ROUGH DRAFT

**2016 Jacobus tenBroek Disability Law Symposium**

**“Diversity in the Disability Rights Movement: Working Together to Achieve the Right to Live in the World”**

Held at:

The National Federation of the Blind

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8:30 a.m.

“International Progress on Improving Accessibility”

MARC MAURER: All right. We're going to get this program underway. I realize that many of you are drinking coffee. On the other hand, if we don't get underway, you'll keep at it. So underway it is. It's fairly easy to get people to be peaceful in this side of the room. Less so on the other side of the room. So if you'll move this way, that will be helpful.

Charlie?

>> Charlie's talking. I can hear him.

MARC MAURER: The 2015 Jacobus tenBroek Disability Law Symposium book will be on sale today at the table next to the literature tables here in the members’ hall. It's $12 no matter where you buy it.

This morning we start with a session entitled, "International Progress on Improving Accessibility."

We have two people on the program listed to present, and we have a third person as a surprising presenter. Not all that surprising, as you've heard of him before.

Jonathan Lazar is professor of computer and information sciences at Towson University.

David Lepofsky is the chair of Accessibility for Ontarians with Disabilities Act Alliance.

And the third surprise presenter is Scott LaBarre.

Now, Jonathan Lazar, as I say, is the professor at Towson. He founded the universal usability laboratory at Towson University and served as its director until 2014. His teaching and research focuses on web accessibility and people with disabilities, user-center design methods, assistive technology, and public policy. During the 2012-2013 academic year, he was the Shutzer fellow at the Radcliffe Institute for Advanced Study at Harvard University, where he investigated the relationship between human computer interaction for people with disabilities and United States disability rights law.

He has authored or edited ten books, including "Global Inclusion: Disability Human Rights and Information Technology," coedited with Michael Stein, which will be published in mid-2016. "Universal Designability" in 2007. "Web Usability: A User-Centered Design Approach," 2006. And "Ensuring Digital Accessibility through Process and Policy" in 2015, coauthored with Daniel Goldstein and Anne Taylor.

He has other credits, but that will give you an idea.

David Lepofsky is currently chair of the Accessibility for Ontarians with Disabilities Act alliance, a part-time visiting professor at the Ontario Hall Law School and adjunct member of the University of Toronto faculty of law, cochair of Barrier-Free Canada, and the chair of the Toronto District School Boards Special Education Advisory Committee.

Previously he served in the Ontario Ministry of the Attorney General, where he practiced in the areas of constitutional, civil, administrative, and criminal law from 1982 until his retirement as general counsel until 2015.

Since the late 1970s he has been active in a volunteer capacity advocating for new laws to protect the rights of persons with disabilities in Canada. And he also has numerous other credentials.

Now, Scott LaBarre, I don't have a bio for you, and consequently, I'll do this off the cuff.

He is a practitioner in Colorado. He has been a leader of the National Federation of the Blind for the last four years or so. A young leader initially and a much broader service as a leader subsequent to that. And he has done practice which has involved litigation on behalf of disabled people in many parts of the United States and has also been assigned to international work where he was a principal negotiator in the NGO space for the treaty which deals with international lending of books for blind individuals, which I believe is the only treaty that features only subjects dealing with blindness that the United Nations has ever adopted.

And he has other credentials as well, but that's enough for now.

So I asked the presenters, which of you begins?

JONATHAN LAZAR: I will begin.

MARC MAURER: Jonathan Lazar, here he is.

(Applause.)

JONATHAN LAZAR: Good morning, everyone!

Before I start, I just want to take a moment to say thank you. I'm a computer science professor at Towson University, and many of my legal mentors over the years are the people sitting in this audience, the people who have gotten me really excited about law, interested in law, so it's just a great opportunity to say it's an honor to be here and thank you for all of you who have been mentors over the years.

For many of you, you're familiar with some of the challenges in accessibility in the United States. So, yeah, you may be a little bit frustrated. The 508 refresh has been so slow. It's not that fresh anymore.

(Laughter.)

Maybe by the time the Magna Carta people keep talking about it, maybe it's fast in that comparison.

We all are frustrated sometimes with the speed of the movement on regulations and some of the policies and implementing some of these regulations and laws.

So it's often useful to say, okay, well, what's going on outside the U.S.? How are other countries doing? What are the relevant treaties? What are the relevant multinational and national laws, regulations, policies, documents? We don't want to just talk about what's going poorly because that wouldn't be any fun. Let's talk about what's interesting, what's a possibility, what might be some best practices. What are some other countries doing where maybe we can learn something or maybe there's something we could possibly apply here in the U.S. Maybe we could support our friends in other countries.

So we're going to talk about it in this morning's presentation. That was an overview. We'll start talking about the CRPD and the Marrakesh treaty. So happy Scott LaBarre is here to talk with us about Marrakesh. We'll talk about multinational policies. Then I'll give you some best practices and in some cases maybe not so best practices from some other countries. Then talk a little bit about developing countries and what some of the issues are related to accessibility in developing countries.

I personally will not say a single word about Canada, because clearly the expert on that is sitting right here. So David will talk all about accessibility and some of the great work that he's done and his alliance have done in Canada.

So starting with the CRPD. Any time you talk with folks about the CRPD, right, they say, oh, yeah, yeah, the technology is in there, right? Yeah, technology. There's this vague sense somehow that, oh, yeah, the CRPD, technology is in there.

And most people say, oh, okay. Article 9, article 21 both discuss technology. Article 9 calls upon countries to promote access for persons with disabilities to new ICT, including the internet. And article 21 encourages countries to provide information intended for the general public to persons with disabilities in accessible formats appropriate for different disabilities.

Most of the time people are happy to leave it there.

I've been spending a lot of time working with Michael Stein, not the one here but the one at Harvard Law School. See, there you go, I met him this morning because now I know both Michael Steins.

(Applause.)

I've been working with the other Michael Stein at Harvard Law School looking at a book on human rights and I.T. accessibility in a broader sense. So the book that I have coauthored with Daniel Goldstein and Anne Taylor looks at best practices and U.S. policies is.

This other book is an edited book, a lot of coauthors, looking at the future and areas that are maybe unresolved. The intersections of law and technology where either we are settled from a legal point of view but not technology point of view or vice versa.

And we had some authors who wrote about areas that maybe are articles I just talked about, 9 and 21. Because there are so many things in technology that are pervasive in our life. It's not just about access for work, right? So for instance, computer gaming. How many people in here are gamers? Either raise your hand or say yea. We have a few gamers in this audience. That's great. Fantastic.

People think of gaming as something that's just fun, right? Something you do, oh, just because it's fun, it's enjoyable.

What they don't realize is that computer gaming is now actually a core part in many cases of employment tests. Games and simulations as you apply for a job online. It's part of socialization, right? It's part of education.

And so, in a way, and this is the argument that one of the authors in this book made, in a way access to computer gaming is a human right. At first you may say, really? Gaming? Gaming is for computer scientists who maybe need to do laundry and take a shower. If it's used for employment or socialization, to be excluded from all of that really excludes you from a lot. It's not just for fun.

So then you can look at, and this is the argument this author made. You can look at other articles in the CRPD. You could look at article 26, for instance, habilitation and rehabilitation. You can look at article 30 about recreation and sport. It's not just 9 and 21.

If you think about privacy, and so much of the time we talk about that everyone should have the right to a private vote. Everyone should have a right to private bank access. You should not have to give someone your pin number for your card or do any of that. Everyone, including people with disabilities, should be able to personally, individually, privately interact with technology, not give someone else the password or pin.

There are other articles in the CRPD, 22, about privacy of personal health in rehabilitation information. You could look at article 31 about data protection. Safeguards. Privacy for persons with disabilities.

So really, when you talk about accessibility, it's not just 9 and 21. So we're hoping to expand that discussion a little bit and say there are all these other areas that are important when it comes to technology and people with disabilities, whether it's gaming and recreation, whether it's privacy of your data. These are important things.

So really, we need to spend time, and I say we as computer scientists but all of us need to spend time getting more familiar and comfortable with the CRPD in the context of technology. It's a little bit broader than just 9 and 21.

And if you're not familiar with the work of the G-3 ICT, the global initiative for inclusive ICT, it's an advocacy initiative established by the U.N., basically working on the ICT portions of the CRPD. They share solutions, they raise awareness, they work on harmonization and standardization. They have a tool kit for policymakers. So there's really a lot there. You know, I know it's really tempting to just say, oh, you know, CRPD, that hasn't been ratified, yeah, I'll just leave that by the side.

If I as a computer scientist am very excited about this, in all the different ways we can connect this with computer science, I think it's important that we all really make an effort to figure out all the other ways because at some point we hope it will be ratified. All the ways we could tie in CRPD with technology. There's just a lot of interesting stuff out there for us to deal with.

So Scott will talk about the Marrakesh treaty because no one knows it better than Scott LaBarre.

(Applause.)

MARC MAURER: Now, Jonathan, the next time you make this presentation, add a couple things.

JONATHAN LAZAR: Okay.

MARC MAURER: I know you want to do this. One of the things that you can do to make yourself a lot of money in this day and age is become a computer game designer. Why are the disabled not part of designing computer games? That means this has to do with employment. It has to do with the way to make yourself a bundle of cash. And the idea is that we're trying to figure out ways for disabled folk to get a bundle of cash. Isn't that -- I mean, I realize this is not the only thing that you're supposed to be able to get in America, but that's one of the things that people always talk about. Where can I get the money.

And so employment includes designing the computer game.

Now, think about all of these sports activities. Here's another thing to add. When is it that we're going to have disabled people playing football? I realize that today the big deal is to play football and to go through all the medical tests to find out, but it's not going to stay that way. As we expand the horizons, a bunch of us are going to be on the field. Scott LaBarre was a big bruiser at one time. Maybe he still is. The idea of running over the other guy and knocking him down and getting the ball, this is called fun. Why do I think it's fun? I don't. But he does.

So you've got to keep in mind that we're expanding participation beyond what we know today and put it in.

Scott LaBarre, here's your --

JONATHAN LAZAR: Actually I'm going to add one comment based on that because you made a good point about something. Since most of you in this audience are involved with law and probably not deeply familiar with some of the computer science literature, let me tell you, if at any point you run into someone that says that computer games cannot be made accessible for people with disabilities, they can be made accessible for people in wheelchairs, people who are blind. Tell them they're incorrect. There's a relatively rich basis of research and prototypes about doing things like make "Dance Dance Revolution" that works for people in wheelchairs and "Guitar Hero" for blind people. Designers know how to do this. The key problem has been getting companies to adopt these features, to realize, oh, gosh, people with disabilities do game. They like gaming. We can design for them. We can design in a way that works for everyone so that our next "Dance Dance Revolution," "Guitar Hero," whatever game you're interested in, that it's inclusive and everyone can take part. So just remember, the next time someone tells you a game can't be made accessible, it has already been done and there's a great base of literature. Follow up with me if you want any geeky research papers about how to technically make it work.

And back to Scott LaBarre and then I'll come back.

(Applause.)

SCOTT LaBARRE: Thank you. I never have been called a big bruiser in public before.

(Laughter.)

I did wrestle for seven years. So I guess that's as close as I got to playing football. And I think I would have liked to have played football. When I was in high school, I knew a lot of the football players. I was stronger than a lot of them. So who knows what might have happened. But fortunately I didn't play football and maybe that's a good thing because I don't have all the concussion history that goes along with playing football.

I want to talk to you for a few moments about the Marrakesh treaty. How many here have heard about the Marrakesh treaty before this morning? Please say aye.

How many have not?

Okay. This is pretty good. Most people have not really heard about Marrakesh and even if folks have heard about it, I think it's fair to say that a lot of people don't really understand what it does because it is a copyright law treaty. And it is in fact the first copyright treaty that deals exclusively with user rights, with the consumers' rights. And therefore it is different from any other kind of copyright treaty that has gone before.

There have been other kind of treaties that address user rights, but they have also worked to expand the rights of publishers and rights holders and what have you. So this was the very, very first treaty that dealt exclusively with exceptions or limitations for consumers.

Additionally, it has been the only international treaty of which we are aware that deals specifically with the issue of blindness and print disabilities. Of course we have CRPD which deals with disability broadly, but this international treaty is aimed squarely at those who are blind, low vision, and have other print disabilities.

The Marrakesh treaty does essentially two things. First, it creates exceptions and limitations in domestic law that allow the reproduction of published works and other works in accessible formats.

Now, why is this important? Because technically, when an author or a publisher is granted a copyright, that is an exclusive right to control whatever the work is and who can copy it and who can use it and who can buy it and so forth.

In the United States, before 1996, we had no exception or limitation involving the blind and print disabled. So when somebody wanted to put a book into an accessible format, that individual or organization would have to go to the right holder and say, can we please put this into Braille, can we please record an audio copy. Or whatever the case might be. So you had to get permission every single time. And as you can imagine, that permission was either declined or took a long time to get. I remember when I first went blind at the age of 10 and I started to get books from the talking book library, I was reading books that my colleagues had read four or five years previously. So in the United States, in 1996, through the work of the National Federation of the Blind, in cooperation, believe it or not, with the Association of American Publishers, we got the Chafee Amendment adopted, which creates an exception in U.S. copyright law that says that an authorized entity who has, as its mission, the job of putting books into accessible formats or putting published works into accessible formats can do that without first getting the permission of the copyright holder.

And in the world, something like 56 other countries have created similar types of exceptions and limitations in their law. That means that two-thirds of the world's countries do not have such exceptions and limitations.

So the Marrakesh treaty first creates exceptions and limitations in the countries that do not have them currently.

Second, the other major thrust of the Marrakesh treaty is to allow the cross border exchange of accessible format copies. This has not been permitted in the past. So if we create a book here in the United States, either in Braille or some other kind of accessible format, we cannot second that to Canada. Canada cannot send us books. We cannot get books, accessible books, from Spain or the U.K. or Uganda or wherever. So this has led to a great deal of duplication across the world, and it's also led to what we call the book famine. I originally intended in college to become a Spanish major in addition to political science. I had to quit that major because I could no longer get books in accessible format that were in Spanish. And so I gave up that major. If Marrakesh would have been in place, I would have been able to do that.

Now, what's going on currently with Marrakesh? It was officially adopted by the World Intellectual Property Organization in June 2013. However, adoption of the treaty alone does not make it law internationally. A certain number of countries must ratify or accede to the terms of the treaty to make it law or, in other words, the wording of the treaty is enter into force. We need 20 ratifications or accessions to enter into force. There are now 16 presently. The last country to accede to the country was Israel just in the last couple of weeks.

And finally, the United States has officially sent the treaty to our Senate. Just about a month ago. The United States signed the treaty in October of 2013, and when you sign a treaty, that is an intent to ratify it. It is not ratification. As you know, we need two-thirds of the Senate to ratify it.

So the treaty is currently before our Senate.

In addition to ratification of the treaty, there is going to be some implementing legislation, because the U.S. government team believed that our law needs to be amended to fully comply with Marrakesh. And consequently, the treaty has not only gone to the Senate. Implementing legislation has also gone to the Senate Judiciary Committee and the House Judiciary Committee.

Our hope is to get this treaty ratified and the implementing legislation adopted yet this term. And I think that there is good will out there and the chairs of the various judiciary committees are in support of the treaty and want to see if they can possibly get it done this term.

The U.S. government team has been really pushing the Senate and the House because they would really like the United States to be the 20th ratification. That would be cool, because that means once we get that 20th ratification, the treaty becomes an official international agreement that can be quoted and cited and what have you. And so we're working hard.

Now, I won't go into the weeds about what some of the issues are and some of the hang ups that might cause us to slow down on the track to ratification, but I would urge all of you, when we send out the word, to please contact your senators and contact the members of the judiciary committee in both houses to urge ratification of Marrakesh and adoption of the implementing legislation.

So I think I will stop there, and obviously if there are any further questions about the treaty, I would be happy to answer them. It was a great day when we got the treaty adopted in 2013, but it doesn't become a reality until the treaty enters into force and we get a whole bunch of ratifications throughout the world.

The treaty has also created something you'll be hearing about, the accessible books consortium created under article 9, a body run by WIPO that is first of all establishing an international database of accessible copies of books. Second of all, building capacity. A lot of countries don't have what are called authorized entities. They don't have entities that can put books into accessible formats. So WIPO is helping to build these around the world.

And lastly, ABC is working on inclusive publishing. Let's get to a point where all books, at least in the digital context, are born accessible, which will help us.

(Applause.)

It will help us break down barriers. Because as far as we can tell, right now less than 5% of the world's published works are available in accessible formats.

(Applause.)

DAVID LEPOFSKY: So let me ask, again by show of hands or saying yea, how many people are familiar with EU mandate 376?

Wow. I think I heard one grown maybe and a cricket. Wow.

Okay. So let's talk a little bit about EU mandate 376. Again, how many people are familiar with section 508 in the U.S.?

Okay. If you want to think about section 508 and procurement in the U.S. and procurement policies, EU mandate 376 has a lot of similarities. The focus is on making sure when governments spend money, they spend it in an accessible way. That they only procure technology that is accessible.

And there's some important aspects of this mandate. The process was actually started in 2005 when European standards organizations were asked to develop some standards for ICT procurement. And then the idea was, once these standards were developed, countries in the EU would harmonize around these standards. So the standards came out from three European standards organizations in 2014. I don't mean three separate ones. I mean three organizations worked together to make one standard. Can I tell you by the way, sometimes people say, oh, we're going to make three standards! I'm like, no, it's not a standard if there's three of them.

(Laughter.)

Really.

So an updated version came out of the standard in 2015. And now countries are working to integrate these into national law.

Now, here's the law that's interesting and useful for us. One of the big problems, when you look at contracts and procurement, is observe they'll say something vague like, meets accessibility requirements. Right? And it won't say anything else.

Is section 508 compliant.

Of course that's open to interpretation, what that means.

One of the great parts about EU mandate 376, it's actually written in that it's not enough to say, must meet EU376. It has to document how. So you can't just say it should meet it. It has to say, in the procurements, how will this be tested. How will this be met. How are you measuring success. How do you know if it's accessible or not.

One of the frustrating things I often run into is when I tell people about accessibility, someone would say in our university computing department, well, we haven't received any complaints so it must be accessible.

No, that doesn't mean it's accessible. You need to know if it is. You need to test.

I believe some of our many lawyer colleagues in this room have run into that before when they file a complaint and a university or company says, "We just didn't know." That's why you need to have procurement documents and that's why this mandate is doing this. You have to document what the requirements are and how you're going to test. You have to have some evidence to support your claims.

And in a way, that's very similar to what they're doing in Massachusetts. I know Massachusetts doesn't count as international, but whatever. They're doing some really great things there related to procurement. You should take a look. And basically they require vendors to document why and how they're skilled related to accessibility. How much experience they have, what successful projects they've done before. That's what we need. Whether you want to use the Massachusetts model or the mandate, you need to find ways to document this. You need to find ways to think it through. How are we going to check this? Will we do testing with users? Automated tests? Manual inspections?

Now, let's talk for a few minutes about different countries and different approaches they use. We'll talk first about the developed world and then move on to developing countries.

If you look at what countries do outside the U.S. and Canada, they use very different approaches to accessibility. Some countries, the U.K., you have a potential for private lawsuits. Some countries for technology accessibility, they just focus on transparency. Sweden focuses on transparency. Some countries like Germany focus on really prescriptive requirements. Some countries, their laws cover accessibilities but some countries only government technology. Other countries it covers public accommodations.

Of all the countries that have laws in this area, what do they have in common? They're all moving in the direction of adopting cuter accessible design, CAD. Let me ask again, so by saying yea or show of hands, how many people are familiar with WCAD2.0? Those of course are the guidelines for making websites accessible for people with disabilities. AA is the one, from my point of view, WCAD AA, I say AA is appropriate because that means it has all the things that we know how to do and have known how to do for a decade. So if you look at AA and people say, why AA? Because they're all things we know how to do as computer scientists. These are all things that are not new. It's not like oh, my gosh there's this new thing. Sometimes, you know, Judy Greer, sometimes people will say to her, what is this new thing you're talking about? And she's like, it's not new. We've had this since 1999. It's not really new.

That's what I say for AA. AA does all the things that as computer scientists we know how to do.

How many of you are familiar with WCAD2 ICT? I think I know all the people who said yea. I think they're all friends of mine. Maybe I could like poll the audience to see.

It is important. WCAD2.0, the web content accessibility guidelines, they are essentially the international technical standard for technology accessibility, but you say, wait a minute, they're guidelines for websites. We can only use them for websites.

But because they are the technical standards that are the best documented, they have so much documentation, it is a multi-stakeholder process. Companies have been involved. Right? Individuals have been involved. Advocacy groups have been involved. WCAD2.0 is the technical standard that everyone around the world has been rallying around. You say, that's great but only applies to websites.

WCAD2 ICT is a standard that basically takes 2.0 and applies those concepts to non-web technologies, whether you're talking about software applications, operating systems, whatever other ICT you're talking about. WCAD2 ICT allows you to take the standards from WCAD2.0 and apply them to non-web technologies. We now you have this standard that everyone has been rallying around. We need to use all that knowledge and those standards and that documentation to improve non-web technologies.

So that's a trend you see across the earth. That's the trend you see in north and South America. That's the trend you see in Asia, is moving towards WCAD2, if not already there, and starting to now specify WCAD2 ICT.

Some of the challenges are the same across the country. For instance, the issue of cognitive impairment and figuring out technology for cognitive impairment. If you look at intersections of computing and disability rights law and human rights, there are some areas where the law is unclear, but we really know how to do this. The reverse is true when it comes to cognitive impairment. Laws are actually pretty clear that people with intellectual disabilities and cognitive impairment, they have the right to equal access to technology. From a legal point of view that's clear.

As computer scientists, we're still trying to figure out how to implement that. We know most motor impairments we know how to do. Cognitive impairment we're still trying to work out all the different groups, what changes they need, in some cases they don't use any assistive technology. There's a working group within the web accessibility initiative working specifically on developing for the next version of WCAD guidelines on cognitive impairment. How many people are familiar with the working group on cognitive impairment with WAI? Yea? Again, I think the same people I know already. But a good group of people. I'm glad they're all in the room here together.

So there are lots of laws that relate to I.T. accessibility. So whether you want to look at the equality act of 2010 in the U.K. or the anti-discrimination accessibility act, the AAA from Norway, there are laws. Bull there are some interesting approaches that we can learn from how they're implementing these laws because the laws in many cases is a similar things, don't discriminate against people with disabilities. However, how they implement them is interesting. For instance, each EU country has a digital agenda, which is basically a national plan to support the development of the digitization of the country. See, I'm getting excited! By increasing connectivity and basic skills. The two goals of these agendas are, again, getting more people connected to the internet and getting more people with basic digital skills.

Now, some countries are taking this and putting in accessibility and digital inclusion. Part of the national digital agenda in these EU countries is that you have to measure, measure, measure, benchmark, see how we're doing. Because right now in the EU, a quarter of EU residents have never used the internet. One quarter. Ooh, I saw a few go, really? Yeah, really. So for many of these countries, that national agenda is getting more people connected.

To help implement these agendas, almost all the EU countries have now created what's known as the digital champion for their country. So basically a digital champion, and you know, somewhere in my mind I'm imagining someone with a cape. You know, I am the digital champion! You imagine they're all getting together at like the halls of justice or something. All the digital champions would go out and fight bad interface design.

(Laughter.)

See, I'm showing my computer science background.

The digital champions. It's a fascinating thing, basically an individual chosen by their government to take a national public role. In cases they're academics or the national librarian, government officials, entrepreneurs, but their goal is to be out there, getting people to take notice of I need to get on the internet, I need to learn skills. Why? Because this is how many in the country see they're going to get people online. It's not just about a policy but it's about people out there pushing here's why this is important. Almost like a political campaign. Here's why you need to do this.

In some countries, specifically Sweden and Austria, these digital champions have taken a big role in improving ICT accessibility. They have been out there not only talking about more people needing to be connected but also talking about we need to be sure we are inclusive, that we get people with disabilities online, we need to make sure that we are being inclusive and making sure that everyone has the skills because as a national group, as a country, we benefit when everyone gets online and everyone has these digital skills.

So let me ask, how many people are familiar with, again, yea or show of hands, digital agendas in the EU?

(Silence).

Dr. Maurer, now I am. See, there are all these fascinating approaches that we need to look at.

For instance, in the U.K., and they have the equality act, but the interaction specialist group of the British computing society created a British standard the web accessibility code of practice 8878 that gives advice on implementing WCAD2.0. So it's figuring out process. How many people have heard of the code of practice 8878? Two or three people. Okay. This is similar to the advisory notes in Australia that they have in their disability discrimination act. So there are interesting things being done.

I like looking at the Italy example. Italy, the relevant law there is the Stanca Act 2004. What they did, they actually had a university work with a regional government, and they created dashboards. Basically they used automated tools and called the tool they built the accessibility monitoring application. I know automated tools are not perfect but they do fill a need when you need to examine 10,000 websites. Humans can't could that. So they created this automated tool and they basically check on a monthly basis, 367 websites, thousands of web pages, and basically they this an automated tool just available to the web managers from that region, and they saw a large improvement over a 12-month period.

So using a dashboard, and I've been advocating unsuccessfully for a dashboard in the U.S., a dashboard, a public dashboard, of how websites are doing, how government websites are doing when it comes to accessibility.

So you know, they use an approach that's helping. And maybe we need to look at that. Publish dashboards. When people are aware you're not doing well, it makes you want to do better and pay more attention. We should do publicly post at a university how each department is doing when it comes to their ICT accessibility because nothing, nothing would inflame the computer scientists more than being beaten by the English department.

(Laughter.)

That's just the way a university works.

Now, similar to the approach used in Italy, Sweden uses a similar approach, publicly posting their automated reports. They don't have a dashboard per se, but they do publicly post them.

Now, Hong Kong, I know, Hong Kong, not technically a sovereign state, but they do something interesting. Almost all the public universities in Hong Kong teach about digital accessibility. Nearly every single one teaches in their computing content about digital accessibility. Could we say the same thing in the U.S.? I don't think we could. Someone just said no way. That's right, say it, sister. No way.

There is an effort underway in the state of Maryland, actually, NFB worked really hard for the passage of a bill signed by Governor O'Malley and in Maryland there's a work group right now working on a state run work group working on how do we get more content of ICT accessibility into Maryland universities, more taught in computer science I.S. and I.T. Dashboards, there are interesting ideas going on in other developed countries.

What about developing countries? In developed countries, to some extent we know what to do. We have to get David on. Okay. I'll talk very quickly about developing countries.

So in developing countries, if you look at what some countries are doing, for instance, India, so India, they have an accessible India campaign, and the idea is with the accessible India campaign is to just get people aware. In many developing countries, the issue is knowledge. Most of the people don't know people with disabilities can be employed, use technology, live independently.

They have a policy on universal accessibility. They have this accessible India campaign that works towards awareness, workshops, public private collaborations, and the goal is by the end of 2016, 50% of government websites in India will be audited for accessibility.

That's a pretty impressive goal. Their goal is by 2019, 50% of public documents issued by both local and national government will be accessible. And there have been some victories in India. They've issued smart cards now that will work with people with disabilities to do online ticketing for railways. There's been financial assistance provided to universities to undertake accessibility audits. Some banks have added Braille keypads, voice output to ATMs, ramps for wheelchairs. The state bank of India removed its caption after it got a lot of complaints from people with disabilities, especially the blind community. They're adding video description for some famous Bollywood movies. So there's a lot being done around the world and there's a lot that we can all learn from and can strengthen each other.

I hope you found all this content useful. Sometimes it's hard to find. If you try to find information about policies in Sweden or India, it's only available in the local language, we maybe don't have a strong connection with people outside the U.S. as we like.

My email address, if you want to contact me or want resources about this, is JLazar@towson.edu. If you have any questions or want to know any more details, feel free to contact me and follow up. Thank you very much.

(Applause.)

MARC MAURER: Now we get to hear from David Lepofsky, who has been a very aggressive and dramatic leader for disability rights in Canada. Try the mic. It should work.

DAVID LEPOFSKY: The mic works. The content may not.

Good morning, everyone. It's fantastic to be here, and it's really an honor to be able to come from Canada to tell you what we've learned from you and offer ideas you might want to learn from us.

You might know that we have a bit of a different political system than you. Our election last year was twice as long as it's ever been. It was 11 weeks!

(Laughter.)

And we're still exhausted. But we do watch south of the border to see what ideas we can learn, you know, in a spirit of neutrality. Sometimes we hear ideas from you that we think we might want to learn from. One that's getting a lot of attention, I won't name any candidates, but one idea that's caught on, some of us think we should think about the idea that maybe we should build a wall along our southern border.

(Laughter.)

And make you pay. We Canadians are known to be nice, so we'll let you pay in Canadian dollars.

(Laughter.)

It's great to be here. I want to give you an idea of where we are at on our campaign for accessibility. I come from this, both as a blind individual who needs accessibility, but also someone who has been involved in community organizing as a volunteer for many years outside my regular job as a government lawyer. After I retired last December, it's taken on a new and exciting realm because I'm now working part time at the law school. As part of our experiential learning, we have an entire disability rights intensive program. Not just some of the programs you heard about yesterday. My own mandate as a part-time visiting professor is actually including me trying to include disability rights in as many courses by guest lecture as I can. The idea being not just to have the few who want to do this as a career learning about it, but trying to get it before all law students, hoping we'll have a template that can be shared elsewhere.

But if we're going to talk about accessibility rights and where we're at, I think I could summarize where Canada sits compared to the U.S. this way. I think we're each ahead of each other. Canadians I believe are better at defining rights in this area than are Americans. Americans are far better than Canadians at implementing them.

So let me give you an illustration and then you can compare it to your situation in your own minds. On the issue of defining rights, well before your Americans with Disabilities Act was passed, we had in place strong guarantees of equality and bans on discrimination in the public and private sectors. We had them across the country. We have a federal system like you, except we have a federal government and provinces, not states, and we have a constitution. Every jurisdiction, federal and provincial, has a human right code. That human rights is the Canadian term we use for an anti-discrimination law. Within their reach, they ban discrimination in housing and employment and access to good services and facilities and the like on a range of grounds. Since the early 1980s, disability has been included in each of these.

As well, our constitution had added to it in 1982 a charter of rights. You had your Bill of Rights much longer. Ours was brought to us thanks to our Prime Minister, Justin Trudeau.

It included an equality rights provision, section 15. It included a list of prohibited grounds of discrimination. Disability wasn't in there. And there was no way a court could read it in. There was a big debate in Canada when our constitution was before parliament back in 1980 over whether we should enact it and maybe how we might change it.

Well, even before we had the internet or social media, indeed, even before we had personal computers, a campaign was mounted by a number of people who wanted to include disability equality in the equality provision of our new charter rights. It wasn't a coordinated campaign. It was folks around the country pressing on it as best they could. I had the privilege of playing the role of constitutional spokesperson on this issue for the Canadian national institute for the blind on 36 hours' notice, appearing before the parliament. Ultimately we won. And the only right added to the charter of rights while it was before parliament before it was enacted that wasn't there, before the debate, but was there after, was equality for people with mental or physical disabilities as a fundamental constitutional guarantee which was pretty exciting. If you go to YouTube and search on the charter of rights, I put the video up there. If you're visually impaired, you're spared the misery of seeing what I looked like with hair. And my voice sounds a little higher.

But in any event, it was exciting. If you get to the early 1980s, where we're at in Canada is that whether you're a government organization, a public sector organization, private sector organization, you are subject to a requirement of ensuring equality for people with a physical or mental or sensory disability. And the good news, I believe we're ahead of you, folks, is on a couple of levels.

The term disability was defined very broadly. Two, exemptions were defined very narrowly. Three, from the get go, the disability was in there. A central requirement was a duty to accommodate up to the point of undue hardship. And four, our case law interpreted the duty to accommodate very broadly and defenses to it were interpreted very narrowly.

So we were, and sometimes this sort of synthesis of where we were came from court decisions and sometimes it came from the actual language that we negotiated in the legislation, but either way, we got there.

And so we defined our rights well, and our courts basically said the constitution by its own terms prevails over all other laws, but human rights codes the Supreme Court said are also quasi constitutional so they prevail over all private action but they also prevail over all other laws unless the other law specifically states it supersedes the human rights code. So both constitutional and quasi constitutional rights.

Another area we're ahead, it was rejected that we would have levels of scrutiny in inequality cases. The same level of scrutiny applies to all prohibited grounds of discrimination. We don't have inequality among equality seekers.

And I'm proud of all of that. And I could also tell you that we have a mix of different ways to enforce these laws. If it's a constitutional claim, you have to bring a lawsuit in one of our courts. Which means you will be up against a government lawyer funded by the taxpayer, and that is a tough road to hoe obviously for a lot of people who can't afford it.

If it's a human right claim, historically and up until recently, in every province and federally, we had public law enforcement agency, the human rights commission, that you filed a complaint with. They had the discretion to investigate and take it to a tribunal hearing if they couldn't resolve the case and felt it warranted a hearing.

The problem with that enforcement regime is it was systemically underfunded and slow. And often it took years to get progress and a number of people didn't bother with it because it took so long or they gave up or found that their case was not actually brought forward to a tribunal. And the tribunal, at least in Ontario, the model was one that was a combination of a public and private sort of model because what happened is, if your case in Ontario went to a human right tribunal, the commission played the role of a civil context like a public prosecutor. But the complainant also had statuses of party so they could have their own lawyer, call their own evidence, and even take a position at odds with the human rights commission. So you weren't just a witness; you were a party and you could also pitch the case as you wish.

Now, because of the slowness or the problems with enforcement, this has led two provinces to back off the public enforcement of public agency and to what I call in a critical way a privatized enforcement system where they took the commission out of the enforcement business in the area of individual complaints and said instead you bring your case before a human right tribunal yourself. You investigate it yourself, litigate it yourself. That's happened in Ontario and in British Columbia. I was opposing this because we thought the old system of public enforcement would do better if it was better funded and streamlined. Amend it, don't end it. But we lost that fight. It remains a subject of debate whether the new system is an improvement or a setback. We have been a leading role in advocating for it.

Let me just tell you about three cases that will highlight for you kind of where we've come.

One is a case that illustrates important human rights development in Canada and a concept I invite you to steal. I believe it's implicit in what you do but it's worth grabbing the language if you like. The case stands for the proposition that the guarantee of the ban on discrimination is not only including a duty to remove old barriers but a duty to prevent the creation of new barriers. In this case, what happened is our equivalent to Amtrak, is called Via Rail, went out a bought a bunch of new passenger cars, a third of its fleet, with tens of millions of dollars, and these cars turned out to be less accessible than the old cars they were replacing. And the Supreme Court in Canada, using anti-discrimination language in national transportation legislation essentially said, no you can't do that and found against the rail company. So I would say that case is for the proposition that a ban on discrimination includes a pro discrimination.

I'm ready to find a case that says where we could go with this, but the calculation of undue hardship and the prevention of new barriers is different than for the removal of old barriers. You have an old barrier, the assessment of undue hardship is based on what did it cost to fix it. When it comes to the prevention of new barriers, it should be focused on what is the cost of preventing it beforehand. And of course most new barriers you could prevent at no or low cost and way less to fix it afterwards.

My argument is that they can't create a new barrier flying in the face of the constitution, and then use their failure to fulfill their duty to prevent the new barrier and say, oh, but it will cost so much to fix the mess we created illegally! No, the measure should be, could they have prevented it and if not, then they're in violation of the law. That's my argument and I'm eager to see that get tested.

The second case I'll tell you about relates to the extension of this. Via Rail was the first. The second was a case by an obnoxious blind fellow who took on the largest transit authority in Canada to force them to announce subway stops. The case is called Lepofsky versus the transit system. No relation.

(Laughter.)

They have to audibly announce all route stops. After I won that case, or around the time I was on the verge of winning it, I asked the transit commission, if you're going to announce all subway stops to accommodate blind people, maybe you should announce all bus stops and streetcar stops. You might think there's a direct analogy. Everybody I spoke to thought there was an analogy except for the transit commission. So therefore, a second case came out of that. I won that case too.

(Applause.)

There are several things about this case that have wider implications. One, it led to more regulatory responses and even outside of that, other transit authorities are now begrudgingly move in the direction of calling all route stops.

The second is the overwhelming feedback I have gotten in support of this is not from blind people, who are happy, but most of the feedback I get from sighted people, who can't see through crowds or can't read street signs at night or can't see through a snow storm. We get those on occasion in Canada. And so on. This has become the paradigm of the situation where accommodating us accommodates everyone.

And finally, the fact that TTC opposed me so long and so hard has really resonated with the public. They spent 450,000 bucks on lawyers, opposing consistently and reliably calling out route stops. People are understandably appalled. In response to those who say it costs so much to do accessibility, my answer is, it costs a heck of a lot more to oppose accessibility. And we should be looking more vigorously at holding accountable those who waste public money in opposition to doing it rather than bemoaning the alleged costs which are so typically overstated of doing the right thing.

The third case, before I move to our implementing rights area, the third case is a case by a blind woman in Toronto who brought a claim in the late 2000s to require the federal government in Canada to have accessible websites. The standards about complying back then were systematically not being met. She won the case. It was a charter case, brought in our courts. And it stands for the proposition that web accessibility is part of equality. We didn't have to get into any battles like you do under the ADA about is a website a place of public accommodation and so on.

The federal government was given a mere 18 months to remediate all its websites, which also stands for the proposition that we expect action and we expect it now.

Well, that's what we're getting in terms of some illustrations of case law and defining rights.

Let me talk to you about implementing. After you folks passed the Americans with Disabilities Act, a number of us in Canada said, maybe there are some ideas we could get from this. The right to sue you got in the ADA is something we already had and had for a decade or almost a decade. But the regulatory standard setting was something we didn't have. Initially there was a small number of us that grew to a larger number of us who said, we should be doing the same thing. This really started in Ontario in 1994, forming a coalition to fight for comparable legislation. I became its cochair and later its chair and we started a decade-long fight that led to the enactment of accessibility for Ontarians, AODA. It passed unanimously, which doesn't happen often. All our political parties not only passed it unanimously but rose in unison to applaud it. It was a very exciting day in May of 2005 when that happened.

If you want to learn more about the background to any of this, before I carry on, I'm going to offer you a couple of resources, one of which is my coalition, the AODA alliance that fights for its effective implementation, we have a regular email update. If you want to sign up, I'll invite you to either print your email address or if you can't print yourself, we've asked for a person to be assist by bringing a pad of paper around and I will send you our updates.

I'm recording this and will be making it available through Twitter. If you're interested, send an email and just say, sign me up. AODAfeedback@gmail.com.

Another way to find out all about us, and this is a completely shameless plug, is follow me on Twitter @davidlepofsky. We are really active on Twitter and we're trying to be a new source of accessibility all around the world.

And finally, if you go to our website, AODAalliance.org, you'll see among other things a link to a 12 video lecture series fully captioned on the history of our campaign, how we mounted the campaign, what we tried to do, and how we're doing. They're resources that may be of assistance.

What was this campaign about? What exactly did we win? We basically said there were two problems with our human rights codes of charter. It wasn't a problem that we didn't define rights well. We did. But the problem was twofold. One, they don't tell organizations what to do. If they don't know about website accessibility, it doesn't tell them they have any obligation there. If you ride public transit, it doesn't tell you about calling route stops. It just says "don't discriminate."

MARC MAURER: David, two minutes.

DAVID LEPOFSKY: Got it. Need to be able to know what to do. And the other problem is it required individuals to bring claims individually and enforce them themselves, and that too was too much of a burden for people with disabilities. Believe me, we know.

So the AODA requires the government to lead Ontario to become fully accessible by 2025. It requires it to do so by enacting all the accessibility standards, detailed regulations, that will tell organizations what we need to do to get us there, and it requires the government to effectively enforce them.

Since then, how are we doing? Good news is we've made some progress. Bad news is the standards passed aren't strong enough but we didn't adopt WCAD2.0 back in 2011, we did actually, but we haven't enforced it.

What's happening across the country, the message has spread. Manitoba got a disability act passed in 2013. The government of Nova Scotia promised in 2013 to develop one. It's under development. We now have an active group in British Columbia called barrier-free British Columbia advocating for the same.

Last fall in our federal election, a bunch of us had formed a new coalition called Barrier-free Canada. We have got together to start pressing for a national disabilities act. A Canadians with disabilities act. Well, we fought the campaign largely on Twitter, and we won. We got a commitment from Justin Trudeau that if elected they would enact a Canadians with disabilities act.

While I was in CSUN last week to speak, Justin Trudeau's first budget committed $2 million for a consultation on what the law should include, and our own Prime Minister tweeted, first time ever, about his government's commitment to passing Canadians with disabilities act.

And finally, the federal government appointed a cabinet member who is visually impaired, a lawyer with a background in human rights. That's who has the lead duty to develop this law.

So to wrap up, it's a privilege to speak with you. I would love to share with you more about how we're doing, what you could learn from us, and I'm delighted to be here to learn all of what you're doing ahead of us on how to effectively implement rights. Thanks very much.

(Applause.)

MARC MAURER: Thank you all for the panel of international disability efforts. I urge you to join in the coffee break that we're having and people can ask you questions there. We are out of time.

We have six different workshops coming up in the next couple of minutes, and we will start our next gathering here after the break, after the workshops, which if I remember right is 11:15. So that will be the last of the plenary sessions. And I very much urge you to come. I have some things to say in that one myself. You might have said, well, but you have said things in every of the other ones. So be it.

A break now. Thank you, David, Jonathan, and Scott.

(Applause.)

(Break.)

10:00 a.m.

"How to Improve Settlement Agreements"

LAINEY FEINGOLD: I'm sure Dan will be here any second.

I'm Lainey Feingold in private practice in California. I work in a dispute resolution process called structured negotiation. We do not file lawsuits. Instead, we have an alternative approach to working with companies. We have agreements with Bank of America and Wal-Mart and Major League Baseball, Weight Watchers, and other institutions.

To my right...

TIMOTHY FOX: I'm Timothy Fox, co-executive director of a civil rights enforcement center, with offices in Denver and Berkeley. I do a lot of lawsuits that are almost all ADA, disability rights stuff. Did my first one in 1992. That's about it.

LAINEY FEINGOLD: Okay. So what we're going to do is we have a lot of topics. We're going to set the timer for five minutes for each topic. When the buzzer goes off, we're going to switch topics. Someone yesterday thought I was a rude presenter and that my phone kept going off, so I'm telling you this. When you hear this (ringing), can everyone hear that? When you hear that, it's not my phone going off. It's just time to move on because we want to be sure to cover the high level topics.

The first topic is Dan's, which is the negotiator's mindsets. I'll pinch hit for him. We're all trained as lawyers to litigate and research, but for preparing for negotiations and having the appropriate mindset to be a negotiator -- the five-minute thing doesn't work unless I push start. I get confused being Daniel Goldstein. I have a book coming out in September called structured negotiation: A winning alternative to lawsuits. In that book, I have a whole chapter on the mindset of structured negotiation which is the same mindset of negotiating at the middle or end of a lawsuit. So some of the characteristics I think are so important: One, listening to whoever you're negotiating with. Trusting -- Dan, I was having to be Dan!

DANIEL GOLDSTEIN: You do a better Dan, I'm sure. I'll go around the other way.

LAINEY FEINGOLD: So yeah, my negotiating mindset things are trust, listening, trying to get into the head of where your negotiating partner is, patience because everyone is not moving at the same pace, and if you don't have patience and trust, negotiations can go awry.

Now I'm going to turn over the mindset back to Dan, whose topic it is.

DANIEL GOLDSTEIN: Okay. First of all, my apologies for being late.

I think the first thing you have to think about is whether you're going into a negotiation or mediation because I think the approach is wildly different, depending on which one you're talking about. They are in common the way popcorn and pate are both foods but in every respect they are significant in different ways.

When you're talking about injunctive relief, I think it's important to go the negotiation route because you have got to be able to hear without intermediation what it is that concerns the other side and you have to be able to communicate without intermediation about what your client really needs. As with all things, there are exceptions to that.

And you need to go into the negotiation having thought about the open-ended questions you're going to ask the other side about what their concerns are as opposed to thinking you know that before you walk in the door.

LAINEY FEINGOLD: Tim, do you want to say anything?

TIMOTHY FOX: Yeah, just one more thing. Most of my settlements have come after protracted litigation, and often it's, as litigation can be, pretty aggressive and people can have some hard feelings. You won't reach a settlement if you carry all of that in to the settlement negotiations with you. So part of what I try to go, sometimes less successfully than others, is to kind of clear that stuff out and think through how to get an agreement.

DANIEL GOLDSTEIN: Let me just add one other thing, which is, when you're negotiating in a context other than a civil rights case, injunctive relief, there can be back and forth in a lot of different ways, but usually in a civil rights case, injunctive relief, you don't have areas of everything is not a flexible area because there are certain things you simply have to have and you have to have them in every agreement.

So that means that you have got to think about strategies where you can articulate to the other side why actually you have common goals. Two of the things that I communicate often is, we don't want to send a message that accessibility is expensive. And we don't want to send the message that accessibility is hard. Because then other people are not going to follow what we do and judges will stop ordering it. So let's work together to figure out ways we can do this that aren't hard and expensive so everyone can emulate what we're doing today.

So try to find ways to frame what you want that makes it a joint enterprise to find a solution.

LAINEY FEINGOLD: Sounds like a structured negotiator. If I had a dollar for every time I said "we need to figure out a way to do this that's going to work for you, how do you think the best way to get this into your corporate or..." (ringing) I'm going to follow my own rule but I'm next so it's okay.

The next thing I want to -- and I put the starter on this time.

How do you start a negotiation? When you're in a litigation, at some point you may say, hey, we're close enough or it seems like we could maybe sit down and start writing an agreement. In structured negotiation, we don't have discovery. We have informal communication. We have informal information sharing. And at some point, it's time to translate that into a legal document. So I think there's a really sensitive time and you can't be on automatic pilot and just decide yourself, oh, I'm going to send them a written settlement agreement, let's start the negotiations: So very frequently I will write to or call the opposing counsel who I don't like to call opposing counsel but for the purpose of this conversation, if I say opposing counsel, you know who I mean, you know, do you think it's time, are your people ready to start talking about how to translate what we've been talking about into a legal document.

And sometimes they say, no, don't send us legal document yet, our people aren't ready. Or yeah, that would be good to help clarify the issues.

One point I want to share, when you're in a negotiation mindset, nothing is really unilateral. So even asking your negotiating partner if it's a good time to start drafting.

When I start drafting, sometimes I send a draft agreement but often I send what we call a term sheet, just high level points of what the terms are going to be. Some more written out than others. And that's partly to avoid freaking out the business people who might have been really working well on solution but haven't really thought about legal language. So the transition between solution and legal language can sometimes be tricky, which is another point that when you send the opening agreement, I don't often fill in every sentence. I might have a section, I know I want training and in all of our negotiations we work with organizations on training because that's key to incorporating accessibility, but often I say training as a section header but I don't write the training requirements because I want to hear from the company first, who do you think is best in your institution to train. And we don't lose anything by letting them go first.

When I was younger, I always thought, we should go first or they should always go first. But every topic in the agreement might have a different answer. It might make sense, like I always think it makes sense for the other side, even though I don't like to use the term "other side," the people you're negotiating with, to come up with a schedule. Because chances are, sometimes -- well, I don't know chances are. But sometimes the schedule they propose for the fix might be faster than what I would have thought of. And if it's too long, we have negotiations to shorten them down. But nobody likes to feel like the solution is crammed down their throat. So they know they're going to be fixing their website, fixing their mobile app, installing talking ATMs, etc., but we want -- and all of us I think need the people we're negotiating to take ownership of the issues and one way to do that is when you're starting, to say, hey, we're going to need a roll out schedule for this, what will work for you.

Mostly they put out something that's too long for us and we have to scale it back, but by letting them go first, there's just more ownership and it's also a place where I often say to opposing counsel, who I really try to have a good relationship with, another key negotiating thing, how high up the chain do you have to go to get the answer. Because if they have to go too high up, you don't want them going to top management because then it will be hard for them to scale it back. So if they can give you a schedule but it's not set in stone, let them go first. If it might be set in stone, you might want to go first. So these are the considerations on how you start and when you start.

TIMOTHY FOX: Just one more thing to add, and you'll hear a lot of my comments today are about shifting from litigation to settlement. And sometimes that's hard to do. I came up at a big firm in D.C. before we started my organization and one of the things they did which we've now started doing is to have a separate attorney in big cases and a settlement attorney who doesn't have all the bad faith built up there. Daniel Goldstein played that role for us in one of our class actions in California. Taco Bell was the defendant and they had a separate attorney who did all of the negotiations on their behalf as well and it worked out really quite well, getting the personalities out of the negotiations.

DANIEL GOLDSTEIN: Because as we all know, I have a very bland personality.

So there's no one size fits all here (ringing). You have to figure out where the other side is coming from. If they're coming from at heart we really don't believe your client belongs here or we just think this is regulatory BS, then you've got to I think go in very early with a very clear and definite set of things. But if you've gone in to a tech company and you're talking about the product development process because you don't want to keep seeing more inaccessible stuff coming out and they keep responding by saying, which of our current products do you want to us prioritize, you've got to listen to the subtext. The subtext to that is, we think that building accessibility in from the start will slow us down and put us at a competitive disadvantage so we really don't want to talk about changing our product development process; we want to talk about going back and fixing stuff that we're going to take off the market shortly afterwards because it's going to be obsolete.

So you've got to hear what the subtext is because there's no point in sending a term sheet if you all are talking past each other and not on the same page.

Once you both know what you're talking about and agree to talk about what you're talking about, I remember my oldest saying when she was a teenager, people never argue what they're arguing about. And there's great wisdom in that unfortunately. Once you've figured out what you're arguing about, then send the term sheet.

LAINEY FEINGOLD: Okay. We're going to go on to the next topic. The rest of these topics are not in any particular order. It's more to just kind of mix it up a little.

The next thing we want to put on the table is monitoring language. Tim.

TIMOTHY FOX: So we litigate almost all, at least I litigate almost all large cases, class actions or actions on behalf of large organizations, and monitoring is really huge because these cases often the heart of the fixes occur after the settlement agreement. Making sure that's done correctly is an important part of this.

We just finished a 10-year monitoring case and we're just about to start an 8-year monitoring case.

I wanted to touch on three different things. One is, just kind of the mindset and it's very similar to what we've talked about before, which is shifting from litigation, you've gotten to the point where you're talking monitoring, so pretty much the defendant has been caught. And often they're not very happy to be talking about someone kind of monitoring their stuff, intruding, at least that's what they think, into their business.

So part of what we try to do is create monitoring systems that work with their existing systems as best we can. So for example, in one of our cases, they had a mystery shopper program and we just added in accessibility questions into the mystery shopper program. Saved them money, gave us great information. Same kind of thing with customer complaint systems. We had a case where there was a lot of problems with aisle width and people in chairs being able to get through the store. So we added to the customer complaint line questions that went to that and then they would fill out their reports and we would be able to track and see if things were improving.

A couple other thoughts along the same lines. We do a lot of architectural accessibility cases which often involves surveys of different retailers or whatever it might be. And we had good success in cases where the defendant will train their construction people to do these surveys. We then make sure that they're done correctly, either through photographic evidence or by doing follow-up sampling surveys. If you're going to rely on photographs or documentation or anything like that, it's really important to be very clear in the settlement agreement what it is that you're expecting to be seeing and when you're going to be seeing it and how often.

One more point on monitoring, which is fees. And let me just put as a placeholder, this is in the agreement but it's tricky because of the cannon. Courts tend to look at factors such as how quickly after the initial order has happened, is it something that happened years and years after. So maybe you've evaluated the new and you need a new order out of the court. But these are things you still have a lot of leverage even out of case law to get into the agreement.

One of the things that we've within doing because the concern on the defendant's side is that you've got monitoring fees that are going to be uncapped and go on for a long time and they just can't agree to that. What we're concerned about is you often have issues that come up in monitoring either right at the beginning or unexpected issues come up in the middle of monitoring and we can't afford not to get our fees for that. So recently we've agreed to an annual cap on our fees with the understanding that if we don't meet that, if we bill for less than that cap, in one year that extra amount gets applied to subsequent year caps and it works out pretty well because the typical monitoring agreement has years that are busy and years that are not. And this allows for that and also gives the defendant some comfort that they're not going to be on the tap for unlimited monitoring fees.

LAINEY FEINGOLD: I'll just say it works similarly in structured negotiations. I think our monitoring provisions are often similar. Structured negotiations, at the beginning of the process we have a ground rules document. So we don't worry about that legal piece. We do have the same barriers with companies saying they can't afford it or they would rather pay just one lump sum.

The other thing about monitoring, and this will be our next topic, keeping the clients involved in the monitoring process. We try to have either semiannually or quarterly meetings with the companies, with the clients, typically on the phone to keep the cost down. But just having the organizations know that clients are still paying attention to this and still care is a great way to hold their feet to the fire (ringing).

DANIEL GOLDSTEIN: Next topic?

LAINEY FEINGOLD: Good, look at us.

The role of clients in negotiations. Man.

DANIEL GOLDSTEIN: Okay. So I think especially in disability rights, having the client visibly involved at every stage apart from the ethical requirement of it is very important to an effective negotiation because the defendant either thought that people with disabilities didn't count or that they weren't much or whatever, right? So it was interesting yesterday, some people were asking me why we call Dr. Maurer, Dr. Maurer and why we call President Riccobono, President Riccobono. Part of that is, I think it's very important when I'm in a negotiation and Dr. Maurer is in a room, that I'm calling Dr. Maurer Dr. Maurer and that he's calling me Dan. Because I think it's, you know, it's that old phenomenon, we have a negotiation, we go to a restaurant, the waiter will probably say to me "What does he want." Instead of asking Dr. Maurer, "What do you want."

So I think it's very important to make the appropriate power arrangement clear, even if I have the client's permission on something and we're talking on the phone, I will probably say, I'll have to get back to you after I check with the client, unless there's an urgent reason to say otherwise.

I haven't seen it often, but sometimes with pro bono groups, there can be a notion about putting your notion of what's the appropriate solution, please don't follow your client's instructions, or don't take them on in the first place if their expectations aren't realistic about what a good solution is. So that's what I would say about role of clients.

LAINEY FEINGOLD: I just want to add one quick thing. I totally agree with everything Dan said. In structured negotiations, we have the added advantage of not having depositions. In companies or the government or whoever we're negotiating with, they meet the client as a person, as the role that they're in with the organization to begin with, a member of the public, the customer, whatever. And the other thing about structured negotiations is the clients can really serve as experts because in many situations, the experts, especially in disability rights, the expertise lies in the clients. I learned early in my career before I knew about structured negotiations, I did a trial and this is like so embarrassing to say but we were representing two wheelchair riders, one of whom was a very well-known disability consultant. So it's like why hire and pay an expert? He experienced it and knew how to fix it. It was a jury trial and we lost. Of course the plaintiff can't play the expert.

But one time we did a case on accessible pedestrian signals. We had joint experts as they always are in structured negotiation, but we also had our client, who was blind and experienced the lack of APS, and who was nationally known, on a million commissions on APS. So he could use his expertise and it wasn't discounted because he wasn't wearing this hat of I'm a plaintiff suing you. So that's another role of clients.

DANIEL GOLDSTEIN: There's a disadvantage for lawyers like me who don't have a visible disability because I can't speak with the same authenticity that, say, Scott LaBarre or others can when I'm talking to my adversaries. But I can make up for my disability, as it were, that I don't have a visible disability, by having my client take an active and visible role.

TIMOTHY FOX: I think that's right. We're right now in the middle of negotiating a curb cut action, and our four clients, I won't give you their names but you would know of some of them. They're just amazing individuals. And if we didn't have them in the meetings, I would be showing pictures of corners without curb ramps and saying, see how bad this is. When they're there, they're say second quarter, I'm trying to go to work and because there's no curb cut on that corner, I have to go out in the street, and look at this, sometimes it's in the evening and it makes it incredibly difficult, unsafe, and makes it so I can't be next to my friends or they need to go out in the street with me.

It's a very powerful way of complaining to the defendant the real life consequences.

LAINEY FEINGOLD: Okay. Our next topic is one that I've really been thinking about a lot in writing my book, which is understanding your negotiating partners' fears. Fear came up in the sessions yesterday a couple times. There is fear of disabled people. There is fear of the accommodations. There is fear of the cost of the accommodations. And the fear, even though we think it's bullshit, it's real to the people holding it. And to negotiate a solid agreement, we have to get past those fears.

For example, we do work with national retailers on talking prescription labels and there was a real fear if we had talking labels, oh, my God, what if the person didn't hear it right or what if they took the wrong medication. Oh, my God, right now you're giving blind people medication with no label at all. How can you be afraid of talking labels.

But I'm here to tell you, I believe that fear was real for them.

With audio pedestrian signals, they were afraid a blind person would get misinformation and step off the curb at the wrong time, when without it, they get no information. Even though white cane users or guide dog users can navigate independently, the signals provide useful information.

In those two cases, in the talking ATM cases, they were afraid. We heard we don't want to do talking ATMs because blind people get assaulted at ATMs. We were like, come on.

If we didn't work with these fears, and the best way to overcome those fears is for the organizations to meet the blind people, in my cases or the disabled people and see, oh, yeah, like in the ATM cases, what was so powerful is the clients were like traveling around the world, they couldn't get $20 of their own money out of an ATM. So you have to dissipate fear.

Also you can draft language around fear that doesn't hurt your case but provides comfort to the other side. The right to modify the agreement with the technology fails. Fine to have that language as long as it's very robust with alternative technology that provides equal access.

What if the regulations change or the law changes. We had one case where a company was afraid there would be too many requests for large print, they didn't want to provide large print. We were like, okay, good there's too many requests we'll figure it out then. And we dealt very specifically with language to deal with fears of things that probably were never going to come up. So fear doesn't have to derail agreements, but you have to recognize the fear and be creative about the language.

In the ATM cases, we had modification for this, modification for that, none of it ever happened. So lawyers and business people are trained to be anxious about the unknown and it's a big stumbling block in negotiations. You have to acknowledge it, draft language around it. We never had to rely on any of the outs we negotiated, and we were able to move forward.

Okay. Next. We have Tim on dispute resolution.

TIMOTHY FOX: Dispute resolution. Let me start by saying something I should have said earlier in monitoring, which is, and it also plays a role in dispute resolution, which is, I really, in fact just in negotiating all parts of settlements, I try to get operations people involved because, and maybe it has to do with fear as well. But we want people at the table whose job it is in real life to solve problems and get past the attorney-attorney dynamic that is often a stumbling block to productive settlements.

And I like that in true dispute resolution systems, there's kind of a back and forth we put in for dispute resolution where you give notice in writing of the problems, everybody knows what it's supposed to be, but the second step as soon as you can is you talk to the other side. Hopefully face-to-face. We like to have those discussions with the operations people because if this a stumbling block to implementing the settlement agreement, it's a real issue and you want to figure out how to solve it. And the people we always find are best at solving it are the folk inside the corporation whose job it is to solve problems.

And so we'll try to get a sit down with them, and we don't ask -- part of our process is designed to give incentives to the defendants to solve problems so we won't ask for fees in this first step of mediation or dispute resolution.

If that doesn't work, then we ramp it up and go either straight to court or mediation as the next step with a professional mediator.

One of the things that we discover is the court option can be a really lengthy, time consuming, and inefficient method of solving disputes. So what we are starting to do in some of our cases is to have a third party be as binding as possible. That sounds like arbitration and I know that's a no-no word, but it's somebody we've picked in advance that both sides like and trust, and the alternative is, as we discovered in one of our ATM cases, we had to go to a contempt proceeding twice in front of a federal court. We won both times and had a great settlement, but it took about five years.

So now in that case, we have designated a person as a special master who both sides trust. That person can take a dispute, meet with all the technical people, resolve it, and it's done. It's actually worked out well. We did the same thing in one of our curb cut cases, took somebody we all trust immensely. If we get to the point where the sit down meetings aren't working, she has the power to just decide the issue. And obviously there's potential she decides it in a way that's not in our favor, but that's true of the court and at least we get something done quickly.

DANIEL GOLDSTEIN: I would just add on dispute resolution that I think it's important to know going in why things might fail, and that helps you design the dispute resolution.

I like to say, and it's 90% true, that whenever I sit down for a negotiation, everybody in the room seems to be all for accessibility so why is there going to be dispute. And it turns out the answer, as far as I can tell, is twofold. One is, the people who are going to do the actual work aren't in the room, nor are their supervisors, their direct supervisors, who are saying this needs to be up on the web by July 1st and that's all I care about.

So we need a good reporting process to avoid dispute resolution, but the other end of it is that sometimes the folks who would be most appalled like the CEO, don't ever find out that it's not working. So one of the ways I try to avoid dispute resolution now is to provide President Riccobono and the CEO will talk twice a year on where things are and that makes a big difference. Because another thing that leads to the need for dispute resolution was that the accessibility initiative got starved financially and so it's not progressing the way it should. And that's less likely to happen if you involve the top.

When you are hearing a lot from the other side about let's put 60 days in for this instead of 30, let's put 45 days in for this stage, that should be a signal that they're actually not terribly confident that they can pull off the agreement and maybe it's time to go back and talk some more about the -- (ringing).

LAINEY FEINGOLD: Yeah, just one quick thing on dispute resolution. So in our agreements, we have dispute resolution as Tim described it. I have learned that rather be on automatic pilot, always being in relationship with the people you're negotiating with, I had one case where I called up and said, this is not working, I don't know why, should we put it into dispute resolution. And the lawyer said, oh, God, please don't, because I'll have to get outside counsel. We'll do what we can to fix it, but if you put it in dispute resolution, it will bog it down.

Another case, you know, we always ask, like is it time to write the agreement. Should we put it in dispute resolution. And she said, yeah, I think we should because it will get the attention from the higher ups. So you have the language and it's living. You have to work with it.

So the next five minutes is for questions, which we can take now. The other three topics, just so you know, you can hear them before the questions, we want to talk about incremental steps towards big results, term and duration, release, and negotiating money and fees.

Yeah. Michael.

>> Can you repeat what you just said about something related to if they start putting in time tables, Dan?

DANIEL GOLDSTEIN: I was saying if you sent over a draft that said, you know, 30 days to respond to the complaint and then level two is X. And there are a couple of possibilities if they come back and they're really fine tuning those details. One is you've just got a really obsessive, anal adversary pro lawyer, in which case you don't have to pay any attention to whether there's a subtext. But if there seems to be a lot of attention lavished to small details.

I guess what I'm trying to urge as a theme on all these topics is look for the subtext. Here the subtext may be, we are putting a lot of attention into the dispute resolution process because we are not comfortable that we're going to be able to do what you're getting to us promise to do. So that was my point.

>> Could you speak to having clients participate in advisory committees or advisory councils? I had a request from an opposing client ton have my deafblind client participate in an advisory disability committee. You have ever had that happen and do you recommend that?

DANIEL GOLDSTEIN: I think it's a two-edged sword. We have that in our agreement with social security. There's an implementation agreement board that has both social security brass and some of the disabled employees on the board as well as representation actually from class counsel on the board. And that can be a good way of staying on top of things, but if your client is one person on a seven-person board that votes, then there's the risk that you've just made your client window dressing and in effect neutered your client's ability to effect change. So it can be a good thing. You just have to be alert. And it's sort of like the Germans putting the union leaders on the corporate boards. It can be a good thing or it can be a very bad thing.

>> Lainey, earlier you mentioned joint experts. Explain a little bit. At what stage of the process do you bring them in, how down find them, more detail on that.

LAINEY FEINGOLD: Okay. I'll give a one-minute summary of my chapter on this. When we write the opening letter, we have often worked with an expert behind the scenes but we don't put the expert into the letter because we really don't want a battle of the experts. And we want the organization we're working with to have access to the best experts in the field. So we don't want to take them off the table to have them be our experts.

So it all depends on the case. If there's a need for expertise, we tell the company, you know, you need some expertise here. We usually, again, on the theme, nobody likes anything shoved down their throat, so if there's more than one best expert, we always recommend two or three. So the company feels like they are choosing. And they are. And sometimes -- well, the companies always pay. Sometimes they come to meetings and they're part of the process. Sometimes the companies hire the expert and they do the work behind the scenes.

In the accessible pedestrian signal case, there are really only two great experts in the whole country. So we told the city, you should hire them. And the whole expert team in that case was our client and those two.

So we don't have any protection like what if the negotiations fall apart and then you won't be able to use your expert in litigation, honestly I never worry about that because the negotiations don't fall apart, but you could have an expert retention agreement which we did in one case. When we wrote to JetBlue the company said basically screw you, we won't negotiate, we filed the lawsuit and immediately got into negotiations, we wanted them to have the best experts but we had a lawsuit pending so we did draft up an agreement which is in the book to protect our right to use the experts later if the negotiations fall apart but usually we don't worry about that.

>> Do you ever include time tables for negotiations in the framework agreements?

LAINEY FEINGOLD: We have the ground rules document. It's funny. There's a lawyer in Chicago named Andre Scolagos. We don't usually put a time frame in say in these negotiations aren't completed in a year all bets are off because I find it creates false expectations and the client -- on the other hand, Andre says he loves having it in because he says it holds their feet to the fire. So I think it depends on your relationship, how big the case is. So you can in the ground rules document put, you know, this agreement will lapse in nine months. If you put such a thing in the ground rules document, I would urge you to look at it and say, oh, is this still working eight months in and then you might want to extend it. But you can, and people do.

TIMOTHY FOX: One more thing on joint experts. We used a joint expert in the Kmart case, surveys of 1400 stores, now significantly less, and the joint expert met with both parties and taught their in house construction people how to do those surveys.

A similar concept is a pilot program where both parties go out and do surveys and make sure they're in agreement about how the surveys will be done, what they're looking at, and an expert could be really helpful in that process.

DANIEL GOLDSTEIN: And it doesn't have to be joint, if I can just add in. We had a negotiation recently where it was clear that they didn't really understand what would be involved in making their business accessible. And they were absolutely convinced as something of a startup that it would bankrupt them. So I said, look, you guys are going to need an expert if you go forward with litigation. Let's stay the litigation, you pick one of the following three experts, pay them and find out if it really is going to break the bank or if there's an effective way to do this. Because I knew it was not as big a deal as they thought it was.

LAINEY FEINGOLD: That's kind of what we do too. I guess they're not really joint because they're not meeting with both of us. But they're like mutually agreed on is maybe a better word.

DANIEL GOLDSTEIN: Right. We never saw the report but we got what we wanted.

LAINEY FEINGOLD: Okay. So next topic, and I think if we talk fast we'll have time for another set of questions. And Tim just alluded to this. Incremental steps toward big results. I think this has been one of the key reasons that structured negotiation has been a successful method for 20 years in this field is because sometimes you can't always get what you want. Like what you need is to get the organization started on the path, and when they're started on the path, then that helps eliminate the fear. So we sometimes do pilot agreements before -- pilots, not really agreements, before we even have an agreement. In the San Francisco APS case, we would not get them to sign anything until they ran a pilot of five intersections. So we worked with them, helped them get their expert, did the pilot, then got our agreement.

In the case of Wal-Mart on talking prescription labels, again, none of these cases had lawsuits, they agreed to a talking prescription label through mail order all over the country and 12 stores because they weren't ready to roll out to every store and they might not need to. But by doing it in that fashion, they now will install the talking labels directly in the store for whoever requests it.

Talking ATMs. We did first five Citibank, first ten Wells Fargo. And another thing in the pilot, whether you call it an interim agreement, a pilot agreement, an interim step, appreciate and acknowledge what the company has done. It may not be all that you want yet, but it is amazing, no matter how big the company, like we gave Major League Baseball an award. Actually they've now gotten two from blind organizations. And I went to visit MLB offices. They have this plaque prominently displayed. People like us, we think, what's the big deal, it's our conferences. But no matter how big the company, they appreciate the honor.

We did a case with Cinemark movie theater and wanted them to install the equipment for the opening of Harry Potter. We had the clients write directly to the company how excited the girl was and the parents were. So small steps and honoring those small steps is I think are very effective negotiation strategies.

Anybody want to say anything else about that?

Okay. So let's just you go to the next one. If people have questions about that, we can do them afterwards.

Okay. The next topic is term or duration of the agreement.

TIMOTHY FOX: This will be pretty short. Obviously the term of the agreement depend the nature of the settlement. If there's training or policy changes, anything like that, it's way too easy for them to fix it in the short term and way too easy for all of those steps to come undone in a year or two. We're very clear in the agreement about the length of the term, that also affects agreements not to sue. I think that's it.

LAINEY FEINGOLD: I like to throw in, sometimes we get asked to have an indefinite term. Like we're doing this. Can't we just have an agreement that lasts forever. We always say no to that because I feel obligated to monitor the agreement. So it can't really last forever. And also in technology. You know, things change. We really don't want agreements that last forever. They can get stale or forgotten. Of course once the agreements expire, we stay on top of it and make sure the policies we negotiated are part of the organization's way of doing business but we never agree to an indefinite term.

Okay. Next up. Release language and covenants not to sue. Dan.

DANIEL GOLDSTEIN: Really? Okay.

LAINEY FEINGOLD: I think we didn't get to this yesterday.

DANIEL GOLDSTEIN: No, we didn't.

LAINEY FEINGOLD: It's a good topic.

>> That's why I came back.

DANIEL GOLDSTEIN: Oh, did you. Okay. Well, I don't know that I have anything very wise to say. I almost never agree to covenants not to sue. And I do my releases as narrowly as possible. I mean, you certainly can't when you represent an organization compromise, as a practical matter, you can't keep a member in Missouri from deciding on her own she wants to file suit. And you have to be very clear about that.

And the few times that I have done a covenant not to sue, it is highly specific to the very thing that is being settled, and only if I have a dispute resolution process that allows me to negate the entire agreement and go to court on the original basis. Those covenants not to sue can be very dangerous.

Sometimes you will be asked not just for that but you will be asked to cooperate if anybody else sues them. And it better be a gold plated deal before you say yes to that. That should come with $5 million for your organization and 30% of their employees are going to have visible disabilities, right?

LAINEY FEINGOLD: So I think the most important thing I've learned over 20 years, depending how sophisticated the attorney is on the other side, they may ask for a release that's too broad. It's important to read that language critically. The release can only go up to the day that you sign. You can't release for the future. You can't release members of organizations. You can't release affiliates of organizations unless they're in the agreement.

We do negotiate covenants not to sue so I want to hear more offline from Dan about why he doesn't do that. We have the covenants not to sue during the term of the agreement by the clients limited to the subject of the agreement because the release is only going up to the day you sign. They agree to spend three years fixing things, you've agreed, so I kind of think it's reasonable that we agree not to sue them during the three years while they're fixing it, as long as, and the covenant not to sue is very specific about this that it doesn't impact the dispute resolution about the agreement. So that's how we use the covenants not to sue.

TIMOTHY FOX: I just, as I said earlier, we do a lot of class actions and release language in class actions is really important. We have injunctive cases and defendants often want releases covering class claims and that just never happens.

LAINEY FEINGOLD: Okay. So our last -- yeah, I mean, in the 15 years ago, Amy Robertson and I think you were involved in this a little and I were objecting to a lot of class action settlements around the country that lawyers were doing on disability rights releasing monetary claims in states where people weren't getting a penny. So there are still lawyers trying to get that kind of language into cases. You can expect objections from disability rights bar association if you settle something like that.

Okay. The last topic and then we will have time for questions is negotiating about damages and fees. What I want to say about that is, I think most of us know, we try to do the injunctive relief first and do the damages after that and the fees after that. And in structured negotiation where everything is relationship building from the very first letter, where we try to praise the good things the organization is doing while at the same time we're telling them that they're violating the ADA, no matter how good the relations are, when it comes to money, there is a shift. And emotions can run high. Defenses that haven't really shown their faces, or defensiveness that hasn't shown its face in two years of working together on solution is suddenly all over the place. And in some ways, I wrote about this in the book. I said in some ways it's almost like money is a dirty word. And I have gotten comfortable talking about the damages and fees sort of like, well, Congress decided about this. The state legislature decided money is part of these claims because we live in a country that values civil rights. So we have to talk about money. That doesn't mean we have to get all incensed like I used to. I've gotten stuck into mediations because I was so incensed with the opening offer I couldn't really see that it was an opening offer.

So my advice about money and negotiations is really to kind of stay calm and carry on. For the company, it's just about dollars. For us and our clients, I think it's a more emotional thing. It was a wrong, a civil rights violation, we were treated badly, and you've got to handle that tone shift from injunctive to damages in a calm manner.

DANIEL GOLDSTEIN: I would just add that I'm not very good at negotiating money, at least in terms of fees. But that is an area where I think a mediator can be helpful. And my partner who is a far better negotiator than I am about money says there is absolutely no premium for being reasonable in a mediation. And I think that's true. You just have to -- I mean, you need to be prepared to bring some power bars because the first serious offer from the other side will come at 4:15. If you're there until 8:00, you may get what you want.

The hard part I think for all of this is the mediator who doesn't understand that you're not going to negotiate your fees until you negotiate the damages. And ethically, that's a nonstarter to compromise.

There are ways you can handle it in your up-front fee agreements so if you get stuck, you really can negotiate a total number, but you don't ever want to be pitting against your client for the same dollars. And so one way or the other, you just need to be prepared for that when you negotiate damages and fees.

LAINEY FEINGOLD: Yeah, in structured negotiation, I've done about 65 cases and there's only been four times we've needed to call in a mediator and it's always been to handle the money. When I was doing my book and interviewing the opposing counsel I worked with, one of them said, I just needed to have another person tell me I had to pay you. That was one. So mediation is an option and I think when it comes to money, it's often a good solution.

TIMOTHY FOX: There's actually I think an ethics opinion, ABA ethics opinion, that if we run into a mediator that doesn't understand we won't talk money until after we're real far down the road on injunctive relief, we can have a mediator who says just that.

LAINEY FEINGOLD: Okay. We have five minutes for questions.

>> When you're negotiating money, do all the tactics that you learn in how to buy a used car and all that kind of stuff, are they all useful? You know, like you want to bid as far -- you always want to wait for the other person to offer first and then work off that number and you always, you know, if you want more money, you go for more than you want and then you negotiate down, I mean, do all those strategies --

LAINEY FEINGOLD: I don't know anything about buying a used car, but I do think, and again, I talk about this in the book, that in the injunctive relief, just like Dan said at the beginning, we know what we need. He just have to be straight with that.

>> No, I understand that. I'm talking about the money.

LAINEY FEINGOLD: When you make the switch to money, even with the good relationship, you have to ask for more. You have to ask for more than you need.

>> So you ask for more and nibble at the end.

DANIEL GOLDSTEIN: A couple things. One is, excuse me, with fees -- the sky is not the limit. You can't ask for fees you aren't earned, right? So you're always going to be in a losing position with that kind of negotiation.

With damages, on the other hand, at the same time that you're going to be stubborn, you want your signals understood. And that means that you need to be clear about where the midpoint is about where they are and where you are, and they're going to try to be clear about what they think is the midpoint, and their midpoint is well below yours.

But there is a text, a subtext, to each demand you make and each offer they give you, and if you're not reading each other correctly, you're in trouble. And where the mediator can come in to be helpful is saying, hopefully the other side but maybe you, why you're not being realistic about there's a gap between what you could get in court and what you get here.

Negotiating the fees are different because you don't have as much room to go down. You can't go -- or you certainly don't want to go to the halfway point. And so you're more in the trenches about why did there need to be two lawyers and a paralegal at that deposition, and so on and so forth.

TIMOTHY FOX: Dan or Lainey, I often get asked for proof of our fees by submitting our fee record.

LAINEY FEINGOLD: The cases we do best on in fees are the cases where they know the clients the best. Sometimes in structured negotiations, it's so much more cost effective for the other side because no depositions or expert battles. Sometimes we just tell them what the number is and they pay us the fees. Sometimes you tell them the number and they want to talk about the number. And sometimes they ask for the fee runs which we always provide once all the injunctive part is agreed upon and finalized.

DANIEL GOLDSTEIN: We just redact the attorney client stuff.

But the other thing is, we have a rule in this district that we follow when we're not in this district, which is that we send a quarterly letter letting them know where the meter is.

LAINEY FEINGOLD: Oh.

TIMOTHY FOX: Wow.

DANIEL GOLDSTEIN: And that saves sticker shock. And it also tends to move the substance of negotiations forward nicely.

>> Have you ever walked out of mediation, and if so, how have you used that? I've had situations where -- and I know generally I'm not going to get a decent money offer until 4:15, but there are other times when it looks pretty clear that we're not going to make much progress on injunctive relief for example and in those situations, I've been tempted to say thank you. As opposed to paying the mediator and interpreters for another couple of hours.

Have you done that? And has it been helpful?

TIMOTHY FOX: Yeah, we've done that. Sometimes you run against -- we've done that a lot at times. I mean, it's not the preferred -- I would prefer a different ending but sometimes we've been up against defense counsel that won't even make virtually any kind of reasonable offer. And we're in the context of litigation where we have recourse and we don't have to just sit there. We can file summary judgment. Yes, that's happened. It means that down the road, next time you meet, there's going to be more of an air of tension than there would otherwise be but you really have no choice.

DANIEL GOLDSTEIN: I would be -- I have only done it rarely, but I think the only times I've done it are when I am prepared to litigate and it's not just I don't want to talk at 3:00 this afternoon, it's I'm done, let's just get this done in court, it will be more efficient and more satisfactory and I'm sorry this didn't work out.

I would be very -- I would have to think long and hard about how I could go back into a negotiation I walked out of.

LAINEY FEINGOLD: Okay. We want to be respectful of the time. So thank you all for coming, and you can reach any of us by email or through websites or right now. Happy negotiating.

(Applause.)

(Break.)

11:15 a.m.

"Employment and Olmstead: The Right to Real Work"

MARC MAURER: All right. Let's begin.

I notice that I have inadvertently permitted the time to carry on past the start time. My apologies.

Scott LaBarre over there tells me there is a Disability Rights Bar Association meeting this afternoon. Those who are in the disability rights bar are urged to pick up your packet of material. Those who are in the disability rights bar are invited to lunch in the dining room. If you're not a part of the bar, then you can apply to Scott LaBarre. He's got the system by which you can come to be a part of it. It is a very exclusive group. Just ask Scott about that.

(Laughter.)

So if you want to be part of that exclusive group, you talk to Scott but you need to get your materials and figure out your lunch and then join in this afternoon in that meeting.

SCOTT LaBARRE: 1:40 sharp.

MARC MAURER: 1:40 in this room. Lunch is ahead of that.

Now, our last panel for this meeting of the symposium is a discussion about employment and Olmstead, the right to real work. We have three people to present. Well, actually five if you count everybody. But we have three listed in the program. Matthew Dietz, Regina Kline, and then I am listed as well.

And somewhere here I have a long history of Matthew Dietz's qualifications. And there it is.

Matthew Dietz is president and litigation director of disability independence group. He has handled over 500 civil rights matters involving all aspects of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Fair Housing Act, and other state and federal laws protecting an individual's civil rights.

He is currently lead counsel for the putative class action on behalf of institutionalized children with disabilities in Florida. Currently he is an adjunct professor of law at Saint Thomas University, teaching disability rights litigation, and he is a member of the advisory board of directors of the Burton Blatt Institute at Syracuse University.

He is past chair of the equal opportunities in the law section and the public interest law section of the Florida bar association. And I notice he has other credits as well.

Now, Regina Kline is currently acting as senior counsel in the office of the assistant attorney general for consider division for the Department of Justice. Presently she -- well, she was trial attorney with the disability rights section of the consider division at DOJ. Her work as a trial attorney focused on the integration mandate of the Americans with Disabilities Act, and she has been a lawyer involved in the most interesting cases involving sheltered workshops in Rhode Island and Oregon, and she has numerous other credits.

I am also presenting on this panel, and I'm immediate past president of the National Federation of the Blind. I am a lawyer, and this is not just happenstance. I actually wanted to be one. So I still want to be one. I did not enter the courtroom as a counsel representing anybody from 1997-2016, and I do admit that it is good to be back.

So these are your presenters, and the folks have suggested that I might begin. And that suits me so I'll do that.

Dr. tenBroek, who was the founding president of the National Federation of the Blind and who served in that capacity from 1940 until 1961 and then reassumed the office in 1966, in 1956 was writing for the convention on the National Federation of the Blind. So he was addressing primarily blind individuals but he was also addressing in a broader sense individuals with disabilities generally.

And one of the paragraphs or a part of it that he used at that time said, "The constitution of the United States declares that all persons, born in the United States, or naturalized, are citizens. There is nothing in the constitution or anything that I have ever been able to find that says this section should not apply to persons who are blind. If born in the United States, or naturalized, whether before or after blindness, blind persons are citizens of the United States now and are now not merely in some future generation possess the right to be citizens and share that status.

"Moreover, the bounty of the constitution extends to all persons, whether citizens or not, rights to freedom, equality, and individuality. As citizens, then, or as persons who happen to be deprived of one of their physical senses, we claim under the broad protection of the constitution the right to life, personal freedom, personal security, the right to marry and rear children, to maintain a home, and the rights so far as government can assure it to that fair opportunity to earn a livelihood which will make these other rights possible and significant. We have the right freely to choose our fields of endeavor, unhindered by arbitrary, artificial, or manmade impediments all limitations on our opportunity, all restrictions on us based on irrelevant considerations of physical disability are in conflict with our constitutional right of equality and must be removed." 1956.

(Applause.)

Now, Dr. tenBroek was not unfamiliar with certain of the pronouncements about disability that had been made prior to 1956. The Buck versus Bell case which came out in 1927. A case in which a disabled person was involuntarily sterilized was known to him. He assigned it to his classes routinely as required reading. That decision, written by Oliver Wendell Holmes, Jr., is well-known for saying that "three generations of imbeciles are enough."

Probably less well-known for another sentiment which says, "It is better for all the world if instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

In other words, Justice Holmes was saying there are two kinds of persons: One is the regular people like him, for example; and the other is "their kind," which is a different kind from the kind that participates in ordinary humanity.

I find that statement not only to be insupportable in law but to be reprehensible and insupportable in fact. And I got to wondering why this decision came before the Supreme Court. The law that was being considered had been adopted in 1924. The case came on before the court in 1927. It didn't take long. How long does it take to get to the Supreme Court? And how difficult is it to get an institutionalized person to be recognized as a participant in a Supreme Court case? You know how troubling it is. I have sometimes thought it would be helpful to get a case before the court but I know how long it takes and I know how much work there is involved. How did it happen in three years?

Well, what I've read tells me that counsel for the person who was involuntarily sterilized also served on the board of directors of the institution where she was institutionalized and where the sterilization took place. In other words, there has never been a case determining whether disability is a different kind of humanity. The thing was brought to justify what the people in that institution wanted to do, and there wasn't really an adequate trial as we would call it today.

Dr. tenBroek also knew that section 14 of the Fair Labor Standards Act had been adopted and that it says that there can be a special wage for disabled people, different from and lower than the one that applies to everybody else. In other words, it's legally based discrimination on those who possess disabilities. Currently that section is section 14C of the Fair Labor Standards Act.

And we have wanted to change that for as long as we have been working on disability matters. And we've wanted to know how to go about it. We've been to Washington to talk to the members of the Congress, and the number of those with the courage to recognize that we all participate in a basic humanity has not been great.

But in the 1980s we got a modification to the 14C provisions. Before 1966 you could pay a special minimum wage, which was less than the one that applies to everybody else. In 1966 a floor was established in the law saying it could be less but it couldn't be less than 50% of what everybody else got. It could be more, but it couldn't be less.

In 1986 that subminimum wage floor was removed from the law but there was put into the law a system to challenge a special wage evaluation for worker was disabilities. It has almost never been used, and there has been a lot of argument that even if it is used, the remedies available are so small that it costs more to bring an action than you'll get in recompense even in back wages under the FLSA.

We got to wondering how true law this is. And the folks at disability rights Ohio found some clients working in a workshop for the county of Seneca, Ohio. And they wanted to challenge a subminimum wage determination. And we studied the question to try to determine what the best way to go about this might be.

Section 14C says that if you want to challenge a subminimum wage determination, you could do this before the Department of Labor, but if you are challenging under the Fair Labor Standards Act and you think that you're entitled to not a subminimum wage but a full wage, then you have the challenge of going to federal court. So we studied the question and decided that it would be faster to try to bring it under the Department of Labor, because after you file your petition, the Labor Department is supposed to give you an administrative law judge in ten days and then there's supposed to be a hearing at thirty days so you get forty days before you're supposed to be in front of a judge from when you file.

It hasn't happened. We did that and there was a judge and we had a hearing for a week, and we have a decision and it is a decision worth remembering because it says that there has to be a connection between the determination of a lesser ability of the individual and the disability that that individual has. You have to show that the disability caused it.

Before this decision the workshops assumed that just by saying this worker has a disability and isn't as productive as we think the worker should be, that was enough. The decision of the judge says, you have to show how the disability had the impact on diminishing that person's capacity to work.

There are many details and we could go over them, but what I want to mention to you right now is this: When you are an employee, you have to worry about your relationship with your employer. Are the bosses satisfied with you? Are they willing to have you stay? Are they willing to give you something to do? Are they willing to sign a paycheck for you? Are they willing to treat you in such a way that you can come again and feel at least welcome enough to do your work?

Or will there be reaction against you, either by your supervisor or by your employees who work with you? Are those who work with you going to say to you, "Don't make waves"? Is it going to be so challenging that you can't live with what you've done because you have got to be in the same place doing many of the same things day after day after day once the decision is over and while it's going forward?

In other words, people don't come to this without courage. You have to have guts to say, "There's something wrong here, and I want to be the one who shows that it's wrong."

We had three clients. We still have three clients. One of them is a blind person. One of them has multiple disabilities, none of which by itself would probably be sufficient to show significant disability. One of them is participating in the autism spectrum. We have two here who have been able to come. One of them was not able to come. But we have two of these folks here, and I want to take just a moment for them to tell you about what it's like to be in a sheltered workshop and what it was that made them decide to say, "There's something wrong here, and I'm going to be the one to help show that it's wrong."

Let's see. Which one of you wants to begin?

>> I will go first.

MARC MAURER: The person who will speak to us first is Joe Majors. He's one of our clients. He'll take just a minute or two to tell us about how it was for him to be in this case. Here's Joe Majors.

(Applause.)

JOE MAJORS: Hello, my name is Joe Majors, and I have worked in the community in the past. I ended up back in my hometown in Ohio, and I was referred to the workshops.

For a time, I was mostly put on stuff that was decent, but then they just decided they could throw me on this assembly line because -- I'm not sure what all the reasons were. They just kind of tried to say there were too many things I couldn't do. Some I understand better than others.

Through the process of trying to work with rehab, that went nowhere. And when I talked to disability rights Ohio about that, I was asked about the workshop and I was all too happy to tell, just being thrown on the line like that, being paid this arbitrary wage. Everything I tried to say to demonstrate that I was working at a higher rate than what I was getting paid was totally ignored. It's my understanding that they have since changed the nature of the time study. I haven't been trained on it. I'm not sure why that is, but I will say that they never really encouraged a faster pace on the line for anybody, whether they could do it or not.

(Applause.)

MARC MAURER: When Joe was working in private industry, he was making over $12 an hour. When he got to the workshop, he was being paid many different wages but often he was being paid $2.52 an hour and sometimes less than that. And that is his history.

Now, our other client here, a person who demonstrates courage, is Mark Felton. And he has not had as much history in employment but he does work for the workshop. Here he is.

(Applause.)

MARK FELTON: I've been working for the workshop for approximately four years. I noticed during the time I had been working there, there's been quite a bit of unfairness. I noticed some of the wages there aren't as fair as they should be. And then along with Joe, I decided to get involved with this program to put a stop to it and make things better for everybody.

Basically I many job is to make sure everybody has a fair equal wage, and basically go from there.

There's been a lot of discrimination at the work shop that I don't approve of, and basically there has been times when me and Joe here have been put on the line when we're qualified for something better. And I think, as an employee, me and Joe should be able to do things that others can do as well. They're just as qualified.

(Applause.)

MARC MAURER: What happened in this case is that the judge looked at these people and said, "These folks appear to me to be the same kinds of workers that you can find in industry anywhere else, and if there's going to be different treatment, disparate treatment, then there has to be a demonstration that there's a need for it. And unless that has happened, they've got to be treated in the same way that people without disabilities are treated."

I hope and I believe that this decision is as important as that.

Now, we're going to hear next from somebody who has worked in sheltered workshops even more than I, and this is Regina Kline.

(Applause.)

REGINA KLINE: Thank you, Dr. Maurer. It's such a privilege to be able to speak after Joe and Mark. I don't have -- I'm a lawyer at the Justice Department in the civil rights division. We've been very busy over the last five years in this area, but nothing speaks clearer than the experiences of people who have worked in sheltered workshops and who are capable of working in real jobs in the community.

(Applause.)

So I think this is a form of Justice Department hazing because my boss Eve Hill is in the audience laughing and eating muffins probably.

So I am privileged to be here and I'm privileged to tell you why we've been so busy in this area.

Dr. Maurer was just talking about the Fair Labor Standards Act and section 14C which actually refers to section 2-14C.

We don't enforce the FSLA but we do enforce the ADA and Title II of the ADA and the Americans with Disabilities Act as it corresponds to the Supreme Court decision in Olmstead versus LC. The administration has had a very significant commitment to Olmstead enforcement. 2009, President Obama declared 2009 the year of community living. But I want to break it down for you in terms of numbers as we're here at the end of an administration.

The Department of Justice civil rights division has taken on over 50 matters in 25 states that correspond to DOJ Olmstead enforcement actions. What that means is 53,000 people, let me just say it again, 53,000 people have been impacted by DOJ consent decrees in this area.

(Applause.)

The number that hasn't been spoken about and I'm here to bring the news, of those enforcement actions, 10,500 people with disabilities will receive employment services that will help them identify, find, and obtain real jobs in the community.

(Applause.)

Title II prohibits discrimination by public entities. We enforce the integration regulation. That regulation requires the administration of services programs and activities in the most integrated setting appropriate.

What is that? That is where individuals have the opportunity to, individuals with disabilities, have the opportunity to interact with people without disabilities to the fullest extent possible.

I want to tell you about a district court decision in our case in Oregon. In the case of Lane versus Kitzhaber. In May 2012 the district court in Oregon ruled on a motion to dismiss it. The ADA and Olmstead applied to government programs and services that include employment, and that is significant. Up to this point, the reach of ADA and Olmstead had not been applied outside of the residential context.

In this decision, very expressly they declared that the confines of Olmstead were not purely residential, although the facts of that Supreme Court decision involved women that were unnecessarily segregated in a psychiatric hospital. The ruling in our case expressly declared that that was not the limitations of the Supreme Court's decision were not purely residential.

And then something happened. The DOJ is engaged in three cases in three years that have been resolved that apply the ADA and Olmstead outside the realm of the residential setting. The first case in 2013 involved the United States and Rhode Island and the city of Providence. The second case was a statewide Olmstead decree involving the state of Rhode Island and its sheltered workshop system. The third case was the resolution of Lane versus Brown, as it was now called, just this last year.

I'll tell you about these three cases but the important thing to discuss is what is integration in the employment context. What has DOJ said about what integration is? And I think is the perfect opportunity to dovetail on what Dr. Maurer was speaking about.

We know that there are over half a million people in the United States at any given time who are in segregated sheltered workshops for day programs. We also know that many people across the United States can and want to work in real jobs in the community. When it comes as a legal principle to defining and declaring what integration looks like in the employment context, in our decrees and in the work of the civil rights division, we've declared integrated employment to mean individualized typical jobs in the community, earning at least minimum wage, working among peers without disabilities, for the maximum number of hours, consistent with a person's abilities and preferences.

We've also used as relief in these three cases access to services and supports that enable people to choose what they want to do in integrated settings during the hours that they're not working.

In Rhode Island, in the first decree, which was in 2013, we found a population of 200 individuals with intellectual and developmental disabilities, and half of the individuals were youth in a high school. The high school special education program was referring and feeding students down the street to the adult sheltered workshop. It was a lifeline of segregation. It trained the students in tasks that looked like adult sheltered workshop life.

When we went to the workshop, we found adults who remembered their time at that particular school and the decades of learning, first learning how to perform very rote, manual tasks and repetition in school, and how they, as an adult in sheltered workshop often shared contracts between the school and the workshop.

So we found a direct pipeline between this school and the adult workshop.

When we looked at the entire state of Rhode Island later in a subsequent investigation, we looked at about 3,000 people many of whom were unnecessarily segregated. People who can and want to work in real jobs in the community. Many people who formerly did work in real jobs in the community and who were in sheltered workshops at this point.

The statistics are clear. In Rhode Island, there were 80% of the people who had intellectual and developmental disabilities at the time of the investigation, 80% were in segregation, were in sheltered workshops. Only 12% were in integration at the point of the DOJ statewide investigation there.

So what's the relief? There are 2,000 people in the state of Rhode Island that will receive real jobs in integrated settings over the next ten years because of the consent decree with the state of Rhode Island. Over approximately 1300 youth will receive the appropriate transition services while in school in order to identify jobs that they're interested in, to understand their preferences, and to move on and transition from school into real jobs, never to reach the front door of the sheltered workshop.

So that's Rhode Island. The Rhode Island agreement exemplified also the need for public entities to provide a sustained commitment to funding this relief. We recognized through that case that these problems are complex. They involve multiple state service systems, as mentioned by this conversation. They involved the education system. They involved the adult disability system. They involved Medicaid and the use of benefits planning. These are complex systems and it requires state leadership to fix these problems.

In Lane v Brown, the Oregon case, that case involved the United States intervening in a private lawsuit that was brought on behalf of eight named plaintiffs. The United States brought with it a claim that involved the risk that was imposed on youth that were leaving Oregon schools statewide. The relief and the global resolution of that case just this past year includes relief for 7,000 people, some of whom are youth leaving Oregon public schools, and institutionalized population of roughly 2700 people with intellectual and developmental disabilities.

One of the statistics in Oregon, how they compare, at the point of investigation, again, the point of the department's investigation, the employment service system looked like 60% of people who are receiving state employment services to work were doing it in segregation. And 16%, only 16%, had access to the types of services that would follow them into real jobs in real employment settings. Hundreds of kids every year in Oregon were going directly from the door of school to the front door of the workshop, with no stops in between.

So in that decree, which is the Oregon decree, over 1,115 adults will receive competitive integrated employment in the coming years, and probably 4,900 youth ages 14-24 will receive access to the very important transitional services and supports that they need in order to select real jobs in integrated settings when they leave school.

So this is the work that the department has done in three cases in those three years. The work is really just beginning. We're seeing states across the country that are acknowledging excessive overreliance on segregation with, you know, as employment systems are administered and are taking voluntary steps to try to redefine integration in the state service system. So we're very proud of the work that we've done in this area, and we hope that more people like Joe and Mark have the choice to work in real jobs in the community.

(Applause.)

MARC MAURER: And our final presenter for this panel is Matthew Dietz.

(Applause.)

MATTHEW DIETZ: Coming to this conference is one of my favorite things I do because I get to see people who I really deem to be almost family members. We disagree at times, but we all have the same fight and I love seeing every single one of you.

Now, every case is an individual. So when we're talking about Olmstead and employment, I think of the nuts and bolts. When I think of Olmstead and healthcare, I think of the nuts and bolts. What are we talking about? What barriers are we talking about? What are we doing essentially?

And I'm actually embarrassed. I have one client and her name is Melody. She is a 27-year-old woman who lives with a developmental disability in Miami and she has 16 hours a day of companion care that is paid for through the home and community based waiver. And her mom wants her to work. The only work that she can get is at Good will. Or she could work in a sanitation facility.

In school for the 22 years that she went to school, she went tonight her entire education, she knows how to alphabetize and loves Justin Bieber. I mean, mention Justin Bieber and she starts to giggle. Which I don't mention Justin Bieber a lot.

(Laughter.)

And you look and you think to yourself, what does the typical job, what is a typical job, what is typical employment, what role do we have, what are the obligations under Title II, what are the obligations under Title I, all of these things go into how do you help this one client who wants to work, to make her life complete like everybody else? She doesn't want a babysitter.

And I still have that file sitting on my desk. And it hasn't moved because it's very difficult. What do you do? How do you do it?

In an Olmstead case, you look at the programs and services for the person, what's available or could be made available. If somebody is getting 14 hours of companion care, why can't that same person get other services? Where is VR? What are the services involved? And that is the important thing to look at.

And even when you look at an Olmstead case, a healthcare case, which is basically the same format, you look at what is keeping that person in the nursing home. Is it a lack of home healthcare? Is it a rule or regulation or procedures that Medicaid has that keeps that person in their home? Is it attitudinal barriers? What is the issue?

Well, so what you look at is you look at to say, what is vocational rehabilitation providing? What services do they provide? So I went to VR. And I said, so what can you do?

Well, they don't have jobs available and if they do have jobs, they pay for supportive working for a period of 90 days after a person gets a job and then it's the employer's responsibility.

But they don't talk along with the waiver providers for additional services after that. They don't talk to the Medicaid providers that provide for services before that.

So you have to look at the entire system to say, what is there, what's available.

When you're looking at healthcare, the most important thing is the issue of choice. I said, what are the options? What can you give my client and my client's mother, all the options they have? What services are available?

We don't have that. We're not coordinated.

So you're talking about an informational barrier which is always a huge barrier whenever you deal with an Olmstead case. How do you access services.

So what do you do, how do you do it. Now, the talk of a typical job and some research I did and I wanted to find out in looking at 503 compliance, what are businesses doing? How are businesses integrating persons with disabilities in normal ordinary typical jobs? They make normal ordinary typical jobs and they open them up to persons with disabilities.

But what about Melody, who has a developmental disability? How can she be placed in a normal ordinary typical job? What typical jobs are there? What supportive services are available for her?

And there are.

But the question is, then you look into other things such as customized employment and job carve, which are not obligations under Title I. You have to be a qualified employee who can do the job. It does not require an employer to change the job itself for a new job.

So what I did is I went to VR and I went to a new place, went to animal services and I say, okay, you're opening up a brand new multimillion dollars facility. What are you doing to hire people with disabilities here?

Whenever you talk to people like this in government, you get one of these looks. You mean we have to do something special?

And I said, wouldn't it be a great idea to open up jobs to people with developmental disabilities, to open up jobs to people with autism, this is a perfect place. There's so many people that I've spoken to who said, I would love to have a job with animals. What a great place to work.

So I had a meeting with them and they were very receptive to the idea. They said, that sounds great.

So we sat in a room and they had these five jobs, greeters, walkers, other things, and they were wondering, how do you do it?

So they never heard of job carving or job customization. With regards to employment afterwards, they never knew and VR never knew the services that were available on the waiver after they got employed to keep them in the job. And there were also nothing there after that to say, you can keep this job and there are other jobs that you can do. You're successful at this job and it is a job you want to do and a job that you like to do.

So the focus is, when you can get people out of these sheltered workshops, where do they go? What is the typical employment that is out there? What type of jobs? What hours are the jobs? What services are available? There are services available through the waiver. There's habilitation services that are available. There's waiver services that are available. And those jobs, those services keep people employed.

So when you look at it, when I look at Melody in the future, I'm going to say, "So Melody, what services do you want? Where do you want to work? What's available out there? Speak to vocational rehab. Say, can you carve a job? What can we do? Speak to an employer and do it."

Olmstead is not complicated. Olmstead is one client saying, the services are available, what are my barriers for the services, are these attitudinal or physical or procedural barriers? I was talking to Tina before, and I said, I looked through the handbook and they had habilitation employment services have to be medically necessary? Who makes that decision that has nothing to do with medicine? Are they really denying services because something is medically necessary or not?

So when a person comes to your office and they say, I cannot find competitive employment because of my disability, that could be an Olmstead case. But you have to look at it and say, what services, what programs, what are the hitches, what are the barriers, these attitudinal or policy barriers that prevent somebody from getting a job? If one person has that barrier to get a job, if they're deeming a job-related service as being medically necessary or not, that is what Olmstead is. That is to get somebody out in the community and to get a job, to get competitive employment, because employment is what the goal of what this provision, this effort in Olmstead, is about.

Thank you.

(Applause.)

MARC MAURER: We'll take some questions in a moment.

Mark Felton got out of high school without going through the training necessary to get a driver's license. He a few months ago got his driver's license, and he's been hoping for the last three years or so to earn enough money so that he could get an automobile. And he came to this conference, and one of the first things he told me was that he has possessed himself of a 2002 Cadillac.

(Applause.)

So the next time I go to Ohio, if I should do that, I expect to see him styling on the roads there.

(Laughter.)

Are there questions?

>> Hi, my name is Rena with New York lawyers for the public interest.

In my previous career, I did FSLA cases. I was wondering, is the piece rate that people are being paid under the subminimum wage, is that being calculated correctly and is there room for attorneys to file those cases with attorneys' fees to challenge the calculations that are being made?

MARC MAURER: In the decision that we had, which is currently on appeal before the administrative review board in the Department of Labor, we were awarded liquidated damages equal to the back wages. We were awarded attorneys' fees. And the award was $276,000 recently was issued for attorneys' fees.

I'm sure all of that will be appealed and reviewed. And part of the case had to do with the calculation of the piece rates that were being applied in the case. So if this case holds, the chances are good that there will be attorneys' fees awards. But I am sure once we get through the Labor Department appeal, there will be a federal appeal. I'm sure the case is not over.

>> I'll be watching.

MARC MAURER: You can count on it that I will be too.

Other questions?

>> Hi, this Rabia. So I had a question in the spirit of the conversation that we started yesterday in terms of diversity and race and mass incarceration. Is there any talk of curtailing prison labor, given that this is a new category of institutionalizing people? We know they are disproportionately people with disabilities and it's a fairly lucrative part of the American economic system to pay prisoners pennies on the dollar to produce goods and services.

MARC MAURER: Let's see. I'm not doing that. It doesn't -- we've had a lot of questions from blind people in prison over the years. But we've never done a prison project, although this symposium has urged and suggested that perhaps we should do that. And we'll give it some thought and see where we go with it.

Do either of you know of prison labor cases?

REGINA KLINE: I'm not aware of a prison labor case, but I think that, yes, I had the opportunity to hear you speak yesterday. I think you raised very important issues about the intersectionality between disability and criminal justice reform and the Justice Department is very interested in these issues as well. We should continue to have a dialogue about that.

MARC MAURER: So if you get some really good facts, maybe you could let us know and we'll see what we can do.

One of the things that is true that comes out of these symposia is that there are those who come and they say to me, there ought to be a case involving... And they lay out whatever it is. And I say, you got a plaintiff on you? I'm very often looking for a plaintiff. I am delighted with our clients in Ohio. They are decent human beings and I'm glad to know them. I don't want to sound negative or anything like that, but I would have taken most anybody because we didn't have any plaintiffs. But I'm glad to know there are other people I would be glad to represent.

Other questions.

>> This is Claudia Center. Just a quick comment. I think that we should start saying that job carving and robust job restructuring is required under Title I of the ADA. I know there's cases against us, but the EEOC is starting to come around on this, and if we have another friendly administration for 4 or 8 years, we can maybe even get some good guidance on robust job restructuring for people with intellectual disabilities that's analogous to job carving. I think we should start saying it and then maybe other people will start saying it.

(Applause.)

MARC MAURER: We need to talk about it before it comes true. That's always the case. So that's a great idea. Let's start there. Thank you.

Questions or comments?

>> Mildred Rivera. I had a question for DOJ. I haven't heard of jobs referred to as "real jobs." That kind of surprised me because it seems like jobs in the workshops are real jobs too. They're just not getting real pay for those jobs. So I was wondering.

(Applause.)

REGINA KLINE: I think it's a fair point. You're giving me a pointer in terms of public presentation style for the next time.

I didn't mean to diminish the jobs in the workshops are not real jobs. And the truth is, that the relief that we seek is competitive integrated employment, and I took pains to kind of describe what that was. But nothing about that would sort of belie that people are working, and in fact, a lot of the evidence in these cases are not only are people working but they're working quite hard in the workshops. They're not getting paid competitively, and many of them don't want to work there.

Now when I say that, I didn't say that there aren't people that do want to work there, but I think what our cases are about are significant overreliance by state service systems on those settings in lieu of integrated alternatives.

So you raise a very fair point, and thank you for bringing that up.

MARC MAURER: Yeah, the offer in rehabilitation circles is frequently, we got this job for you at the sheltered workshop, do you think you'd want it.

You say what are the other choices.

And they say, well, we don't really know.

So the choice is, do you go there or do you stay home. With that choice, I mean, there isn't meaningful choice and you start with all these developmental disability systems and they automatically put you on this track and you don't have another track. There is no other meaningful choice that is a real live choice. With that in mind, that's what people end up.

MATTHEW DIETZ: And that's also one of the reasons why information and choice and what's available is something that should be required of all states.

MARC MAURER: Other questions or comments?

>> David Lepofsky, the guy on the other side of that wall. Hey, maybe we'll put Braille on the wall so it will be accessible.

(Laughter.)

Just an idea, in terms of the job carving thing, and I can't point to case law on this but just throwing it out as an idea, the premise that you take the job as is built on the idea that the job today is what it's always been and what it will always be.

And that 30 years ago may have often been the case. But now the job that people are doing probably won't stay the same for more than 20 minutes because of technology, workplace restructuring, working off site, and so on.

So I think one way, if someone wanted a case to challenge the idea of job restructuring that isn't on the table is to pick the right case where you have a workplace where there is a lot of job restructuring going on any way, there's a lot of reorganization or change in job descriptions. So a refusal to do it based on disability could be described as adverse treatment. You're doing it for everybody else, why won't you do it for me because my request is disability based.

It might just be an angle to get a kind of way to get in the door. It's just an idea I thought I would throw out for you.

MATTHEW DIETZ: I think that one of the hardest cases to have are failure to hire cases. They're incredibly difficult employment cases. I think the best shot to the do it would be a change in the regs or some incentives for businesses under 503.

MARC MAURER: Other questions?

MATTHEW DIETZ: One more question in front.

MARC MAURER: Steve, let's get you a mic.

>> First of all, I just can't start without again expressing my admiration for the courage and effort of the workers who resulted in this result. It's just tremendous. And many of our victories, including in the Lane case, reflect that same kind of commitment.

But I'm wondering to what extent in the litigation of these cases the financial situation and possible profit margins associated plays an important evidentiary role.

MARC MAURER: Well, there was no presentation about the position of the workshop in our case. They just didn't do it.

>> But in other cases that will be forthcoming.

MARC MAURER: Undoubtedly they'll argue that that is a factor. They just didn't think it was important enough. They thought they would be able to do it and get away with it and that the workers were different from ordinary workers and that that would be enough.

So I think there will be a different presentation of the record in the next case, my guess would be.

MATTHEW DIETZ: In an Olmstead case, the issue is not so much as the costs or whether or not it's an undue burden, in my opinion, in these cases because they're already providing services and it would be cheaper to get a job on a lot of bases than to have the person unemployed with a babysitter.

Do you have any thoughts on that?

MARC MAURER: There's a good deal of research showing that the supported employment system is cheaper than operating a sheltered workshop. And in the Seneca case, the sheltered workshop has an annual budget of a little over a half a million dollars. Of course that's not all of the money that goes into it because the county provides all of the supervision. There are about 20 supervisors and the county pays for them all. The county also provides transportation, and there are about 60 buses in the fleet. They are not part of the work of the workshop. There is no rent because the company that gets all the goods and services from the workshop has given the facility to the workshop which is a nonprofit. And the nonprofit pays a dollar a year for rent.

I never did find out who pays the insurance. I kept wondering whether or not we had the right to defend that and I still wonder that.

But nobody put on anything about the finance. I would have been glad if somebody had done so, because we might have been attacking a different defendant, and I still think there are some other attacks that can readily be made there.

So if they want to put it together with a different record, bring it on.

>> This is T.L. Just some context as to in the federal prison system, right now the average wage is 12 cents per hour. I have created databases of deaf, deafblind, blind, and disabled prisoners all across the nation. So if anyone is actually interested in taking on a sheltered workshop case or any other sort of case related to those who are incarcerated who are members of our community, keeping in mind that people with disabilities are the largest minority in our prison system, so we're about 20% of the population but 80% of our prison populations, I think it would be worth taking a look at. I would love if DOJ would take some meaningful action on this issue because obviously there's a clear issue. And so that's the federal wage 12 cents per hour average. Most states are lower. Some are not paying anything at all.

In Florida and Louisiana, we have deaf workers working for free. So I would encourage people to go into prisons and find contacts, and again, I'm happy to provide names and information for possible cases as well. Thanks.

(Applause.)

MARC MAURER: You have brought a perspective different from one we sometimes encounter and I'm glad.

So we better follow up.

We are getting close to the end of the session. Any other questions?

All right. Let me just say to all of you, at least the way I look at it, we have an objective here when we come, and the objective is to share with each other ideas that will make us more effective at what we do and that will make us better leaders at the places we intend to lead and that will change the position of people with disabilities in our society.

And I, with such humility as I have, however much that is, believe we've done that.

Now, we're not done. It's not over. We have to do more of it. But I think, at least for my part, I feel better equipped today than I did when we started. I appreciate your being here. I look forward to more interaction, more education, more opportunity to learn what I don't already know.

This brings us to the close of the 2016 Jacobus tenBroek Law Symposium.

(Applause.)

(Symposium ended at 12:26 p.m.)