute; the other applicant who has no disability accurately types 75 words per minute. The employer can hire the applicant with the higher typing speed, if typing speed is needed for successful performance of the job.

Q. What limitations does the ADA impose on medical examinations and inquiries about disability?

A. An employer may not ask or require a job applicant to take a medical examination before making a job offer. It cannot make any pre-employment inquiry about a disability or the nature or severity of a disability. An employer may, however, ask questions about the ability to perform specific job functions and may, with certain limitations, ask an individual with a disability to describe or demonstrate how s/he would perform these functions.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship. A post-offer medical examination may disqualify an individual if the employer can demonstrate that the individual would pose a "direct threat" in the workplace (i.e., a significant risk of substantial harm to the health or safety of the individual or others) that cannot be eliminated or reduced below the oedirect threatî level through reasonable accommodation. Such a disqualification is job-related and consistent with business necessity. A post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury.

After a person starts work, a medical examination or inquiry of an employee must be job-related and consistent with business necessity. Employers may conduct employee medical examinations where there is evidence of a job performance or safety problem, examinations required by other Federal laws, examinations to determine current oefitnessî to perform a particular job, and voluntary examinations that are part of employee health programs.

Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

Tests for illegal use of drugs are not medical examinations under the ADA and are not subject to the restrictions of such examinations.

Q. When can an employer ask an applicant to "self-identify" as having a disability?
A. Federal contractors and subcontractors who are covered by the affirmative action requirements of section 503 of the Rehabilitation Act of 1973 may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the section 503 affirmative action requirements. Employers who request such information must observe section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

A pre-employment inquiry about a disability is allowed if required by another Federal law or regulation such as those applicable to disabled veterans and veterans of the Vietnam era. Pre-employment inquiries about disabilities may be necessary under such laws to identify applicants or clients with disabilities in order to provide them with required special services.

Q. Does the ADA require employers to develop written job descriptions?

A. No. The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Q. What is "reasonable accommodation?"

A. Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

Q. What are some of the accommodations applicants and employees may need?

A. Examples of reasonable accommodation include making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs. Reasonable accommodation also may include reassigning a current employee to a vacant position for which the individual is qualified, if the person is unable to do the original job because of a disability even with an accommodation. However, there is no obligation to find a position for an applicant who is not qualified for the position sought. Employers are not required to lower quality or quantity standards as an accommodation; nor are they obligated to provide personal use items such as glasses or hearing aids.

The decision as to the appropriate accommodation must be based on the particular facts of each case. In selecting the particular type of reasonable accommodation to provide, the principal test is that o effectiveness, i.e., whether the accommodation will provide an opportunity for a person with a disability to achieve the same level of performance and to enjoy benefits equal to those of an average, similarly situated person without a disability. However, the accommodation does not have to ensure equal results or provide exactly the same benefits.

Q. When is an employer required to make a reasonable accommodation?

A. An employer is only required to accommodate a "known" disability of a qualified applicant or

employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest, an appropriate accommodation, the employer and the individual should work together to identify one. There are also many public and private resources that can provide assistance without cost.

Q. What are the limitations on the obligation to make a reasonable accommodation?

A. The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition, an employer is not required to make an accommodation if it would impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as an "action requiring significant difficulty or expense" when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. Where the facility making the accommodation is part of a larger entity, the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

Q. Must an employer modify existing facilities to make them accessible?

A. The employer's obligation under title I is to provide access for an *individual* applicant to participate in the job application process, and for an *individual* employee with a disability to perform the essential functions of his/her job, including access to a building, to the work site, to needed equipment, and to all facilities used by employees. For example, if an employee lounge is located in a place inaccessible to an employee using a wheelchair, the lounge might be modified or relocated, or comparable facilities might be provided in a location that would enable the individual to take a break with co-workers. The employer must provide such access unless it would cause an undue hardship.

Under title I, an employer s not required to make its existing facilities accessible until a

particular applicant or employee with a particular disability needs an accommodation, and then the modifications should meet that individual's work needs. However, employers should consider initiating changes that will provide general accessibility, particularly for job applicants, since it is likely that people with disabilities will be applying for jobs. The employer does not have to make changes to provide access in places or facilities that will not be used by that individual for employment-related activities or benefits.

Q. Can an employer be required to reallocate an essential function of a job to another employee as a reasonable accommodation?

A. No. An employer is not required to reallocate essential functions of a job as a reasonable accommodation.

Q. Can an employer be required to modify, adjust, or make other reasonable accommodations in the way a test is given to a qualified applicant or employee with a disability?

A. Yes. Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform job functions rather than reflect limitations caused by the disability. Tests should be given to people who have sensory, speaking, or manual impairments in a format that does not require the use of the impaired skill, unless it is a job-related skill that the test is designed to measure.

Q. Can an employer maintain existing production/performance standards for an employee with a disability?

A. An employer can hold employees with disabilities to the same standards of production/performance as other similarly situated employees without disabilities for performing essential job functions, with or without reasonable accommodation. An employer also can hold employees with disabilities to the same standards of production/performance as other employees regarding marginal functions unless the disability affects the person's ability to perform those marginal functions. If the ability to perform marginal functions is affected by the disability, the employer must provide some type of reasonable accommodation such as job restructuring but may not exclude an individual with a disability who is satisfactorily performing a jobs essential functions.

Q. Can an employer establish specific attendance and leave policies?

A. An employer can establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave. An employer also may be required to make adjustments in leave policy as a reasonable accommodation. The employer is not obligated to

provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

A uniformly applied leave policy does not violate the ADA because it has a more severe effect on an individual because of his/her disability. However, if an individual with a disability requests a modification of such a policy as a reasonable accommodation, an employer may be required to provide it, unless it would impose an undue hardship.

Q. Can an employer consider health and safety when deciding whether to hire an applicant or retain an employee with a disability?

A. Yes. The ADA permits employers to establish qualification standards that will exclude individuals who pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or of others, if that risk cannot be eliminated or reduced below the level of a oedirect threatî by reasonable accommodation. However, an employer may not simply assume that a threat exists; the employer must establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. By requiring employers to make individualized judgments based on reliable medical or other objective evidence rather than on generalizations, ignorance, fear, patronizing attitudes, or stereotypes, the ADA recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace.

Q. Are applicants or employees who are currently illegally using drugs covered by the ADA?

A. No. Individuals who currently engage in the illegal use of drugs are specifically excluded from the definition of a "qualified individual with a disability" protected by the ADA when the employer takes action on the basis of their drug use.

Q. Is testing for the illegal use of drugs permissible under the ADA?

A. Yes. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, employers may conduct such testing of applicants or employees and make employment decisions based on the results. The ADA does not encourage, prohibit, or authorize drug tests.

If the results of a drug test reveal the presence of a lawfully prescribed drug or other medical information, such information must be treated as a confidential medical record.

Q. Are alcoholics covered by the ADA?

A. Yes. While a current illegal user of drugs is not protected by the ADA if an employer acts on

the basis of such use, a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if s/he is qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to an alcoholic. However, an employer can discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct. An employer also may prohibit the use of alcohol in the workplace and can require that employees not be under the influence of alcohol.

Q. Does the ADA override Federal and State health and safety laws?

A. The ADA does not override health and safety requirements established under other Federal laws even if a standard adversely affects the employment of an individual with a disability. If a standard is required by another Federal law, an employer must comply with it and does not have to show that the standard is job related and consistent with business necessity. For example, employers must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration. However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws. If an employer can comply with both the ADA and another Federal law, then the employer must do so.

The ADA does not override State or local laws designed to protect public health and safety, except where such laws conflict with the ADA requirements. If there is a State or local law that would exclude an individual with a disability from a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If such a "direct threat" exists, the employer must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer cannot rely on a State or local law that conflicts with ADA requirements as a defense to a charge of discrimination.

Q. How does the ADA affect workers' compensation programs?

A. Only injured workers who meet the ADA's definition of an "individual with a disability" will be considered disabled under the ADA, regardless of whether they satisfy criteria for receiving benefits under workers' compensation or other disability laws. A worker also must be "qualified" (with or without reasonable accommodation) to be protected by the ADA. Work-related injuries do not always cause physical or mental impairments severe enough to "substantially limit" a major life activity. Also, many on-the-job injuries cause temporary impairments which heal within a short period of time with little or no long-term or permanent impact. Therefore, many injured workers who qualify for benefits under workers' compensation or other disability benefits laws may not be protected by the ADA. An employer must consider work-related injuries on a case-by-case basis to know if a worker is protected by the ADA.

An employer may not inquire into an applicant's workers' compensation history before making a

conditional offer of employment. After making a conditional job offer, an employer may inquire about a person's workers compensation history in a medical inquiry or examination that is required of all applicants in the same job category. However, even after a conditional offer has been made, an employer cannot require a potential employee to have a medical examination because a response to a medical inquiry (as opposed to results from a medical examination) shows a previous on-the-job injury unless all applicants in the same job category are required to have an examination. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future. However, an employer may refuse to hire, or may discharge an individual who is not currently able to perform a job without posing a significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation.

An employer may refuse to hire or may fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or worker's compensation history.

An employer also may submit medical information and records concerning employees and applicants (obtained after a conditional job offer) to state workers' compensation offices and "second injury" funds without violating ADA confidentiality requirements.

Q. What is discrimination based on "relationship or association" under the ADA?

A. The ADA prohibits discrimination based on relationship or association in order to protect individuals from actions based on unfounded assumptions that their relationship to a person with a disability would affect their job performance, and from actions caused by bias or misinformation concerning certain disabilities. For example, this provision would protect a person whose spouse has a disability from being denied employment because of an employer's unfounded assumption that the applicant would use excessive leave to care for the spouse. It also would protect an individual who does volunteer work for people with AIDS from a discriminatory employment action motivated by that relationship or association.

Q. How are the employment provisions enforced?

A. The employment provisions of the ADA are enforced under the same procedures now applicable to race, color, sex, national origin, and religious discrimination under title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991. Complaints regarding actions that occurred on or after July 26, 1992, may be filed with the Equal Employment Opportunity Commission or designated State human rights agencies. Available remedies will include hiring, reinstatement, promotion, back pay, front pay, restored benefits, reasonable accommodation, attorneys' fees, expert witness fees, and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation.

Q. What financial assistance is available to employers to help them make reasonable accommodations and comply with the ADA?

A. A special tax credit is available to help smaller employers make accommodations required by the ADA. An eligible small business may take a tax credit of up to $5,000 per year for accommodations made to comply with the ADA. The credit is available for one-half the cost of "eligible access expenditures" that are more than $250 but less than $10,250.

A full tax deduction, up to $15,000 per year, also is available to any business for expenses of removing qualified architectural or transportation barriers. Expenses covered include costs of removing barriers created by steps, narrow doors, inaccessible parking spaces, restroom facilities, and transportation vehicles. Additional information discussing the tax credits and deductions is contained in the Department of Justice's ADA Tax Incentive Packet for Businesses available from the ADA Information Line, see page 29. Information about the tax credit and tax deduction can also be obtained from a local IRS office, or by contacting the Office of Chief Counsel, Internal Revenue Service.

Q. What are an employer's recordkeeping requirements under the employment provisions of the ADA?

A. An employer must maintain records such as application forms submitted by applicants and other records related to hiring, requests for reasonable accommodation, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year after making the record or taking the action described (whichever occurs later). If a charge of discrimination is filed or an action is brought by EEOC, an employer must save all personnel records related to the charge until final disposition of the charge.

Q. Does the ADA require that an employer post a notice explaining its requirements?

A. The ADA requires that employers post a notice describing the provisions of the ADA. It must be made accessible, as needed, to individuals with disabilities. A poster is available from EEOC summarizing the requirements of the ADA and other Federal legal requirements for nondiscrimination for which EEOC has enforcement responsibility. EEOC also provides guidance on making this information available in accessible formats for people with disabilities.

Q. What resources does the Equal Employment Opportunity Commission have available to help employers and people with disabilities understand and comply with the employment requirements of the ADA?

A. The Equal Employment Opportunity Commission has developed several resources to help employers and people with disabilities understand and comply with the employment provisions of the ADA.

Resources include:

A Technical Assistance Manual that provides "how-to" guidance on the employment provisions of the ADA as well as a resource directory to help individuals find specific information.

A variety of brochures, booklets, and fact sheets.

For information on how to contact the Equal Employment Opportunity Commission, see page 29.

State and Local Governments

Q. Does the ADA apply to State and local governments?

A. Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities. It applies to all State and local governments, their departments and agencies, and any other instrumentalities or special purpose districts of State or local governments. It clarifies the requirements of section 504 of the Rehabilitation Act of 1973 for public transportation systems that receive Federal financial assistance, and extends coverage to all public entities that provide public transportation, whether or not they receive Federal financial assistance. It establishes detailed standards for the operation of public transit systems, including commuter and intercity rail (AMTRAK).

Q. When do the requirements for State and local governments become effective?

A. In general, they became effective on January 26, 1992.

Q. How does title II affect participation in a State or local government's programs, activities, and services?

A. A state or local government must eliminate any eligibility criteria for participation in programs, activities, and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for the provision of the service, program, or activity. The State or local government may, however, adopt legitimate safety requirements necessary for safe operation if they are based on real risks, not on stereotypes or generalizations about individuals with disabilities. Finally, a public entity must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public entity can demonstrate that a particular modification would fundamentally alter the nature of its service, program, or activity, it is not required to make that modification.

Q. Does title II cover a public entity's employment policies and practices?

A. Yes. Title II prohibits all public entities, regardless of the size of their work force, from discriminating in employment against qualified individuals with disabilities. In addition to title II's employment coverage, title I of the ADA and section 504 of the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities by certain public entities

Q. What changes must a public entity make to its existing facilities to make them accessible?

A. A public entity must ensure that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible. A State or local government's programs, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to facilities of a public entity that existed on January 26, 1992. Public entities do not necessarily have to make each of their existing facilities accessible. They may provide program accessibility by a number of methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate accessible sites.

Q. When must structural changes be made to attain program accessibility?

A. Structural changes needed for program accessibility must be made as expeditiously as possible, but no later than January 26, 1995. This three-year time period is not a grace period; all alterations must be accomplished as expeditiously as possible. A public entity that employs 50 or more persons must have developed a transition plan by July 26, 1992, setting forth the steps necessary to complete such changes.

Q. What is a self-evaluation?

A. A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with title II's requirements. All public entities must complete a self-evaluation by January 26, 1993. A public entity that employs 50 or more employees must retain its self-evaluation for three years. Other public entities are not required to retain their self-evaluations, but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.

Q. What does title II require for new construction and alterations?

A. The ADA requires that all new buildings constructed by a State or local government be accessible. In addition, when a State or local government undertakes alterations to a building, it must make the altered portions accessible.

Q. How will a State or local government know that a new building is accessible?

A. A State or local government will be in compliance with the ADA for new construction and alterations if it follows either of two accessibility standards. It can choose either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, which is the standard that must be used for public accommodations and commercial facilities under title III of the ADA. If the State or local government chooses the ADA Accessibility Guidelines, it is not entitled to the elevator exemption (which permits certain private buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator).

Q. What requirements apply to a public entity's emergency telephone services, such as 911?

A. State and local agencies that provide emergency telephone services must provide "direct access" to individuals who rely on a TDD or computer modem for telephone communication. Telephone access through a third party or through a relay service does not satisfy the requirement for direct access. Where a public entity provides 911 telephone service, it may not substitute a separate seven-digit telephone line as the sole means for access to 911 services by nonvoice users. A public entity may, however, provide a separate seven-digit line for the exclusive use of nonvoice callers in addition to providing direct access for such calls to its 911 line.

Q. Does title II require that telephone emergency service systems be compatible with all formats used for nonvoice communications?

A. No. At present, telephone emergency services must only be compatible with the Baudot format. Until it can be technically proven that communications in another format can operate in a reliable and compatible manner in a given telephone emergency environment, a public entity would not be required to provide direct access to computer modems using formats other than Baudot.

Q. How will the ADA's requirements for State and local governments be enforced?

A. Private individuals may bring lawsuits to enforce their rights under title II and may receive the same remedies as those provided under section 504 of the Rehabilitation Act of 1973,

including reasonable attorney's fees. Individuals may also file complaints with eight designated Federal agencies, including the Department of Justice and the Department of Transportation.

Public Accommodations

Q. What are public accommodations?

A. A public accommodation is a private entity that owns, operates, leases, or leases to, a place of public accommodation. Places of public accommodation include a wide range of entities, such as restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers. Private clubs and religious organizations are exempt from the ADA's title III requirements for public accommodations.

Q. Will the ADA have any effect on the eligibility criteria used by public accommodations to determine who may receive services?

A. Yes. If a criterion screens out or tends to screen out individuals with disabilities, it may only be used if necessary for the provision of the services. For instance, it would be a violation for a retail store to have a rule excluding all deaf persons from entering the premises, or for a movie theater to exclude all individuals with cerebral palsy. More subtle forms of discrimination are also prohibited. For example, requiring presentation of a driver's license as the sole acceptable means of identification for purposes of paying by check could constitute discrimination against individuals with vision impairments. This would be true if such individuals are ineligible to receive licenses and the use of an alternative means of identification is feasible.

Q. Does the ADA allow public accommodations to take safety factors into consideration in providing services to individuals with disabilities?

A. The ADA expressly provides that a public accommodation may exclude an individual, if that individual poses a direct threat to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. A public accommodation will be permitted to establish objective safety criteria for the operation of its business; however, any safety standard must be based on objective requirements rather than stereotypes or generalizations about the ability of persons with disabilities to participate in an activity.

Q. Are there any limits on the kinds of modifications in policies, practices, and procedures required by the ADA?

A. Yes. The ADA does not require modifications that would fundamentally alter the nature of the services provided by the public accommodation. For example, it would not be discriminatory

for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

Q. What kinds of auxiliary aids and services are required by the ADA to ensure effective communication with individuals with hearing or vision impairments?

A. Appropriate auxiliary aids and services may include services and devices such as qualified interpreters, assistive listening devices, notetakers, and written materials for individuals with hearing impairments; and qualified readers, taped texts, and Brailled or large print materials for individuals with vision impairments.

Q. Are there any limitations on the ADA's auxiliary aids requirements?

A. Yes. The ADA does not require the provision of any auxiliary aid that would result in an undue burden or in a fundamental alteration in the nature of the goods or services provided by a public accommodation. However, the public accommodation is not relieved from the duty to furnish an alternative auxiliary aid, if available, that would not result in a fundamental alteration or undue burden. Both of these limitations are derived from existing regulations and caselaw under section 504 of the Rehabilitation Act and are to be determined on a case-by-case basis.

Q. Will restaurants be required to have brailled menus?

A. No, not if waiters or other employees are made available to read the menu to a blind customer.

Q. Will a clothing store be required to have brailled price tags?

A. No, not if sales personnel could provide price information orally upon request.

Q. Will a bookstore be required to maintain a sign language interpreter on its staff in order to communicate with deaf customers?

A. No, not if employees communicate by pen and notepad when necessary.

Q. Are there any limitations on the ADA's barrier removal requirements for existing facilities?

A. Yes. Barrier removal need be accomplished only when it is "readily achievable" to do so.

Q. What does the term "readily achievable" mean?

A. It means "easily accomplishable and able to be carried out without much difficulty or expense."

Q. What are examples of the types of modifications that would be readily achievable in most cases?

A. Examples include the simple ramping of a few steps, the installation of grab bars where only routine reinforcement of the wall is required, the lowering of telephones, and similar modest adjustments.

Q. Will businesses need to rearrange furniture and display racks?

A. Possibly. For example, restaurants may need to rearrange tables and department stores may need to adjust their layout of racks and shelves in order to permit access to wheelchair users.

Q. Will businesses need to install elevators?

A. Businesses are not required to retrofit their facilities to install elevators unless such installation is readily achievable, which is unlikely in most cases.

Q. When barrier removal is not readily achievable, what kinds of alternative steps are required by the ADA?

A. Alternatives may include such measures as in-store assistance for removing articles from inaccessible shelves, home delivery of groceries, or coming to the door to receive or return dry cleaning.

Q. Must alternative steps be taken without regard to cost?

A. No, only readily achievable alternative steps must be undertaken.

Q. How is "readily achievable" determined in a multisite business?

A. In determining whether an action to make a public accommodation accessible would be "readily achievable," the overall size of the parent corporation or entity is only one factor to be considered. The ADA also permits consideration of the financial resources of the particular facility or facilities involved and the administrative or fiscal relationship of the facility or

facilities to the parent entity.

Q. Who has responsibility for ADA compliance in leased places of public accommodation, the landlord or the tenant?

A. The ADA places the legal obligation to remove barriers or provide auxiliary aids and services on both the landlord and the tenant. The landlord and the tenant may decide by lease who will actually make the changes and provide the aids and services, but both remain legally responsible.

Q. What does the ADA require in new construction?

A. The ADA requires that all new construction of places of public accommodation, as well as of "commercial facilities" such as office buildings, be accessible. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Is it expensive to make all newly constructed places of public accommodation and commercial facilities accessible?

A. The cost of incorporating accessibility features in new construction is less than one percent of construction costs. This is a small price in relation to the economic benefits to be derived from full accessibility in the future, such as increased employment and consumer spending and decreased welfare dependency.

Q. Must every feature of a new facility be accessible?

A. No, only a specified number of elements such as parking spaces and drinking fountains must be made accessible in order for a facility to be "readily accessible." Certain nonoccupiable spaces such as elevator pits, elevator penthouses, and piping or equipment catwalks need not be accessible.

Q. What are the ADA requirements for altering facilities?

A. All alterations that could affect the usability of a facility must be made in an accessible manner to the maximum extent feasible. For example, if during renovations a doorway is being relocated, the new doorway must be wide enough to meet the new construction standard for accessibility. When alterations are made to a primary function area, such as the lobby of a bank or the dining area of a cafeteria, an accessible path of travel to the altered area must also be provided. The bathrooms, telephones, and drinking fountains serving that area must also be made accessible. These additional accessibility alterations are only required to the extent that the added

accessibility costs do not exceed 20% of the cost of the original alteration. Elevators are generally not required in facilities under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center or mall; the professional office of a health care provider; a terminal, depot, or other public transit station; or an airport passenger terminal.

Q. Does the ADA permit an individual with a disability to sue a business when that individual believes that discrimination is about to occur, or must the individual wait for the discrimination to occur?

A. The ADA public accommodations provisions permit an individual to allege discrimination based on a reasonable belief that discrimination is about to occur. This provision, for example, allows a person who uses a wheelchair to challenge the planned construction of a new place of public accommodation, such as a shopping mall, that would not be accessible to individuals who use wheelchairs. The resolution of such challenges prior to the construction of an inaccessible facility would enable any necessary remedial measures to be incorporated in the building at the planning stage, when such changes would be relatively inexpensive.

Q. How does the ADA affect existing State and local building codes?

A. Existing codes remain in effect. The ADA allows the Attorney General to certify that a State law, local building code, or similar ordinance that establishes accessibility requirements meets or exceeds the minimum accessibility requirements for public accommodations and commercial facilities. Any State or local government may apply for certification of its code or ordinance. The Attorney General can certify a code or ordinance only after prior notice and a public hearing at which interested people, including individuals with disabilities, are provided an opportunity to testify against the certification.

Q. What is the effect of certification of a State or local code or ordinance?

A. Certification can be advantageous if an entity has constructed or altered a facility according to a certified code or ordinance. If someone later brings an enforcement proceeding against the entity, the certification is considered "rebuttable evidence" that the State law or local ordinance meets or exceeds the minimum requirements of the ADA. In other words, the entity can argue that the construction or alteration met the requirements of the ADA because it was done in compliance with the State or local code that had been certified.

Q. When are the public accommodations provisions effective?

A. In general, they became effective on January 26, 1992.

Q. How will the public accommodations provisions be enforced?

A. Private individuals may bring lawsuits in which they can obtain court orders to stop discrimination. Individuals may also file complaints with the Attorney General, who is authorized to bring lawsuits in cases of general public importance or where a oepattern o practiceî of discrimination is alleged. In these cases, the Attorney General may seek monetary damages and civil penalties. Civil penalties may not exceed $55,000 for a first violation or $110,000 for any subsequent violation.

Miscellaneous

Q. Is the Federal government covered by the ADA?

A. The ADA does not cover the executive branch of the Federal government. The executive branch continues to be covered by title V of the Rehabilitation Act of 1973, which prohibits discrimination in services and employment on the basis of handicap and which is a model for the requirements of the ADA. The ADA, however, does cover Congress and other entities in the legislative branch of the Federal government.

Q. Does the ADA cover private apartments and private homes?

A. The ADA does not cover strictly residential private apartments and homes. If, however, a place of public accommodation, such as a doctor's office or day care center, is located in a private residence, those portions of the residence used for that purpose are subject to the ADA's requirements.

Q. Does the ADA cover air transportation?

A. Discrimination by air carriers in areas other than employment is not covered by the ADA but rather by the Air Carrier Access Act (49 U.S.C. 1374 (c)).

Q. What are the ADA's requirements for public transit buses?

A. The Department of Transportation has issued regulations mandating accessible public transit vehicles and facilities. The regulations include requirements that all new fixed-route, public transit buses be accessible and that supplementary paratransit services be provided for those individuals with disabilities who cannot use fixed-route bus service. For information on how to contact the Department of Transportation, see page 29.

Q. How will the ADA make telecommunications accessible?

A. The ADA requires the establishment of telephone relay services for individuals who use

telecommunications devices for deaf persons (TDD's) or similar devices. The Federal Communications Commission has issued regulations specifying standards for the operation of these services.

Q. Are businesses entitled to any tax benefit to help pay for the cost of compliance?

A. As amended in 1990, the Internal Revenue Code allows a deduction of up to $15,000 per year for expenses associated with the removal of qualified architectural and transportation barriers. The 1990 amendment also permits eligible small businesses to receive a tax credit for certain costs of compliance with the ADA. An eligible small business is one whose gross receipts do not exceed $1,000,000 or whose workforce does not consist of more than 30 full-time workers. Qualifying businesses may claim a credit of up to 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250. Examples of eligible access expenditures include the necessary and reasonable costs of removing architectural, physical, communications, and transportation barriers; providing readers, interpreters, and other auxiliary aids; and acquiring or modifying equipment or devices.

Telephone Numbers for ADA Information

This list contains the telephone numbers of Federal agencies that are responsible for providing information to the public about the Americans with Disabilities Act and organizations that have been funded by the Federal government to provide information through staffed information centers. The agencies and organizations listed are sources for obtaining information about the law's requirements and informal guidance in understanding and complying with the ADA.

ADA Information Line
U.S. Department of Justice

For ADA documents and questions

800-514-0301 (voice)
800-514-0383 (TTY)

www.ada.gov

U.S. Equal Employment Opportunity Commission

For publications

800-669-3362 (voice)
800-800-3302 (TTY)

For questions

800-669-4000 (voice)
800-669-6820 (TTY)

www.eeoc.gov

U.S. Department of Transportation

ADA Assistance Line for
regulations and complaints

888-446-4511 (voice)
TTY: use relay service

www.fta.dot.gov/civilrights/civil_rights_2360.html

Federal Communications Commission

888-225-5322 (voice)
888-835-5322 (TTY)

www.fcc.gov/cib/dro

U.S. Architectural and Transportation Barriers Compliance Board

800-872-2253 (voice)
800-993-2822 (TTY)

www.access-board.gov

U.S. Department of Labor
Job Accommodation Network

800-526-7234 (voice & TTY)

www.jan.wvu.edu

U.S. Department of Education
Regional Disability and Business Technical Assistance Centers

800-949-4232 (voice & TTY)

www.adata.org

Addresses for ADA Information

U.S. Department of Justice
Civil Rights Division
Disability Rights Section
P.O. Box 66738
Washington, DC 20035-6738

U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507

U.S. Department of Transportation
Federal Transit Administration
400 Seventh Street, SW
Washington, DC 20590

Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Architectural and Transportation Barriers Compliance Board
1331 F Street, NW Suite 1000
Washington, DC 20004-1111

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- Braille
- Large print
- Audiocassette
- Electronic file on computer disk.
- Internet www.ada.gov

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Comparison of the
ADA (as construed by the courts) and the ADA Amendments Act (S. 3406)

Issue	ADA (as construed by the courts)	S. 3406 (ADAAA – as passed)
Scope of the Definition of Disability: In General	The ADA defines a "disability," in part, as a physical or mental impairment that substantially limits a major life activity of an individual. (This is the first prong of the definition of disability.) In several cases, the Supreme Court has narrowly construed this definition in a way that has led lower courts to exclude a range of individuals from coverage, including individuals with diabetes, epilepsy, cancer, muscular dystrophy, and artificial limbs.	The ADAAA defines a "disability," in part, as a physical or mental impairment that substantially limits a major life activity of an individual. (This is the first prong of the definition of disability.) The ADAAA rejects the Supreme Court's interpretation of "substantially limits" by providing a rule of construction stating that the term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADAAA. Findings and purposes make clear that Congress intended to apply a less demanding standard than that applied by the courts, and to cover a broad range of individuals. A rule of construction provides that the definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.
Mitigating Measures	One way in which the Supreme Court narrowed the group of people covered under the ADA was by ruling, in the case of *Sutton v. United Airlines*, that mitigating measures (such as medication or devices) were to be taken into account in determining whether a person was substantially limited in a major life activity. Thus,	The ADAAA provides that the ameliorative effects of mitigating measures should not be considered in determining whether an individual has an impairment that substantially limits a major life activity. An exception is made for "ordinary eyeglasses or

Comparison of the ADA (as construed by the courts) and the ADA Amendments Act (S. 3406)

	if medication or devices enabled a person with an impairment to function well, that person was often held by a court not to have a disability under the ADA – even if the impairment was the basis for discrimination.	contact lenses," which may be taken into account.
"Substantially Limits"	The Court held in *Toyota Motor Mfg. of Kentucky v. Williams* that an impairment "substantially limits" a "major life activity" if it "prevents or severely restricts the individual" from performing the activity. 534 U.S. 184, 198 (2002).	The ADAAA requires that the term "substantially limits" be interpreted consistently with the findings and purposes of the Act. The findings of the Act state that the EEOC and the Supreme Court have incorrectly interpreted the term "substantially limits" to establish a greater degree of limitation than had been intended by Congress.
The "Major Life Activity" Requirement	In the *Williams* case, the Supreme Court ruled that a "major life activity" must be an activity that is "of central importance to most people's daily lives." 534 U.S. 184	The ADAAA includes a non-exhaustive list of major life activities, such as seeing, hearing, eating, sleeping, walking, learning and concentrating. Major life activities also include the operation of "major bodily functions," such as the immune system, normal cell growth, and the endocrine system.
Episodic Conditions and Multiple Major Life Activities	Some lower courts have held that individuals must be limited in more than one major life activity in order to have a disability under the law. Other courts have held that episodic or intermittent impairments, such as epilepsy or post-traumatic stress disorder, are not covered under the law.	The ADAAA makes clear that an impairment that substantially limits a major life activity need not also limit other major life activities in order to be considered a disability. In addition, the ADAAA clarifies that impairments that are episodic or in remission are considered disabilities if the impairment would substantially limit a major life activity when the condition is considered in its active state.
Regarded as Having a	In the third prong of the definition of disability, the ADA covers people with impairments who are "regarded as"	The ADAAA provides that an individual can establish coverage under the "regarded as" prong by showing

Comparison of the
ADA (as construed by the courts) and the ADA Amendments Act (S. 3406)

Disability	disabled. In the *Sutton* case, the Supreme Court established a very high requirement for an individual to show that he or she is substantially limited in working – essentially requiring the individual to prove that the covered entity that engaged in the discrimination also believed that many other employers would have discriminated against that individual as well. More generally, lower courts have required individuals to show what was in a covered entity's head in order to establish coverage under the "regarded as" prong.	that he or she was subjected to an action prohibited by the ADA based on an actual or perceived impairment, regardless of whether the impairment limits a major life activity. This reinstates the approach of the Supreme Court in the 1987 case of *School Board of Nassau County v. Arline*, 480 U.S. 273. Transitory and minor impairments are excluded from this coverage, and employers and other covered entities under the ADA have **no duty** to provide a reasonable accommodation or modification to individuals who fall solely under the "regarded as" prong.
Findings and Narrow Construction	In the *Sutton* case, the Supreme Court based its narrow reading of the definition of disability in the ADA partly on the ADA's findings that "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority." *Sutton*, 527 U.S. at 484; 527 U.S. at 494 (Ginsburg, J. concurring). In the *Williams* case, the Court used the finding regarding 43 million Americans with disabilities to confirm its conclusion that the terms "substantially limits" and "major life activity" must be "interpreted strictly to create a demanding standard for qualifying as disabled." 534 U.S. at 197.	The ADAAA replaces the two findings used by the Supreme Court to narrow coverage under the ADA with findings and purposes indicative of the breadth of coverage intended by the ADA. The findings make clear that the ADAAA rejects the Court's holdings in *Sutton* and *Williams* and reinstates a broad view of the definition of disability. It adds two new findings, stating that *Williams* interpreted the term "substantially limits" to require a greater degree of limitation than Congress had intended and that the EEOC's regulations defining "substantially limits" as "significantly restricted" were inconsistent with congressional intent by expressing too high a standard. The ADAAA also adds two new purposes, conveying Congress' expectation that the EEOC will revise that portion of its regulations that defined "substantially limits" as having too high a level of severity and conveying Congress' intent that the primary object of courts' attention in ADA cases should be whether covered entities have complied with their obligations and that the question of whether an individual's impairment is a disability should not demand extensive analysis.

Comparison of the
ADA (as construed by the courts) and the ADA Amendments Act (S. 3406)

Regulatory Authority	In *Sutton*, the Court held that "no agency has been delegated authority to interpret the term 'disability'" through regulations. 527 U.S. at 479.	Title V of the ADA (42 U.S.C. 12201) is amended to grant the EEOC, the Attorney General, and the Secretary of Transportation authority to issue regulations interpreting the definition of disability under the ADA.
Academic Requirements in Higher Education	Higher education institutions are subject to the ADA's requirements. For example, Title III of the ADA requires that universities make reasonable modifications in their policies, unless the university can demonstrate that making such modifications would "fundamentally alter" the nature of the educational service being offered.	To address the concerns of higher education institutions, S. 3406 explicitly states that "nothing in this Act alters the [Title III fundamental alteration provision] specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved." This provision thus restates current law in order to clarify that the changes in the definition of disability do not change the "fundamental alteration" provision of the ADA.

Compiled by Disability Rights Network of PA

Disability History Timeline
(http://isc.temple.edu/neighbor/ds/disabilityrightstimeline.htm)

The following is a select list of national and international milestones highlighting people, events and legislation that effect disability rights.

1817
The American School for the Deaf is founded in Hartford, Connecticut. This is the first school for disabled children anywhere in the Western Hemisphere.

1848
The Perkins Institution, founded by Samuel Gridley Howe in Boston, Massachusetts, was the first residential institution for people with mental retardation. Over the next century, hundreds of thousands of developmentally disabled children and adults were institutionalized, many for the rest of their lives.

1864
Columbia Institution for the Deaf and Dumb and Blind was authorized by the U.S. Congress to grant college degrees. It was the first college in the world established for people with disabilities.

1859
Charles Darwin publishes his controversial book *The Origin of the Species.*

1865
P.T. Barnum's American Museum on Broadway is destroyed by a mysterious fire.

1883
Eugenics is a term that was coined by Sir Francis Galton in his book Essays in Eugenics. Americans embraced the eugenics movement by passing laws to prevent people with disabilities from moving to the U.S., marrying or having children. Eugenics laws led to the institutionalization and forced sterilization of disabled adults and children.

1912
The Kallikak Family by Henry H. Goddard was a best selling book. It proposed that disability was linked to immorality and alleged that both were tied to genetics. It advanced the agenda of the eugenics movement.

The Threat of the Feeble Minded (pamphlet) created a climate of hysteria allowing for massive human rights abuses of people with disabilities, including institutionalization and forced sterilization.

1918
The Smith-Sears Veterans Rehabilitation Act provided for the promotion of vocational rehabilitation and return to civil employment of disabled persons discharged from U.S. military.

1924
The Commonwealth of Virginia passed a state law that allowed for sterilization (without consent) of individuals found to be "feebleminded, insane, depressed, mentally handicapped, epileptic and other." Alcoholics, criminals and drug addicts were also sterilized.

1927
The Buck v. Bell Supreme Court decision ruled that forced sterilization of people with disabilities was not a violation of their constitutional rights. This decision removed all restraints for eugenicists. By the 1970s, over 60,000 disabled people were sterilized without their consent.

The U.S. Supreme Court upheld Commonwealth of Virginia eugenic laws as constitutional. Justice Oliver Wendell Holmes equated sterilization to vaccination. Nationally, twenty-seven states began wholesale sterilization of "undesirables."

1932
In order to take advantage of the popularity of Tod Browning's previous film *Dracula* the production head for MGM commissioned a new project, to be "even more horrible." *Freaks* was released to near universal criticism. It received so much bad press and created such ill will that MGM was forced to withdraw it from circulation, suffering a loss of $164,000.

1935
The League for the Physically Handicapped in New York City was formed to protest discrimination by the Works Progress Administration (WPA). The Home Relief Bureau of New York City stamped all applications with "PH" which stood for physically handicapped. Members of the League held a sit-in at the Home Relief Bureau for nine days and a weekend sit-in at the WPA headquarters. These actions eventually led to the creation of 1500 jobs in New York City.

The Social Security Act was passed. This established federally funded old-age benefits and funds to states for assistance to blind individuals and disabled children. The Act extended existing vocational rehabilitation programs.

1939
World War II began. Hitler ordered widespread mercy killing of the sick and disabled. The Nazi euthanasia program (code name Aktion T-4) was instituted to eliminate "life unworthy of life."

1940-44
908 patients were transferred from an institution for retarded and chronically ill patients in Schoenbrunn, Germany to the euthanasia installation at Eglfing-Haar to be gassed. A monument to the victims stands in the courtyard at Schoenbrunn.

1940
The National Federation of the Blind was formed in Wilkes-Barre, Pennsylvania by Jacobus Broek and others. They advocated for white cane laws, input by blind people for programs for blind clients and other reforms.

The American Federation of the Physically Handicapped, founded by Paul Strachan, was the first cross-disability national political organization to urge an end to job discrimination, lobby for passage of legislation, call for a National Employ the Physically Handicapped Week and other initiatives.

1941
Hitler suspended the Aktion T4 program that killed nearly one hundred thousand people. Euthanasia continued through the use of drugs and starvation instead of gassings.

1942
Henry Viscardi, an American Red Cross volunteer, trained hundreds of disabled soldiers to use their prosthetic limbs. His work at Walter Reed Army Medical Center in Washington, D.C. drew the attention of Howard Rusk and Eleanor Roosevelt, who protested when Viscardi's program was terminated by the Red Cross and the military.

1943
The LaFollette-Barden Vocational Rehabilitation Act added physical rehabilitation to the goals of federally funded vocational rehabilitation programs and provided funding for certain health care services.

1944

Howard Rusk began a rehabilitation program for disabled airmen at the U.S. Army Air Force Convalescent Center in Pawling, New York. Dubbed "Rusk's Folly" by the medical establishment, rehabilitation medicine became a new medical specialty.

1945
President Harry Truman signed PL-176 creating an annual National Employ the Handicapped Week.

1946
The Hill-Burton Act (also known as the Hospital Survey and Construction Act) authorized federal grants to states for the construction of hospitals, public health centers and health facilities for rehabilitation of people with disabilities.

The National Mental Health Foundation was founded by World War II conscientious objectors who served as attendants at state mental institutions rather than in the war. The Foundation exposed the abusive conditions at these facilities and became an impetus toward deinstitutionalization.

1947
The President's Committee on National Employ the Physically Handicapped Week was held in Washington, D.C. Publicity campaigns, coordinated by state and local committees, emphasized the competence of people with disabilities and used movie trailers, billboards, radio and television ads to convince the public that it was good business to hire the handicapped.

The Paralyzed Veterans of America was organized.

1948
The National Paraplegia Foundation, founded by members of the Paralyzed Veterans of America as the civilian arm of their growing movement, took a leading role in advocating for disability rights.

University of Illinois at Galesburg disabled students' program was officially founded and directed by Timothy Nugent. The program moved to the campus at Urbana-Champaign where it became a prototype for disabled student programs and independent living centers across the country.

We Are Not Alone (WANA), a mental patients' self-help group, was organized at the Rockland State Hospital in New York City.

----------1950's through 1960's----------
U.S. Civil Rights Movement
Self-Help Movement
Deinstitutionalization Movement
Demedicalization Movement
Consumerism Movement

1950
Mary Switzer was appointed the Director of the U.S. Office of Vocational Rehabilitation where she emphasized independent living as a quality of life issue.

Social Security Amendments established a federal-state program to aid permanently and totally disabled persons.

1951
Howard Rusk opened the Institute of Rehabilitation Medicine at the New York University Medical Center in New York City.

1952

The President's Committee on National Employ the Physically Handicapped Week became the President's Committee on Employment of the Physically Handicapped, a permanent organization reporting to the President and Congress.

1953
Los Angeles County provided at-home attendant care to adults with polio as a cost-saving alternative to hospitalization.

1954
The U.S. Supreme Court in Brown v. Board of Education of Topeka ruled that separate schools for black and white children are unequal and unconstitutional. This pivotal decision became a catalyst for the Civil Rights Movement.

Vocational Rehabilitation Amendments were passed that authorized federal grants to expand programs available to people with physical disabilities.

Mary Switzer, Director of the U.S. Office of Vocational Rehabilitation, authorized funds for more than 100 university-based rehabilitation-related programs.

Social Security Act of 1935 was amended by PL 83-761 to include a freeze provision for workers who were forced by disability to leave the workforce. This protected their benefits by freezing their retirement benefits at their pre-disability level.

1956
Social Security Amendments of 1956 created the Social Security Disability Insurance (SSDI) program for disabled workers aged 50 to 64.

1958
Social Security Amendments of 1958 extended Social Security Disability Insurance benefits to dependents of disabled workers.

Rehabilitation Gazette (formerly known as the Toomeyville Gazette), edited by Gini Laurie, was a grassroots publication which became an early voice for disability rights, independent living and cross-disability organizing. It featured articles by writers with disabilities.

1960
Social Security Amendments of 1960 eliminated the restriction that disabled workers receiving Social Security Disability Insurance benefits must be 50 or older.

1961
President Kennedy appointed a special President's Panel on Mental Retardation.

The American National Standard Institute, Inc. (ANSI) published American Standard Specifications for Making Buildings Accessible to, and Usable by, the Physically Handicapped. This landmark document became the basis for subsequent architectural access codes.

1962
The President's Committee on Employment of the Physically Handicapped was renamed the President's Committee on Employment of the Handicapped reflecting increased interest in employment issues affecting people with cognitive disabilities and mental illness.

Edward Roberts sued to gain admission to the University of California. (James Meredith sued to become the first black person to attend the University of Mississippi.)

1963

President Kennedy called for a reduction "over a number of years and by hundreds of thousands, (in the number) of persons confined" to residential institutions and asks that methods be found "to retain in and return to the community the mentally ill and mentally retarded, and thereto restore and revitalize their lives through better health programs and strengthened educational and rehabilitation services." **This resulted in deinstitutionalization and increased community services.**

The Mental Retardation Facilities and Community Health Centers Construction Act authorized federal grants for the construction of public and private nonprofit community mental health centers.

South Carolina passed the first statewide architectural access code.

1964
The Civil Rights Act, signed by President Johnson, prohibited discrimination on the basis of race, religion, ethnicity, national origin and creed (gender was added later). This Act outlawed discrimination on the basis of race in public accommodations and employment as well as in federally assisted programs.

1965
Medicare and Medicaid were established through passage of the Social Security Amendments of 1965, providing federally subsidized health care to disabled and elderly Americans covered by the Social Security program. These amendments changed the definition of disability under Social Security Disability Insurance program from "of long continued and indefinite duration" to "expected to last for not less than 12 months."

Vocational Rehabilitation Amendments of 1965 were passed authorizing federal funds for construction of rehabilitation centers, expansion of existing vocational rehabilitation programs and the creation of the National Commission on Architectural Barriers to Rehabilitation of the Handicapped.

The National Technical Institute for the Deaf at the Rochester Institute of Technology in Rochester, New York was established by Congress.

1966
The President's Committee on Mental Retardation was established by President Johnson.

Christmas in Purgatory by Burton Blatt and Fred Kaplan documented conditions at state institutions for people with developmental disabilities.

1968
The Architectural Barriers Act prohibited architectural barriers in all federally owned or leased buildings.

California legislature guaranteed that the Bay Area Rapid Transit (BART) would be the first rapid transit system in the U.S. to accommodate wheelchair users.

1970
The Urban Mass Transit Act required all new mass transit vehicles be equipped with wheelchair lifts. APTA delayed implementation for 20 years. Regulations were issued in 1990.

The Rolling Quads was started by Ed Roberts at U C Berkeley.

Disabled in Action was a group started by Judy Heumann at Long Island University, New York.

Developmental Disabilities Services and Facilities Construction Amendments were passed which contained the first legal definition of developmental disabilities. They authorized grants for services and facilities for the rehabilitation of people with developmental disabilities and state DD Councils.

The Physically Disabled Students Program (PDSP) was founded by Ed Roberts, John Hessler, Hale Zukas and others at UC Berkeley. With its focus on community living, political advocacy and personal assistance services, it became the nucleus for the first Center for Independent Living, founded in 1972.

1971
The National Center for Law and the Handicapped was founded at the University of Notre Dame, Indiana. It became the first legal advocacy center for people with disabilities in the U. S.

The U.S. District Court, Middle District of Alabama decided in Wyatt v. Stickney that people in residential state schools and institutions have a constitutional right "to receive such individual treatment as (would) give them a realistic opportunity to be cured or to improve his or her mental condition." Disabled people were no longer to be locked away in custodial institutions without treatment or education.

The Mental Patients' Liberation Project was initiated in New York City.

The Fair Labor Standard Act of 1938 was amended to bring people with disabilities (other than blindness) into the sheltered workshop system.

1972
The Berkeley Center for Independent Living was founded by Ed Roberts and associates with funds from the Rehabilitation Administration. It is recognized as the first center for independent living.

The Rehabilitation Act was passed by Congress and vetoed by Richard Nixon.

The U.S. District Court, District of Columbia ruled in Mills v. Board of Education that the District of Columbia could not exclude disabled children from the public schools.

The U.S. District Court, Eastern District of Pennsylvania, in PARC v. Pennsylvania struck down various state laws used to exclude disabled children from the public schools. Advocates cited these decisions during public hearings that led to the passage of the Education for All Handicapped Children Act of 1975.

Social Security Amendments of 1972 created the Supplemental Security Income (SSI) program. The law relieved families of the financial responsibility of caring for their adult disabled children.

The Houston Cooperative Living Residential Project was established in Houston, Texas. It became a model for subsequent independent living programs.

The Judge David L. Bazelon Center for Mental Health Law, founded in Washington, D.C. provided legal representation and advocated for the rights of people with mental illness.

The Legal Action Center (Washington, D.C. and New York City) was founded to advocate for the interests of people with alcohol or drug dependencies and for people with HIV/AIDS.

Paralyzed Veterans of America, National Paraplegia Foundation and Richard Heddinger file suit against the Washington Metropolitan Area Transit Authority to incorporate accessibility into their design for a new, multibillion-dollar subway system in Washington, D.C. Their victory was a landmark in the struggle for accessible public mass transit.

The Network Against Psychiatric Assault was organized in San Francisco.

In New York ARC v. Rockefeller, parents of residents at the Willow Brook State School in Staten Island, New York filed suit to end the appalling conditions at that institution. A television broadcast from the facility outraged the general public. Eventually, thousands of people were moved into community-based living.

Disabled in Action demonstrated in New York City, protesting Nixon's veto of the Rehabilitation Act. Led by Judy Heumann, eighty activists staged a sit-in on Madison Avenue, stopping traffic. A flood of letters and protest calls were made.

Demonstrations were held by disabled activists in Washington, D.C. to protest Nixon's veto of the Rehabilitation Act. Among the demonstrators are Disabled in Action, Paralyzed Veterans of America, the National Paraplegia Foundation and others.

The Commonwealth of Virginia ceased its sterilization program. 8300 individuals never received justice regarding their sterilizations.

1973

The Rehabilitation Act of 1973 was passed. Sections 501, 503 and 504 prohibited discrimination in federal programs and services and all other programs or services receiving federal funds. Key language in the Rehabilitation Act, found in Section 504, states "No otherwise qualified handicapped individual in the United States, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Handicap parking stickers were introduced in Washington, D.C.

The first Conference on Human Rights and Psychiatric Oppression was held at the University of Detroit.

The Federal-Aid Highway Act authorized federal funds for construction of curb cuts.

The Architectural and Transportation Barriers Compliance Board established under the Rehabilitation Act of 1973 enforced the Architectural Barriers Act of 1968.

The Consortium for Citizens with Disabilities advocated for passage of what became the Developmentally Disabled Assistance and Bill of Rights Act of 1975 and the Education for All Handicapped Children Act of 1975.

1974

The Disabled Women's Coalition was founded at the University of California, Berkeley by Susan Sygall, Deborah Kaplan, Kitty Cone, Corbett O'Toole and Susan Shapiro.

Atlantis Community, Denver, Colorado was founded by Wade Blank who relocated adults with severe disabilities from nursing homes to apartments.

The Boston Center for Independent Living was established.

Halderman v. Pennhurst, filed in Pennsylvania on behalf of the residents of the Pennhurst State School and Hospital highlighted conditions at state schools for people with mental retardation. It became a precedent in the battle for deinstitutionalization, establishing a right to community services for people with developmental disabilities.

The first Client Assistant Project (CAP) was established to advocate for clients of state vocational rehabilitation agencies.

North Carolina passed a statewide building code with stringent access requirements. Drafted by access advocate Ronald Mace, the code became a model for effective architectural access legislation in other states.

Barrier Free Environments, founded by Ronald Mace, advocated for accessibility in buildings and products.

1975
The Education of All Handicapped Children Act (PL 94-142) required free, appropriate public education in the least restrictive setting. This Act was later renamed The Individuals With Disabilities Education Act (IDEA).

The Developmental Disability Bill of Rights Act established protection and advocacy (P & A) services.

The Community Services Act created the Head Start Program. It stipulated that at least 10% of program openings were to be reserved for disabled children.

The Developmentally Disabled Assistance and Bill of Rights Act provided federal funds to programs serving people with developmental disabilities and outlined a series of rights for those who are institutionalized.

The American Coalition of Citizens with Disabilities was founded. It became the leading national cross-disability rights organization of the 1970s.

The Association of Persons with Severe Handicaps (TASH) was founded by special education professionals in response to PARC v. Pennsylvania (1972) and other right-to-education cases. This organization called for the end of aversive behavior modification and the closing of all residential institutions for people with disabilities.

U.S. Supreme Court ruled in O'Connor v. Donaldson that people cannot be institutionalized in a psychiatric hospital against their will unless they are determined to be a threat to themselves or to others.

Parent and Training Information Centers were developed to help parents of disabled children exercise their rights under the Education for All Handicapped Children Act of 1975.

Ed Roberts was appointed Director of the California Department of Rehabilitation. He established nine independent living centers based on the Berkeley CIL model.

The Western Center on Law and the Handicapped was founded in Los Angeles.

1976
Centers for independent living are established in Houston and Chicago.

The Federal Communications Commission authorized reserving Line 21 on televisions for closed captions.
1976 (cont')
Higher Education Act of 1972 amendment provided services to physically disabled students entering college.

Disabled in Action of Pennsylvania, Inc. v. Coleman was known as the Transbus lawsuit. Disabled in Action of Pennsylvania, the American Coalition of Cerebral Palsy Associations and others were represented by the Public Interest Law Center of Philadelphia. They filed suit to require that all buses purchased by public transit authorities receiving federal funds meet Transbus specifications (making them wheelchair accessible).

Disabled in Action, New York City picketed the United Cerebral Palsy telethon calling telethons "demeaning and paternalistic shows which celebrate and encourage pity."

The Disability Rights Center was founded in Washington, D.C. Sponsored by Ralph Nader's Center for the Study of Responsive Law, it specialized in consumer protection for people with disabilities.

The Westside Center for Independent Living, Los Angeles was one of the first nine independent living centers established by Ed Roberts, Director of the California Department of Rehabilitation.

1977
Joseph Califano, U.S. Secretary of Health, Education and Welfare, refused to sign meaningful regulations for Section 504. After an ultimatum and deadline, demonstrations took place in ten U.S. cities on April 5th. The sit-in at the San Francisco Office of the U.S. Department of Health, Education and Welfare lasted until May 1st. More than 150 demonstrators refused to disband. This action became the longest sit-in at a federal building to date.

Section 504 regulations were issued.

Max Cleland was appointed head of the U.S. Veterans Administration. He was the first severely disabled and youngest person to fill that position.

The White House Conference on Handicapped Individuals drew 3,000 disabled people to discuss federal policy toward people with disabilities. It resulted in numerous recommendations and acted as a catalyst for grassroots disability rights organizing.

Legal Services Corporation Act Amendments added financially needy people with disabilities to the list of those eligible for publicly funded legal services.

In Lloyd v. Regional Transportation Authority, the U.S. Court of Appeals, Seventh Circuit ruled that individuals have a right to sue under Section 504 of the Rehabilitation Act of 1973 and that public transit authorities must provide accessible service.

The U.S. Court of Appeals, Fifth Circuit, in Snowden v. Birmingham Jefferson County Transit Authority undermined this decision by ruling that authorities need to provide access only to "handicapped persons other than those confined to wheelchairs."

1978
American Disabled for Public Transit (ADAPT) was founded. It held a transit bus hostage in Denver, Colorado. A yearlong civil disobedience campaign followed to force the Denver Transit Authority to purchase wheelchair lift-equipped buses.

The Adaptive Environments Center was founded in Boston.

Title VII of the Rehabilitation Act Amendments of 1978 established the first federal funding for consumer-controlled independent living centers and created the National Council of the Handicapped under the U.S. Department of Education.

On Our Own: Patient Controlled Alternatives to the Mental Health System by Judi Chamberlin became the standard text of the psychiatric survivor movement.

The National Center for Law and the Deaf was founded in Washington, D.C.

Handicapping America by Frank Bowe was a comprehensive review of the policies and attitudes denying equal citizenship to people with disabilities. It became a standard text of the general disability rights movement.

1979
Part B funds created ten new centers for independent living across the U.S.

Vermont Center for Independent Living, the first statewide independent living center in the U.S., was founded by representatives of Vermont disability groups.

In Southeastern Community College v. Davis, the Supreme Court ruled that under Section 504 of the Rehabilitation Act of 1973, programs receiving federal funds must make "reasonable modifications" to enable the participation of otherwise qualified disabled individuals. This decision was the Court's first ruling on Section 504 establishing reasonable modification as an important principle in disability rights law.

The Disability Rights Education and Defense Fund (DREDF), founded in Berkeley, California, became the nation's leading disability rights legal advocacy center. It participated in landmark litigation and lobbying of the 1980s and 1990s.

1980
The National Disabled Women's Educational Equity Project, Berkeley, California, was established by Corbett O'Toole. Based at DREDF, the Project administered the first national survey on disability and gender and conducted the first national Conference on Disabled Women's Educational Equity held in Bethesda, Maryland.

Social Security Amendments, Section 1619 was passed. Designed to address work disincentives within the Social Security Disability Insurance and Supplemental Security Income programs, other provisions mandated a review of Social Security recipients. This led to the termination of benefits of hundreds of thousands of people with disabilities.

The Civil Rights of Institutionalized Persons Act authorized the U.S. Justice Department to file civil suits on behalf of residents of institutions whose rights were being violated.

Disabled Peoples' International was founded in Singapore with participation of advocates from Canada and the United States.

1981-1984
The Reagan Administration threatened to amend or revoke regulations implementing Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975. Disability rights advocates Patrisha Wright (DREDF) and Evan Kemp, Jr. (Disability Rights Center) led an intense lobbying and grassroots campaign that generated more than 40,000 cards and letters. After three years, the Reagan Administration abandoned its attempts to revoke or amend the regulations.

The Reagan Administration terminated the Social Security benefits of hundreds of thousands of disabled recipients. Distressed by this action, several disabled people committed suicide. A variety of groups including the Alliance of Social Security Disability Recipients and the Ad Hoc Committee on Social Security Disability fought these terminations.

1981
The International Year of Disabled Persons began. During the year, governments were encouraged to sponsor programs bringing people with disabilities into the mainstream of their societies.

The parents of "Baby Doe" in Bloomington, Indiana were advised by their doctors to decline surgery to unblock their newborn's esophagus because the baby had Down's syndrome. Although disability rights activists tried to intervene, "Baby Doe" starved to death before legal action was taken.

The Telecommunications for the Disabled Act mandated telephone access for deaf and hard-of-hearing people at public places like hospitals and police stations. All coin-operated telephones had to be hearing aid-compatible by January 1985. The Act called for state subsidies for production and distribution of TDD's.

1983
The National Council on Independent Living (NCIL) was founded by Max Starkloff, Charlie Carr and Marca Bristo.

A national ADAPT action was held for accessible transportation in Denver, Colorado at the American Public Transit Association (APTA) Convention.

The World Institute on Disability (WID) was established by Ed Roberts, Judy Heumann and Joan Leon.

The Disabled Children's Computer Group (DCCG) was founded in Berkeley, California.

The National Council on the Handicapped called for Congress to include persons with disabilities in the Civil Rights Act of 1964 and other civil and voting rights legislation and regulations.

The United Nations expanded the International Year of Disabled Persons to the International Decade of Disabled Persons (1983-1992).

The Job Accommodation Network (JAN) was founded by the President's Committee on Employment of the Handicapped to provide information to businesses with disabled employees.

Amendments to the Rehabilitation Act provided for the Client Assistance Program (CAP), an advocacy program for consumers of rehabilitation and independent living services.

1984
Ted Kennedy, Jr., spoke from the platform of the Democratic National Convention on disability rights.

The "Baby Jane Doe" case involved an infant being denied needed medical care because of her disability. The litigation argued before the U.S. Supreme Court in Bowen v. American Hospital Association resulted in the passage of the Child Abuse Prevention and Treatment Act Amendments of 1984.

The U.S. Supreme Court, Irving Independent School District v. Tatro ruled that school districts are required under the Education for All Handicapped Children Act of 1975 to provide intermittent catheterization performed by the school nurse or a nurse's aide as a "related service" to a disabled student. School districts can no longer refuse to educate a disabled child because they might need such service.

The National Council of the Handicapped became an independent federal agency.

The Social Security Disability Reform Act was passed in response to the complaints of hundreds of thousands of people whose social security disability benefits were terminated. The law required that payment of benefits and health insurance coverage continue for terminated recipients until they exhausted their appeals.

The Voting Accessibility for the Elderly and Handicapped Act mandated that polling places be accessible.

1985
The Mental Illness Bill of Rights Act required states to provide protection and advocacy services for people with psychological disabilities.

Final legal hearings on eugenics were held in the Commonwealth of Virginia. No financial settlement was granted.

The U.S. Supreme Court ruled in Burlington School Committee v. Department of Education that schools must pay the expenses of disabled children enrolled in private programs during litigation under the Education for All Handicapped Children Act of 1975, if the courts ruled that such placement is needed to provide the child with an appropriate education in the least restrictive environment.

The U.S. Supreme Court ruled in City of Cleburne v. Cleburne Living Center that localities cannot use zoning laws to prohibit group homes for people with developmental disabilities from opening in a residential area solely because its residents are disabled.

The International Polio Network, St. Louis, Missouri, founded by Gini Laurie, began advocating for recognition of post-polio syndrome.

The National Association of Psychiatric Survivors was founded.

1986
Toward Independence, a report of the National Council on the Handicapped, outlined the legal status of Americans with disabilities and documented the existence of discrimination. It cited the need for federal civil rights legislation (eventually passed as the Americans with Disabilities Act of 1990).

Concrete Change, a grassroots organization advocating accessible housing, was organized in Atlanta, Georgia.

The Employment Opportunities for Disabled Americans Act was passed allowing recipients of Supplemental Security Income and Social Security Disability Insurance to retain benefits, particularly medical coverage, after they obtain work.

The Protection and Advocacy for Mentally Ill Individuals Act was passed setting up protection and advocacy (P & A) agencies for people who are in-patients or residents of mental health facilities.

Rehabilitation Act Amendments of 1986 defined supported employment as a "legitimate rehabilitation outcome."

1987
Justin Dart, Commissioner of the Rehabilitation Services Administration, was forced to resign after he testified to Congress that "an inflexible federal system, like the society it represents, still contains a significant portion of individuals who have not yet overcome obsolete, paternalistic attitudes toward disability..."

The Alliance for Technology Access was founded in California by the Disabled Children's Computer Group and the Apple Computer Office of Special Education.

1988
The Air Carrier Access Act was passed prohibiting airlines from refusing to serve people simply because they are disabled and from charging people with disabilities more for airfare than non-disabled travelers.

The Civil Rights Restoration Act counteracted bad case law by clarifying Congress' original intention. Under the Rehabilitation Act, discrimination in any program or service that receives federal funding – not just the part which actually and directly receives the funding – is illegal.

The Fair Housing Act amendments prohibited housing discrimination against people with disabilities and families with children. It also provided for architectural accessibility of certain new housing units, renovation of existing units and accessibility modifications at the renter's expense.

The "Deaf President Now" protest was held at Gallaudet University. I. King Jordan became the first deaf president of Gallaudet University.

ADAPT protested inaccessible Greyhound buses.

The Technology-Related Assistance Act for Individuals with Disabilities was passed authorizing federal funding to state projects designed to facilitate access to assistive technology.

The Congressional Task Force on the Rights and Empowerment of Americans with Disabilities was created by Rep. Major R. Owens, with Justine Dart and Elizabeth Boggs, co-chairs. The Task Force began building grassroots support for passage of the Americans with Disabilities Act (ADA).

Congress overturned Ronald Reagan's veto of the Civil Rights Restoration Act of 1987.

In Honig v. Doe, the U.S. Supreme Court affirmed the stay-put rule established under the Education for All Handicapped Children Act of 1975. School authorities cannot expel or suspend or otherwise move disabled children from the setting agreed upon in the child's Individualized Education Program (IEP) without a due process hearing.

1989
In ADAPT v. Skinner, the Federal Appeals Court ruled that federal regulations requiring that transit authorities spend only 3% of their budgets on access are arbitrary and discriminatory.

The original version of the American with Disabilities Act was introduced in 1988. It was redrafted and reintroduced in Congress. Disability organizations across the country advocated on its behalf (Patrisha Wright, Marilyn Golden, Liz Savage, Justin Dart Jr., and Elizabeth Boggs, among others).

The Center for Universal Design (originally the Center for Accessible Housing) was founded by Ronald Mace in Raleigh, North Carolina.

Mouth: The Voice of Disability Rights began publication in Rochester, New York.

The President's Committee on Employment of the Handicapped was renamed the President's Committee on Employment of People with Disabilities.

1990
The Americans with Disabilities Act was signed by George W. Bush. The Act provided comprehensive civil rights protection for people with disabilities. Closely modeled after the Civil Rights Act and Section 504, the law was the most sweeping disability rights legislation in history. It mandated that local, state and federal governments and programs be accessible, that businesses with more than 15 employees make "reasonable accommodations" for disabled workers and that public accommodations such as restaurants and stores make "reasonable modifications" to ensure access for disabled members of the public. The act also mandated access in public transportation, communication, and in other areas of public life.

Sam Skinner, U.S. Secretary of Transportation, issued regulations mandating lifts on buses.

American Disabled for Accessible Public Transit (ADAPT) organized The Wheels of Justice campaign in Washington, D.C. which drew hundreds of disabled people to support the Americans with Disabilities Act. Activists occupying the Capitol Rotunda were arrested when they refuse to leave.

The Committee of Ten Thousand was founded to advocate for people with hemophilia who were infected with HIV/AIDS through tainted blood products.

The Ryan White Comprehensive AIDS Resource Emergency Act was passed to help communities cope with the HIV/AIDS epidemic.

American Disabled for Accessible Public Transit (ADAPT) changed its focus to advocating for personal assistance services, changing its name to American Disabled for Attendant Programs Today (ADAPT).

The Education for All Handicapped Children Act was amended and renamed the Individuals with Disabilities Education Act (IDEA).

1992
Amendments to the Rehabilitation Act were infused with the philosophy of independent living.

1993

The American Indian Disability Legislation Project was established to collect data on Native American disability rights laws and regulations.

A legal case of four men convicted of sexual assault and conspiracy for raping a 17-year old mentally disabled woman in Glen Ridge, New Jersey, highlighted the widespread sexual abuse of people with developmental disabilities.

Robert Williams was appointed Commissioner of the Administration on Developmental Disabilities. He is the first developmentally disabled person to be named the Commissioner.

Holland v. Sacramento City Unified School District affirmed the right of disabled children to attend public school classes with non-disabled children. The ruling was a major victory in the ongoing effort to ensure enforcement of IDEA.

1995

Maria Rantho, South African Federation of Disabled People's Vice-Chair, was elected to Nelson Mandela's Parliament in South Africa. Ronah Moyo, head of the women's wing of the Zimbabwe Federation of Disabled People, was elected to Robert Mugabe's Parliament in Zimbabwe. Both women felt they faced an uphill struggle with legislators who were ignorant of the needs of people with disabilities.

The First International Symposium on Issues of Women with Disabilities was held in Beijing, China in conjunction with the Fourth World Conference on Women.

ACLIFM, an organization of people with disabilities in Cuba, held its first international conference on disability rights in Havana, Cuba.

Justice for All was organized by Justin Dart and others in Washington, D.C.

When Billy Broke His Head...and Other Tale of Wonder premiered on PBS. The film is about the disability rights movement.

The American Association of People with Disabilities was founded in Washington, D.C.

The U.S. Court of Appeals, Third Circuit in Helen L. v. Snider ruled that continued institutionalization of a disabled Pennsylvania woman, when not medically necessary and where there is the option of home care, was a violation of her rights under the Americans with Disabilities Act of 1990. Disability rights advocates perceived this ruling as a landmark decision regarding the rights of people in nursing homes to personal assistance services.

Sandra Jensen, a member of People First, was denied a heart-lung transplant by the Stanford University School of Medicine because she has Down's syndrome. After pressure from disability rights activists, Stanford U School of Medicine administrators reversed their decision. In 1996, Jensen became the first person with Down's syndrome to receive a heart-lung transplant.

1996

Congress passed legislation eliminating more than 150,000 disabled children from Social Security rolls along with persons with alcohol and drug dependencies.

Not Dead Yet, formed by disabled advocates to oppose those who support assisted suicide for people with disabilities, focused on the idea of rationing health care to people with severe disabilities and imposition of "do not resuscitate" (DNR) orders for disabled people in hospitals, schools, and nursing homes.

In Vacco v. Quill and Washington v. Glucksberg, the Supreme Court validated the state prohibition on physician-assisted suicide, deciding that the issue is within the jurisdiction of the states.

1998

The Persian Gulf War Veterans Act was passed.

In Bragdon v. Abbott, the U.S. Supreme Court decided that under the Americans with Disabilities Act, the definition of disability includes asymptomatic HIV.

In Pennsylvania Department of Corrections v. Yeskey, the Supreme Court decided that the Americans with Disabilities Act includes state prisons.

1999
In Carolyn C. Cleveland v. Policy Management Systems Corporation, et. al., the Supreme Court decided that people receiving Social Security disability benefits are protected against discrimination under the Americans with Disabilities Act if and when they are able to return to work.

In Olmstead v. L.C. and E.W., the Supreme Court decided that individuals with disabilities must be offered services in the most integrated setting.

In three employment cases (Sutton et. al. v. United Air Lines, Inc., Murphy v. United Parcel Service, Inc. and Albertsons, Inc. v. Kirkingburg) the Supreme Court decided that individuals whose conditions do not substantially limit any life activity and are easily correctable are not disabled under the Americans with Disabilities Act.

The Works Incentives Improvement Act (Ticket to Work) became law, allowing those who require health care benefits to work.

2001
The Commonwealth of Virginia House of Delegates approved a resolution expressing regret for its eugenics practices between 1924 and 1979.

2009
The ADA Amendments Act (ADAAA) becomes law.

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Services

Disability Rights Network of Pennsylvania

Intake

All callers to Disability Rights Network of Pennsylvania (DRN) are initially referred to our intake team. The team includes two receptionists, a secretary, a full-time advocate, a part-time advocate, a paralegal, and three full time attorneys. Callers are asked to provide some basic identifying information as well as a description of their problem. In many cases, the intake team can assist the caller by providing information and referral or short-term advocacy assistance. Individuals who need more help can be referred to one of DRN's advocacy teams (listed below) or to a DRN lawyer. The referral is based on the priorities set by the Board of Directors. Because DRN provides its services on a state-wide basis with limited resources and staff, it is unable to handle every advocacy situation for each person who seeks its assistance. Click here to review DRN's Case Selection Criteria.

Protection and Advocacy for Developmental Disabilities (DD)

Under the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), DRN provides advocacy to adults and children with developmental disabilities. DRN focuses on issues such as community integration, protection from abuse and neglect, and access to community services. DRN subcontracts with ELC for all activities concerning early intervention and special education.

Background: The Protection and Advocacy Program for individuals with Developmental Disabilities was the first program authorized by Congress as part of the DD Act in 1975. It is funded through the U.S. Department of Health and Human Services (HHS), Administration on Developmental Disabilities. The original goal of the program was to ensure the rights of children and adults living in institutional settings and to protect them from abuse and neglect.

As disability policy moved away from institutions to the community, the mandate expanded. DD advocacy has played a major role in supporting community integration for persons with developmental disabilities. However, thousands of individuals continue to reside in state-operated and privately owned congregate residential facilities. To assure that persons living in the community get the supports and services that make community living a long-term reality, DD advocacy activities also focus on access to education, family supports, housing, employment, transportation, consumer control of services and the right of every person to be safe.

Protection and Advocacy for Individuals with Mental Illness (PAIMI)

DRN's PAIMI advocates provide assistance to persons with mental illness, with particular emphasis on adults in state-operated facilities, personal care homes and prisons, and on children who are subject to abuse and restraint.

Background: In 1986, Congress authorized the PAIMI program in the Protection and Advocacy for Individuals with Mental Illness Act. PAIMI is funded through the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). The program originally was established to provide protection and advocacy services to individuals with mental illness who were residing or had recently resided in institutional settings. In 2000, Congress greatly expanded the PAIMI mandate to include all individuals with significant mental illness, including people living in the community in all settings but with priority for people in institutions. Several years ago, HHS mandated that protection and advocacy agencies (P&As) receive investigation reports of deaths and serious injuries related to abusive restraint and seclusion practices in hospitals and psychiatric facilities for children. Finally, in 2002 and 2003, Congress affirmed that state P&A programs have a significant role in addressing the community integration needs of individuals covered by the U.S. Supreme Court's Olmstead decision.

Protection and Advocacy of Individual Rights (PAIR)

The third major program that DRN operates is the PAIR program. The PAIR program is designed to protect the rights of all those people with disabilities who are ineligible for the two basic protection and advocacy programs, i.e., children and adults with developmental disabilities (DD) and individuals with mental illness (PAIMI). With the enactment of PAIR, DRN covered all persons with disabilities. Critical disability protections and advocacy issues addressed by PAIR include access to quality supports and services in the community so individuals can live as independently as possible, nursing home transition, access to transportation, and employment and housing discrimination.

Background: The Protection and Advocacy of Individuals Rights (PAIR) program is authorized as part of the Rehabilitation Act. PAIR-eligible individuals include those with physical disabilities, such as spinal cord injury and amputations; sensory disabilities, such as blindness and deafness; and neurological impairments, such as multiple sclerosis and muscular dystrophy.

Protection and Advocacy for Individuals with Traumatic Brain Injury (TBI)

DRN operates a specialized program known as the Protection and Advocacy for Individuals with Traumatic Brain Injury program, which provides advocacy services for persons with traumatic brain injury.

Background: The Protection and Advocacy for Individuals with Traumatic Brain Injury (TBI) program was created by the Traumatic Brain Injury Act as part of the Children's Heath Act of 2000. The program is administered by the Heath Resources and Services Administration of the U.S. Department of Heath and Human Services.

Protection and Advocacy for Assistive Technology (PAAT)

Under the Assistive Technology program, created by the Assistive Technology Act of 2004, DRN assists adults and children with disabilities in accessing assistive technology, including addressing legal barriers to assistive technology.

Background: Funded through the Rehabilitation Services Administration, PAAT has been a major force in ensuring that individuals with disabilities live more productive and independent lives by getting access to critically needed assistive technology in a variety of settings: school, home, and work.

Protection and Advocacy for Voting Access for Americans with Disabilities (HAVA)

Under Protection & Advocacy for Voting Access (PAVA), DRN advocates to ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote and accessing polling places.

Background: Congress created Protection & Advocacy for Voting Access in 2002 when it enacted the Help America Vote Act (HAVA). The program is administered by the Administration on Developmental Disabilities of the Administration for Children and Families, U.S. Department of Health and Human Services.

Protection and Advocacy for Beneficiaries of Social Security (PABSS)

Under the PABSS program, DRN provides Social Security beneficiaries who want to work with the information, advice, advocacy and other services they need to secure, maintain or regain gainful employment.

Background: The Ticket to Work and Work Incentives Improvement Act (TWWIIA) was enacted into law in 1999 with the goal of providing health care, employment preparation and placement services to individuals with disabilities. As part of the Act, Congress authorized the Social Security Administration to make payments to P&As to provide information and advocacy services to Social Security beneficiaries who want to work

Community Advocacy Project for People with Intelectual Disabilities

DRN has staff working from four regions in Pennsylvania to provide advocacy services to assure that persons eligible for Intelectual Disability services who live at home or in other community-based settings have access to the full array of quality services they need to remain in their communities and to protect them from abuse or neglect. This project is supported by the Pennsylvania Office of Developmental Programs of the Department of Public Welfare.

Facility Advocates

DRN has staff working at each of the state-operated facilities, where they provide advocacy assistance and support to the residents and their families. This project is supported by the Pennsylvania Office of Developmental Programs of the Department of Public Welfare.

Benefits Counseling Program (BCP)

DRN's Work Incentives Planning and Assistance (WIPA) / Benefits Counseling Program (BCP) ended on December 31, 2012 due to lack of funding. You may access benefits planning and work incentives information at http://www.socialsecurity.gov/disabilityresearch/workincentives.htm, or by contacting the Social Security Administration at 1-800-772-1213, or the Ticket to Work Call Center at 1-866-968-7842.

Disability Advocacy Support Hub (DASH)

Disability Advocacy Support Hub (DASH) is a project of the Disability Rights Network of Pennsylvania funded by the Pennsylvania Developmental Disabilities Council to assist disability advocacy groups make positive change in their communities and across Pennsylvania. We have a staff of trained professionals and consultants to assist grassroots advocacy groups of all sizes and different kinds of disabilities. To learn more, please see our website http://dash.drnpa.org.

Harrisburg Office

1414 N. Cameron St., 2nd Floor

Harrisburg, PA 17103

1-800-692-7443 [Voice]

1-877-375-7139 [TDD]

(717) 236-8110 [Voice]

(717) 346-0293 [TDD]

(717) 236-0192 [Fax]

drnpa-hbg@drnpa.org [Email]

Philadelphia Office

The Philadelphia Building

1315 Walnut St., Suite 500

Philadelphia, PA 19107–4798

(215) 238-8070 [Voice]

(215) 772-3126 [Fax]

drnpa-phila@drnpa.org [Email]

Pittsburgh Office

429 Fourth Avenue, Suite 701

Pittsburgh, PA 15219-1505

(412) 391-5225 [Voice]

(412) 467-8940 [Fax]

drnpa-pgh@drnpa.org [Email]

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INTRODUCTION

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

GENERAL PRINCIPLES

Reasonable Accommodation

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[(1)] requires an employer[(2)] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "In general, an accommodation is 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."[(3)]There are three categories of "reasonable accommodations":

"(i) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities."[4]

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities.[5] Reasonable accommodations must be provided to qualified employees regardless of whether they work part- time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.[6]

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.[7]

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[8] this means it is "reasonable" if it appears to be "feasible" or "plausible."[9]An accommodation also must be effective in meeting the needs of the individual.[10] In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY[11] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the