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.

Welcome, Introductions, and Opening Remarks

MARK RICCOBONO: If you'll take your seat, we'll get started in one minute.

Good morning, everybody! Good morning and welcome to the Jacobus tenBroek disability law symposium hosted by the National Federation of the Blind, diversity in disability rights, working together to achieve the right to live in the world.

I'm Mark Riccobono, president of the National Federation of the Blind, and I want to welcome you to the National Federation of the Blind Jernigan Institute for this ninth law symposium.

How many people have been at all nine symposia?

A few.

How many are here for the first time?

Awesome.

Well, welcome. Welcome back for those of you who have been here for all of our gatherings. Thank you to those who have made it to as many as you can. And welcome to our first timers. This truly is a community we're building as we approach a decade of work in this area.

To start off this morning, I do want to make sure that I acknowledge our sponsors and supporters for this law symposium. Our cosponsors are at the platinum level Brown, Goldstein & Levy.

(Applause.)

We have gold sponsors of Rosen, Bien, Galvan & Grunfeld and also the AARP Foundation litigation. You can clap for them.

(Applause.)

We also have Whiteford Taylor Preston at the silver level.

(Applause.)

The Burton Blatt Institute. Scott LaBarre. The Mid Atlanta ADA Center at the supporter level. Disability Rights Advocates. And the Disability Rights Education and Defense Fund.

And last but not least, the ABA Commission on Disability Rights.

(Applause.)

This gathering has been organized and the program is put together every year by a steering committee. Thank you to each of the folks who have participated on our steering committee. The steering committee again has always been led by and has been led by this year again Lou Ann Blake, the deputy executive director, deputy director of our National Federation of the Blind Jernigan Institute. You will undoubtedly meet Lou Ann. If you don't meet her, you'll see her running around getting things done. So thank you, Lou Ann.

Also on our steering committee, we have Peter Blanck, Charles Brown, Marc Charmatz, Robert Dinerstein, Brian East, Timothy Elder, David Ferleger, Leslie Francis, Dan Goldstein, Scott LaBarre, Jennifer Mathis, Marc Maurer, Mark Riccobono, and Mehgan Sidhu. So thank you to our steering committee.

(Applause.)

In thinking about our ninth law symposium here, I think diversity is not a new topic for the law symposium. We've discussed it many times before. And diversity is a great rallying point for us. It also creates a great sticking point to help us stay together. You know, by coming together in the common bond that is equal rights and actively seeking diversity within our ranks, we create strength in what we do as a disability rights movement. We strengthen our ability to tackle the hard problems, and there are plenty of them out there. We gain perspectives that we might not have had otherwise, and new strategies that come out of the diverse perspectives that we have, and we broaden the understanding that disability is not limited to a set of people. Its impact can come to anybody, with any particular set of characteristics. Our quest for equal rights is not just something that is limited to a particular subset of people with disabilities. In my world, they're referred to mythically as the super blind. Those are the folks that can have equal rights, but other people with disabilities, no.

We find from the diversity that we do, that's not true. In fact, the diversity in the disability field strengthens us and helps us understand that it's not just a select few people with disabilities. It's all people with disabilities that deserve the right to live in the world.

(Applause.)

That's the common bond that Dr. tenBroek started writing about 75 years ago when he established the National Federation of the Blind and it's that common bond that also makes us stick together here in this disability forum, but also as we go out and we face the challenges that come against disability across the nation.

Talking about diversity, though, challenges us a little bit. Challenges us to ask hard questions and sometimes have some uncomfortable conversations. The.

It also exposes our own misunderstandings about diversity and the characteristics that we all have. So the opportunity for us to come together, share those perspectives, talk about them honestly, and how they impact our work on disabilities rights I think is really important, developing those new perspectives.

At the National Federation of the Blind, we know blindness is not what defines us or our future. Every day we raise expectations of the blind. We don't claim to speak for anybody but blind people because we know we don't like people speaking for us.

The fact that we can come together in a forum like this and discuss a diversity of disability topics is part of our understanding that although blindness is the area we know, we recognize that it is low expectations that prevents all people from disabilities from pursuing their dreams. By working together, we can expand the opportunities for all of us.

We find that a lot of our work today, a lot of our victories today, are informed by the work of this disability law symposium and the diversity that we have been able to share through this forum. Just a couple of examples from this year alone -- it's hard to believe April is tomorrow, but only three months in. In the state of Maryland, a couple of years ago we found that people with disabilities didn't have equal access to absentee voting. The state said, that's okay, you can go to an accessible polling place and that's good enough for you.

We sued the state of Maryland to get access to absentee voting not just for blind people but all people with disabilities. We won the first time, we won on appeal, and we think it won't go any further. So people with disabilities in Maryland now have equal access to all forms of voting.

(Applause.)

Well, as long as we keep at it.

And the diversity of that case is part of what made it strong.

The impact of technology and employment. We just had a great victory here in Maryland in a case where discrimination was faced because of new technologies put into the county that prevented the plaintiff from having the same promotion and advancement opportunities as her sighted colleagues. A case for a blind person but a case that has tremendous implications for all people with disabilities who are going to be facing technologies that might shut them out of employment simply because they're built to not be accessible. One of the many things we're working on.

And finally, in closing my remarks, one of the most important fights I think we continue to have in 2016 and one that we may win this year, and that's the fight for equal pay for equal work for people with disabilities.

(Applause.)

It's nice that it's starting to get into the presidential debate, at least better than some of the other topics that have been bantered around.

You know, this is not a new battle for us. Every day we are winning in terms of creating the understanding in the public that people with disabilities are productive employees and deserve the same rights, privileges, and responsibilities as other workers.

Earlier this year we had a significant victory in Ohio against the senator, demonstrating that people with disabilities, in fact, do deserve the same protections under the law as other workers, and I am pleased that we have to chair this law symposium a gentleman who has chaired all of the other symposia we have had. He was a key lawyer in our work in Ohio. You'll hear about that case later in this gathering. He has been working on disability rights for almost 50 years. And not just working on where the law is today, but where the law needs to go tomorrow. It's a key component of what we do here at the law symposium. He helped to create this gathering and continues to be a force for moving it forward.

To open our session this morning, I want to introduce you to our chair for this gathering, the immediate past president of the National Federation of the Blind and our director of legal advocacy and policy, here is Marc Maurer. Thank you very much.

(Applause.)

MARC MAURER: Thank you very much for the kind words. Many of them are true too.

(Laughter.)

I have been here from the beginning of the law symposium process, and I have done things in the law with respect to disability long before that, so it's a great day to welcome all of you. I have the honorable and challenging task of chairing today. And if I may take just a moment, I have been told that there are some things that are required to be done and first is an announcement that says there's a book available. “The Future of Disability: Law Essays from the 2015 Jacobus tenBroek Disability Law Symposium” will be on sale this morning, during lunch, and on Friday after the conclusion of the symposium for $12 at the table here in the members hall.

Lou Ann told me to make this announcement.

(Laughter.)

She said make it often, in fact. If you can find some of the authors, maybe you can give them the sign.

It was a good symposium last year, and I'm very pleased that we have a book about it. We should go to the trouble of making some more books.

Now, 25 years ago, I was coming to the convention of the National Federation of the Blind of which I was the President of the organization then. And I was thinking about why we have such meetings. It seems to me that one of the reasons that we have those meetings is the same that we're having this meeting. So I thought I would give you a very small notion of what I was talking about then. And I said, in 1664 John Milton wrote, "Let truth and falsehood grapple in a free and open encounter."

Then I went on to say that scholars of this eminence believe that a new idea is enough when it's a better expression of truth than was expressed by the old idea, and that ultimately the new idea succeeds.

And I said, but we've had bad ideas and good ideas side by side a lot of times. In our country and in other countries. And I thought, and I said, if the objective in seeking the truth is to achieve fairness and decency, and I believe it is, time and a new idea are not enough. Within the framework of time, there must be at least three components that come together. First, an idea must be conceived which contains an element of understanding that has not previously been reached.

Second, a proponent of that idea must arise. A leader with the capacity to articulate the nuances in a way that will compel recognition.

And finally, there must be a group of individuals prepared to defend what has been propounded. Such concert of effort is essential, not only to protect the new thought, but to give it body and substance to explore its full meaning and implications.

And then I noted that in a fireplace, one log by itself won't burn. You have to have more than one. And the heat that is reflected from one log to another creates the flame. Consequently, my belief is that we come together today either to serve as the leaders who will express the ideas that may very well shape the future, or to assist those who express them so that there can be enough support to build that idea to make it a reality in the decades to come. This, in my opinion, is why we get together for these meetings.

And because frequently we are talking to each other about the hopes and dreams we want to create, I find this a very joyous gathering, and it's a pleasure to welcome you all to it.

(Applause.)

“Building Diversity in the Disability Rights Movement”

MARC MAURER: For our first panel today, we will be talking about building diversity in disability in our disability rights movement. We have three people to present. They are Anil Lewis, Michelle Garcia, and Rabia Belt. I think what I'll do is take a moment to speak of each of them briefly and then to start on this panel.

Rabia is a research fellow at Stanford University Law School. She is a legal historian whose scholarship focuses on broad and diverse issues including the 19th and the 20th century United States history of disability, legal history, law of democracy, history of suffrage, African-American history, American Indian history, and gender history. And she does other things in her spare time.

(Laughter.)

There are many other credits to her background. I have read some legal history and I note that the Magna Carta, which was adopted some years back, lasted for about 90 days. And it's been regarded as a major piece of history in the legal profession, but it didn't last very long. It was reenacted many times, so it does seem to have found some legs after all.

Maybe she'll tell us about that or maybe she has more current matter to talk about and I rather hope so.

(Laughter.)

Anil Lewis serves as the executive director of the National Federation of the Blind Jernigan Institute, where he leads a dynamic team of individuals responsible for the development of implementation of the innovative projects and programs that encourage the full participation of every blind citizen in their communities. He has been a member of the board of directors of the National Federation of the Blind and also has a number of other credits to his background. He has been very thoroughly involved in the effort to diminish or eliminate the subminimum wage, and it may be that he'll tell us about that.

Michelle Garcia is the Latino community development organizer for Access Living Metropolitan Chicago, where she is responsible for organizing educational forums in Chicago to increase the number of leaders with disabilities and to raise awareness of disability rights and services within the Latino community.

Her work at Access Living includes serving as coordinator of the Latino advocacy group whose mission is to create social change within the Latino community. And again, many other credits for her as well.

Let us move, then, to the part in this panel where we hear from the participants. First we will hear from Rabia.

(Applause.)

>> Thanks very much, Marc. Thank you everyone for being here. It's great to see new friends and old ones here and that there's a full house to talk about diversity within the disability rights movement.

So I wasn't planning on talking about the Magna Carta.

(Laughter.)

(Applause.)

I usually study people who are dead but not that dead.

I think I'm going to focus more on people who are alive for our purposes.

So diversity is certainly a really crucial aspect of the disability rights community. First off, as we all know, an issue of demographics. People of color, LGBT people, and women are disproportionately people with disabilities. And people with disabilities are disproportionately people who are LGBT, people of color, and women.

So if we think about disability rights and we think about hitting disability at the center, one of the questions is, who are the types of people that we're envisioning? Are we thinking about someone who is female, transgender, poor, has an invisible disability?

Are we thinking of someone who is facing a multitude of different types of oppressions of not just disability in their lives? There's sort of a cascading dynamic that we need to address when we think about disability, because we won't get to the Promised Land if we just focus on disability as the characteristic. We also need to tackle things such as racism, sexism, homophobia, and transphobia.

The other issue I think is one having to do with PR. So if we look at movements such as the traditional Civil Rights Movement, the women's rights movement, the gay rights movement, they're sort of kicking our butt in terms of the amount of attention that is being paid to those struggles as opposed to ours. And certainly there are overlaps.

But if we are serving people who are just outside in the world, probably most people would have no idea who Jacobus tenBroek is. People don't know who the Thurgood Marshall or Stonewall or Seneca Falls of the disability rights community are. When I surveyed my students at the beginning of the term, they've never heard of things such as the capital crawl or the Section 504 protest. And these are things where I think the academy can play a crucial aspect. If there's one thing that I think will be important to really put pressure on colleges and universities to add disability studies to their registry so that when we think of what's important, we are not just thinking about race, gender, and class, but we also think of ability as bearing a crucial component in an area of study so that I'm not alone or just have a couple of different compatriots looking at disability history, but that it actually broadens out and it's a large group of people.

The next thing I think that we need to think about is how issues of diversity go into creating disability in the first place so that issues of racism and sexism and homophobia can often be the catalyst for creating people with disabilities. So we can just look at, for instance, the situation in Flint where we have people who are being poisoned by lead and it's producing more people within our community. And this is something where it is a political issue and it's something that needs to be addressed as one certainly. And that is something that needs to be focused on with respect to the disability rights community.

We need to have people, for instance, that are there with respect to Black Lives Matter. We know that, for instance, the people who are getting shot and killed by the police are disproportionately people with disabilities. Half of the people who have been injured or killed by the police, in a recent study, are people with disabilities. So our community needs to be there, because our community is there already.

I think sort of the big elephant in the room with respect to thinking about that political aspect of producing disability is mass incarceration. That is a big driver with respect to creating disability in terms of thinking about chronic illness but also the fact that imprisonment in and of itself creates traumatizing effects. So prisoners and ex-prisoners are an important and large part of our community. It's something that we should address.

And the last thing that I would like to say is, with my time, is looking at cleaning up our own house. So I think that is really great that we have this panel as part of tenBroek and I'm really happy to see that everyone is here for the very first panel that is part of the conference. But we have to take the momentum from this panel and infuse it within the rest of the conference. So we need to make sure that issues, especially having to do with race, are an important part of the conversations that are going to happen both for the rest of today and also tomorrow. So it is not just that we have people of color siloed into the diversity panel, but instead that these issues are actually sort of the full panoply of what happens here.

Looking at this room, this is a lovely mosaic of people who are here, but there's a lot of people in this community that are missing. We need to have a serious conversation about why those people are missing and how to make sure that the symposia of the future look very different than the symposia of today and of the past.

Thank you.

(Applause.)

MARC MAURER: We will get to questions here. There are some raised by this presentation. When we get through with the panelists, if we have time for them, which I think we will, we will take questions.

Our next presenter is Anil Lewis, and he has been introduced. Please welcome Anil Lewis.

(Applause.)

ANIL LEWIS: Good morning. So let's talk about the Magna Carta.

(Laughter.)

It is indeed my pleasure to be here this morning. I realized early on that this is a gathering of individuals with a variety of different qualifications in the legal and research field. I did not want to put myself in a place where I would be competing against that master intellect. I'm going to speak from a place that I know.

I'm here to offer a unique perspective, one that's unique to me so you can't challenge me. Everything I say here is the gospel.

(Laughter.)

But I think it's important to answer the question about why to build diversity. And I like to use myself as an example.

Just to give you a brief description of where I came from. I was born in the city, poor family, with all of those associated challenges. I used to call where I lived the projects and my mom used to get mad when I said that. But for me the projects had a different connotation.

How many people know the show Good Times? Yeah, it's like that. I was more JJ than Michael.

(Laughter.)

A household with a willed mother. My dad died when I was 6. My mom was left to raise four kids by herself, two of whom at that time were blind. For most of my time when I was younger, she was a domestic, cleaning the houses of white families, huge palatial houses with the grass and the trees and a vista with a house emerging. They had a pool, tennis courts, trampoline. It was just nice. And sometimes we would get to go there when school would interfere or whatever and my mom would take us and we would be able to go and experience that.

Most people think that this family was privileged. That's what the class system would have us believe. They had stuff, things, they are privileged with their accumulated wealth.

And some would say they would think these people were better because of that particular status.

But like my mom was always grounding me, she made it clear that no one is better simply because they have lots of stuff. She was doing that to prove to us that we were okay. I internalized it. I believed it.

To be honest with you, I was young enough to be naive enough to not have it affect me. So they had a pool. That was nice. It was a little pool. Our community pool in the neighborhood was huge!

(Laughter.)

All our friends would come and play. They had a tennis court. That's nice. Who wants to play tennis? They had no basketball court.

(Laughter.)

And the trampoline? Well, I did like that trampoline.

(Laughter.)

We didn't have one in the neighborhood.

So I guess it would be -- here, let me put it this way. Rather than thinking that they were better off and had privilege, to be honest with you, I used to think, wow, these poor white folk, they don't even know how to clean their own house.

(Laughter.)

My mom has to go help them clean their house.

(Laughter.)

And one of their sons, Mark West, real good friend of mine, it wasn't about race. It was really interesting. But he taught me how to ride my bicycle and tie my shoes. I count him as a real friend.

I think the benefit of it is that it exposed me to things that I would not have been exposed to and it helped me grow. By being exposed to those different things, I was able to make decisions about what I like and what I don't like. It wasn't about privilege; it was about my preference. And I found out that I liked crackers without caviar.

In the midst of all that, though, I had some problems developing my own identity. Especially as a young black man. There were so many challenging and competing perceptions of who I should be and how I should act. And it was very interesting to deal with.

Luckily, I was born at the time in a revolutionary movement, the Civil Rights Movement. Unfortunately, the revolution, some say, was not being televised. I spent most of my time watching “Father Knows Best.” Anybody? Robert Young? What about “Leave it to Beaver”? Anybody? Oh, you trying to act brand new. You know.

(Laughter.)

All the guys on TV who looked like me weren't that positive role models. Super Fly, anybody?

(Laughter.)

Huggy Bear? That's who I had to identify with.

Interesting, the dynamic change, my lack of experience to racist attitudes evolved through that particular perception, because up until then, Mark was just my friend.

So I was surrounded by a network of family and friends that helped me compete against some of those stereotypes and misconceptions of who and what I should be, luckily. I wasn't poorer or richer than anybody else in my neighborhood. Everybody had patches on their clothes. It wasn't uncommon for cardboard in your shoes when the soles went out. So I wasn't any different or made to feel worse.

They helped me deal with some challenges, and I had some additional ones because I was diagnosed young as mentally retarded. In this forum, you're not supposed to say the R word. But that was my experience. Nobody called me "developmentally disabled." They called me "retard." All those things. I know sometimes today it makes people uncomfortable, but I learned to deal with them because of that circle of support, that network of people who made me realize that I was more than the labels people put on to me. And we engaged in some activities, in retrospect, more powerful than I imagined. Anybody in this room know what joaning is? What about playing the dozens? Yo mama so ugly! You so fat!

We did that. It was fun. Insulting people. But it helped me develop a sense of identity.

Help me out. Sticks and stones?

May break my bones. But words will never hurt me.

I am rubber?

You are glue. Bounce off me and sticks to you. Right?

How many know this one. I am not a nigger...

Gotcha. I am not a nigger. I am the nigger row. When I become a nigger, I will let you know.

These things were strong for us, helped us refute the things in our face and allowed us to take control of our lives.

How about this one. Say it loud! I'm black and I'm proud. Look, the white people didn't want to say it.

(Laughter.)

It's okay. You can say it. It's a song.

My mom said, you can't be equal. You have to be better just to be equal. Anybody have this experience? The world doesn't owe you anything. You've got to earn it.

And because of all of these different things that I was told every day, I beat the odds. And it's unfortunate that I guess I was considered more of the exception than the rule. You have to get to the point where it's more the rule.

But I was able to get a full scholarship to Georgia tech. I didn't want to be an engineer but I got the letter in the mail and my mom took it to work and said, oh, my baby got into Georgia Tech and he's going to be an engineer! Guess what, okay, I'm going to be an engineer.

That's when I realized I was part of a minority class. Up to that point, all the places I went to were predominantly black. I went on campus of Georgia Tech looking for a brother. It was scary. Luckily I would default from where I had already come from and it was nothing. It was a time for me to reevaluate who I was. At that point in my life, I developed quite a bit. I became a social deviant. But to that degree, I also learned things that I otherwise wouldn't have learned in the halls of Georgia Institute of Technology.

But through all of it, I realized I was value added, for all of the different components that I had, not just because of my intellect, my likes, my dislikes, my perspective. I had a different perspective. I was able to engage a disenfranchised population of people. A strength that I had.

I was able to add diversity, right? But all I could say was I was able to be one of the absent voices.

So in doing that, I realized that if I wanted to really make a difference, I had to confront those institutions of power. You may have heard Frederick Douglass, power concedes nothing without a demand. So I started demanding and I started getting access to power. I was pursuing what I felt was power, but it was really that misconception of wealth. I had fallen back into thinking that more things made me better. Made me privileged. I had fallen subject to a misunderstanding of what the fundamental concept of economics was. James Brown had brainwashed me that this was a man's world and if the man makes everything that he can, the man makes money so that he can buy some other man. And I wanted to be part of that man's world.

I was making some pretty significant success until about age 25, when I went blind and completely lost my sight. Now I'm confronted with the other social constructs. I didn't have a network of people who understood blindness. I didn't have any blind role models. In fact, my brother and sister at that point in time were employed in the sheltered workshops getting paid subminimum wages. I had some doubt about whether I was value added. I became what I felt at that particular point was just powerless.

And I realized that my power really was invested in all of the social stereotypes but it was up to me. But it was a little more difficult because you're fighting the moral model. Oh, you're blind because you're cursed for your sins. During my period of rebellion, I committed quite a few sins, no doubt. I started believing that, that maybe this was God's punishment for my behavior.

The medical model also aggravated this whole concept because it wasn't about whether I could be who I was but whether they could fix the blindness that had taken place. There was no separation between being a person with a disability and the individual who used to have value. I was an individual who needed to be treated. We need to fix the blindness. Without the blindness being corrected, you can't be a whole person. I was a broken person, a needy person. You can go through the whole pieces of dealing with the loss of the vision. You go through the denial, the anger, the acceptance, the resolution to your situation, and then in the medical terms, they say you develop an identity. But that's an identity of brokenness and neediness.

So you have to hurry up and work and modify yourself to grow and learn and develop new behavior. I learned about this other movement that also wasn't being televised. The National Federation of the Blind, all these people around me started telling me that blindness is not what defines me, that I can live the life I want. I have to set those high expectations, become a better person. I developed a new identity, right? I redefined myself and I realized, you know what? I was value added. I added a different perspective, offered a different perspective. I was adding to the diversity, right? I was including disenfranchised community that otherwise wouldn't be there. I was an absent voice.

I thought I understood power, but it was through the federation that it was a different type of power. Not the power from authority that I had learned that comes from wealth or prestige. But from relationships. Frederick Douglass said power concedes nothing without demand. I evolved it to say power collaborates with the establishment of relationships. And it's through those relationships that I was able to develop relationships with people in power. I was able to gain access through those relationships. I was able to participate and actually share in that power. And the privilege itself was not the development of the stuff. The privilege was those relationships, giving me access to things I otherwise wouldn't have been able to.

The socioeconomic discrimination people think we're facing, those are all true. But I realized that the discrimination I was able to avoid was not being limited to exposure to a small realm of ideas and opportunities. I combated it by being able to access other perspectives, and other opportunities, that otherwise I would not have been able to, through those relationships that I developed.

And we have to learn to pull those positives from every place. I talk about Father Knows Best. That didn't help me develop that positive concept as a black man. But if you watch those episodes, strong enforcement of moral values, which I think helped me become a great father. You'll have to ask my son about that.

Didn't teach me much about becoming a great husband. I wasn't able to convince either of my ex-wives to wear heels in the kitchen.

(Laughter.)

So to deal with the moral model, I recognized that through the evolution and understanding of my personal experience, all the things I had been taught before were different. So I dealt with the moral model in a different way. I reread the Bible with different eyes. It wasn't the curse. Exodus 4:11, the story of Moses. Moses had a disability. And God, being all powerful, could heal Moses but He didn't. I love the verse that says "Who made man's mouth? Who makes the dumb or the deaf or the sighted or the blind? Is it not I, the Lord?"

I like this verse, because if sighted people think I'm cursed because of blindness, right here, you are cursed too, right? Because who made the sighted. Right there along with the blind.

The other piece I love, I read in John, when Jesus is walking with the disciples, they run across a blind man and they say, "Lord, who sinned? This man or his parents?" Jesus said, "Neither him nor his parents. God made him." That's what I believe.

The medical model, a little bit easier because I just prefer not to be engaged. I'm not broken. You can label me broken all you want. I'm not needy. You can label me needy all you want to.

The whole perspective changes when the power changes, right? Let's say people who use wheelchairs had all the power. Right? Who would be the needy person in this room? Who needs the accommodations? Everybody sitting in a chair, all of a sudden you're needy. You need a chair. You're broken.

If the blind people were in power, who would be needy? Who would need the accommodations of lights in this room?

If the deaf people were in power, who would need the accommodation of this audio system? You would be broken. You would be needy.

But that's not the perspective we want either. We want to value everybody, regardless of their current situation, in a way that's authentic and unique but also real to the goal we want to achieve.

Let me skip over this because this is taking a little longer than I thought.

A quick perception exercise. I'm going to describe a person to you. And you close your eyes. In your mind, establish the positives and negatives.

The person is 72 years old. Positive or negative? Good or bad?

This person is blind. Positive or negative? What do you associate with that?

They're Muslim. What do you associate with that? Good or bad?

They're French. What comes along with that? What is your default?

Lesbian. Same person. What comes along with it? The perception is growing in your mind, who are they, good, bad.

Last thing. They're a lawyer.

(Laughter.)

There you go.

Good and bad, all these perceptions, all of it plays into it. If you think you are so enlightened, if you saw all positives in that individual, you are probably the most dangerous person in the room. If you don't continue to ask questions and grow and evolve, you will continue to make things worse than better.

I'll take a quick moment to talk about how it manifests itself. I am a presidential appointee to the Ability One commission. I'm a person who sits on the commission that does subcontracting to people on the commission. I sit on this commission. These are the people who have been perpetuating subminimum wage. Everybody on this panel thinks they know what's best for the people that they're serving. None of them have a true learned experience. If they have someone in their space, that person hasn't evolved into a positive concept.

When we enter into that room and I work with developing the power through relationships, and they start getting to know me as a person, hopefully they can evolve in their perception of what's the right thing to do. Right?

And as a result of that interaction, we have been able in the past to reach a declaration from the commission that says the commission will seek to end the use of subminimum wage through all of the Ability One programs.

(Applause.)

So you heard a little bit about my story. I've shared some with you. You can say that you've met me, right?

(Laughter.)

You know a little bit more about who I am as a person. And you can glean from that what you want. But basically you met a 51-year-old, good or bad, blind, good or bad, black, good or bad, Baptist, good or bad, American straight male who is the executive director of the National Federation of the Blind Jernigan Institute.

And I'm pleased to be here with you today. I hope my words have added a little bit. But I leave you with this charge: We have to build a better community by pulling out the talent from every individual that exists. In order to do that, we have to put away some of our preconceived notions and misconceptions to do that. Go out and be a champion, be a zealot, advocate, you can do that or you can work with me to empower those absent voices to establish an identity and positive self concept that gets this job done.

Thank you guys for your time and attention.

(Applause.)

MARC MAURER: I just love the questions that I know are going to come for this panel.

The third presenter, the person who is working with the Latino community development program as an advertiser, here is Michelle Garcia.

(Applause.)

MICHELLE GARCIA: Hola. So my name is Michelle Garcia. Gracias for having me here. I'm Spanglish, quite a bit.

I'm from Texas. That's not a good thing right now.

(Laughter.)

Our presidential candidates don't make it good to be from Texas.

So as I said before, I'm from Access Living. I've been there for seven years now. I've done a couple of jobs there, but the most exciting one that I've done has been the Latino community organizing work, and that's because, for one, I am Latina. I love being Latina. I take pride from being Latina. Yea!

(Laughter.)

So with my work at Access Living, it's been very much fun and it's been very challenging. First of all because we do not serve a large population of Latinos with disabilities at Access Living. But we have a project going that started off as a pilot project and grew into this great group. We started in 2009, so do the math. It's been good. It's been going on. We've done campaigns. We have a group of 15 people, which is a large group, considering the population.

I work a lot with people who are undocumented. Yes, the big elephant in the room is that. It's pretty much everywhere. As soon as they hear "undocumented," oh, my God, how are you going to help them, why are you recruiting and doing outreach to the undocumented community. It's not like I go out there and say, show me your papers. I see somebody with a disability in need and how can I help.

We began about 7 years ago, and we began because -- I'm not good with technology. Let me figure this out.

So our group, Cambiando Vidas, we began about seven years ago because we saw the need of the Latino community. We went out and did a survey in the Latino neighborhoods in Chicago, and we saw a need for medical supplies, medical equipment, and there were other people who lacked insurance because of what I just mentioned, lack of documents, not able to access hospitals, much less medical supplies or medical equipment like wheelchairs, walkers, canes, you name it.

So we said, why don't we just start like a lending closet. So we were like, hey, if people want to donate wheelchairs, walkers, canes that they have just sitting in their home, we know that people on Medicaid and Medicare tend to get their wheelchairs every 6-7 years and leave the other ones just sitting there. Why don't they donate them to us and we can donate it to somebody who needs them.

And we did this for -- well, we're still doing this. We've been real successful in giving people who need this durable medical equipment. So we asked people to take things because I have garages full of equipment and they're going, Michelle, you know like you have a garage full of whatever, diapers, whatever. But people need it. I get calls -- well, I used to get calls from Chicago but because our state is in such a mess, our governor is being stingy with money and we don't have a budget. So we are trying to get people whatever they need. So as of now, our group is the only one providing services for the Latino population in all of Illinois because they have closed down any services for the Latino population in the different centers for independent living. So it's like yea for us but also oh, my goodness, where are we going to provide all this need. We already had people calling us and there was too much demand for the need. Did I say that right? Need for too much need for ... Supply for demand ... Did I say that? Sorry.

So yeah. That's one piece. We're very excited.

The next piece is, so how do we bring people in, not just by giving them equipment but also by educating them about their rights. They need to know not just because it might be a person who is undocumented or be underserved, that means they don't have any rights. So we started doing educational forums. We started off with doing self-esteem and knowing how to live in your community workshops. I don't know how many of you are from Latino background, but I know I am. They are very overprotective of a person with a disability. I've come to see that they are seeing things I saw since I was little. Like, no, but how are you going to be by yourself. When I moved from Texas to here, oh, my God, my parents, my mother was like, who is going to take care of you, who will help. You know, they did this whole scared thing. When I told them I was going to get married, that was, forget it.

So it's just the overprotectiveness. They want people in a box. So we decided with CV that we wanted to tell our parents or parents of people with disabilities that we can have a life, we can go to work, we can have a relationship, we can go out and socialize. We can be out until 3:00 in the morning. Our parents think that because we have a disability, we can't go out until the wee hours of the night. I love to be out and about. My family did not like that when I was back home. They still don't like that. My mother calls me and tells me, “Are you home?”

And I'm like, “Mother, I'm almost 40 years old.”

And then my husband's mother is the same way. She's like, “Are you guys home? Did you guys eat?”

(Laughter.)

“Are you guys in bed?”

Yeah, it's just crazy.

So stuff like that is what we wanted to portray that we're just like everybody else.

And the next step was to tell them, okay, well, we did all this self-esteem, you can do it, parents you're going to learn we're like everybody else. And now let's follow up with legal rights. Like if you went to a restaurant and you can't access, you have the right to say something. So we've been doing workshops on that.

But then we did a couple of workshops on that together with the mission on human relations and the attorney general's office to talk about disability. And we've continued doing that for some time. But then we also put into the mix transportation and immigration, because, again, many of the people were undocumented.

We were very involved with everything that has to do with human relationships, like what's going on with immigration reform. Anything that has to do with that, we've been doing numerous workshops on anything that comes up. We have to be very up-to-date, or we try to be very up-to-date on what's going on with those issues.

Transportation is a very huge issue for us as well. Not just for the Latino population but everybody in general, because like for example, at CV, there's a campaign where they have stopped a bus route because they didn't see a point of having it. But a lot of my consumers that lived along that area were like, if they stop the route, we don't have a way to get from point A to point B. The other bus stops that were there were not accessible.

So we went to the city and asked for the bus stop to be added back on. We met with the housing authority, transit authority. After three years, we have a bus route. Yea. And we have bus stops where they're supposed to be. They didn't like us.

Oh, yes, yes, I was just about to wrap up.

So yeah, that's just about all of what we do. And just to wrap it up, sorry if I'm talking too much. We're doing a national conference for Latinos with disabilities and I wanted to invite you guys. It's a good opportunity for you guys to come and know more about what we do and share our ideas. This is on May 24-25. So thank you.

(Applause.)

MARC MAURER: Where is it?

MICHELLE GARCIA: In Chicago, Access Living.

MARC MAURER: Do I need to know Spanish?

MICHELLE GARCIA: No. It's going to be in English.

MARC MAURER: Okay. Thank you very much.

(Applause.)

We're only a little behind time. We have time for a couple of questions. The plan is that you will tell me who you are and then we will get your question. We have mics in the aisles, yes, Lou Ann?

>> Yes, and a roaming mic if you can't make it to the aisles.

MARC MAURER: Your voice changed, Lou Ann.

Questions? No questions?

I want to thank the panel members for your presentations this morning.

(Applause.)

>> We're not sure if there is a question.

MARC MAURER: Well, why don't you ask somebody.

(Laughter.)

I invite the panel members for the next panel to come, please.

Panel number two on the same topic. We have three people to present. We have Ella Callow, who is legal program director of The National Center for Parents with Disabilities and Their Families, through the looking glass.

We have Jane Dunhamn, director of the National Black Disability Coalition.

We have Alice Wong, advisory board member, Asian and Pacific Islanders with Disabilities of California.

I'm going to say a word about these folks and then we'll hear from them.

Ella Callow has directed the legal program for The National Center for Parents with Disabilities and Their Families, funded by the administration for community living's National Institute on Disability independent living and rehabilitation research for 11 years. She provides technical support, legal consultation, and resources to parents, professionals, state, federal, and local government systems and institutions involved in cases where parents with disabilities are being challenged on custody of their children based wholly or in part on the parent's disability.

The center has steadfastly prioritized tribal communities. Under her grant, she is providing trainings to six tribal nations regarding the legal developments on disability and parenting that affect tribal members in state court Indian Child Welfare Act cases and in cases involving evidence-based or best policy practices for dealing with disability challenges in parenting.

Among other things, she has clerked for the Hopi appellate court project.

Jane Dunhamn is one of the founding members and is director of the National Black Disability Coalition, a membership organization that was founded in response to the unique issues concerning African-Americans with disabilities. As the leader of the project, she is currently leading the effort to establish black disability studies programs at universities throughout the United States.

She is also leading a number of efforts in this area in New Jersey.

Alice Wong is a member of the advisory board of Asian and Pacific Islanders with Disabilities of California and is the founder of Disability Visibility Project, a partnership with story corps to record, amplify, and share stories of culture.

In addition, she is a staff research associate at the community living policy center located at the University of California, San Francisco, where she develops online curricula for personal assistance workers and family caregivers and participates in qualitative research projects about people with disabilities and long term services and supports.

So with that in mind, we will begin with Through the Looking Glass, please welcome Ella Callow.

(Applause.)

ELLA CALLOW: Thank you for that introduction.

Good morning, everyone. It's been wonderful to hear the previous panel. Really interesting and very different presentations. And thank you for your continued attention to this issue.

I'm going to be talking about Indian country and disability. I find that disability law, policy literature projects, and discussions often fail to address the American Indian and Alaska native population.

One of the foremost reasons for this is sort of a general history of marginalization and a lack of information among our populous as to how modern Indian country fits in our political and governmental schemes. And the particular challenges that face modern American Indian and Alaska native people around disability as well as other issues.

So I'm going to do a little overview, kind of a little show and tell on Indian country and disability, and then talk about specifically how I hacked my own work to make sure that we prioritize this population, and then leave with you a few thoughts.

So there are 565 federally recognized native nations in the United States with 326 different land bases, reservations, villages, and urban Indian communities. Indian tribes are sovereign entities. Their relationship with the federal government and state and local governments are highly circumscribed by statutory and case law going back over 400 years. This is our oldest cannon of law.

American Indian and Alaska native people are roughly .9% of the U.S. population at this point and are not only members of a racial and ethnic minority but they are citizens of a federally recognized tribe meaning they're also a distinct minority.

The Indian reorganization act of 1934 and 1971 Alaska Native Claims Act, at that time many villages were organized to deal differently with the land granted by that act.

Most tribes have some form of executive, legislative, and tribal courts. They have independent social and health services funded through a complex web of tribal, state, and federal moneys. 61% of American Indian and Alaska native people who are tribal citizens actually live outside of the parameters of their tribal community. And 70% of American Indian and Alaska native people, whether they're citizens or not, live outside of the jurisdiction of their tribes.

The disability rate among American Indian and Alaska native people between ages 16-64 is 27%. That's compared to 18% for the American population generally. The reasons are both historic and current. Native people die at higher rates and are disabled at higher rates than other Americans from diseases that we don't think about like TB. They die 600 times more often. 600% more often from TB, for instance. Diabetes, have 89% higher occurrence of diabetes. Injuries, mainly work-related, 152% higher. Suicide is 62% higher. In fact, Indian youth have the highest suicide rate of all ethnic groups in the United States.

The reasons for this level of disability are both historic and current, as I said. They include a violent 400 year history of oppression with extermination, force add simulation, the banning of traditional religions until 1978 and forced removal of children from their communities to schools and government adoption programs up until the 1970s as well.

Terminations of government, status reorganizations, and forced relocation programs. Each policy period carried discreet health consequences and resulted in modern day circumstances that undermine the health and well-being of American Indian communities. They are the most impoverished, least educated, most exposed to contamination, and most often rural communities.

Relatedly, they're most reliant on employment that carries high risk of death or injury such as farming, mining, logging, and military service. There's a higher level of volunteerism than any other group in the United States. Obviously being a soldier carries a lot of risk of disability.

The Indian health services and DHHS is the principal federal health provider wants to raise the health status. IHS, the Indian Health Service, can take the form of IHS hospitals, clinics, urban health centers operated with IHS money. Also tribal hospitals, tribal health clinics facilitated with a mix of IHS, tribal, and state funding, but the majority are understaffed, underfunded, and paperwork and time involved to get services is long. The distances people have to go to reach them are often extreme as well.

Some of the most exciting work happening in these communities is around their unique vision of what disability is and is not being used to address particular issues. The impact of historical trauma on the psychosocial health of children for instance, they found that adverse childhood experiences are often linked in this community to parents avoiding trauma. A recent article determined that each adverse child experience, ACE, increased the odds of these children later developing a variety of psychosocial disabilities. For instance, every ACE increases the risk of PTSD by 5%, depression 57%, suicide 57%. This type of research is being done by native scholars, using native models, with an integrated view of health and disability. The results are turned into intervention to prevent services by tribal governments.

You can look at the Cherokee nation for example. This is motivating them to really be aggressive in taking over social service funding streams and provision from states. One tribe in Washington was the first to do this in 2014.

In this way, they're trying to avoid further generational trauma and cycles of ACEs because outside services take the children away to serve them with psychotropic medications and nonnative models for healing and they're less successful. So keeping them in their communities, preventing adverse childhood experiences, getting them healing in their community, they're trying to interrupt this cycle of trauma and loss of children.

Okay. So you have a background now on Indian America and on disability in that community. What I want to talk about is kind of how I opened the door in my own work to this population so that it could possibly be of use to you in your own work, taking these ideas and manifesting them.

So my work as a legal director at the national center for parents with disabilities and their families centered on the disparity of children in custody loss of people with disabilities and adoption and guardianship aspects as well. I conduct research, I draft model legislation, provide technical assistance, participate in advocacy training groups, governments, organizations, national and internationally, and provide technical assistance to families.

In our research and the research of colleagues we found that parents with disabilities have significantly higher rates of custody loss than able bodied or typical parents. It's widely estimated that 40-60% of people who are cognitively disabled and 60-80% of psychosocially disabled lose custody of children. Both blind and Deaf communities report heightened rates of custody loss. These parents report high levels of discriminatory treatment in child custody cases.

We have found that counties vastly underestimate this. There's no universal screening. So as an example, I was working with L.A. County and asked them how many parents in your system do you think have disabilities. And they went to a back room and I don't know what they did. But they came back and said, about 3%.

When we went and did random sampling of files, just picked through randomly, and went through using a research model based on some British research that's been done, we found that 17% of the time they were relying on statute sections that allow removal or termination of parental rights based on disability and therefore unfitness.

So already it's gone from 3 to 17%. When we went through and looked for formal and informal evidence regarding disability such as social workers saying the parent has a disability or a police report saying, records of psychiatric treatment, records of medical treatment, it was almost 40%. So we've gone from 3 to 17 to 40%, right? So it's vastly underestimated.

What I wanted to do is that I knew there was this desperate level of child loss among parents with families with parental disability. This is a significant policy issue. Understanding Indian and Alaskan natives face this even more so than the standard population. We knew this would be a particular issue in this community.

We made the decision to consciously open the door to all of our work to the American Indian and Alaskan native population. First, we created an outreach plan to engage these communities and let them know we were here as a resource for them if there was a disabled parent who lost custody of their child or if they wanted more information. We prioritized participating in their conferences. We volunteered our time and efforts to organizations focused on these populations. We contributed the disability piece to efforts to create American Indian and Alaska native foster care and child welfare systems.

So we started out early dost conferences on the west coast, presenting on how disability in parents was used as an in-run around the Indian Child Welfare Act. So they said, yes, we require an expert to show that a child must be removed from their community, but what people were saying was, oh, but mom is bipolar. This isn't a cultural issue. So we don't need to follow the law and have an expert. Or, yes, it says you must place a child with a relative first if possible, but you know what? Grandma has arthritis so we think that's a disability and that's an end run around the requirements of the act.

We volunteered with the bay area collaborative of Indian resources, they have memorandum of understanding with child welfare systems, they come in when there's an Indian family in the system and provide a warm hand off to services and resources. So I joined the board there. We worked with the Casey family programs in our area doing research to figure out what social workers did and didn't know already about their legal requirements with the act. So we put in questions about their understanding disability as well.

Secondly, I come out of the Native American community myself. I have a background in federal Indian law. So I knew that there was going to be very little attention paid to this intersection of disability in indigenous populations. I had never seen it in the scholarship. I knew there wasn't much there. So I began to write and publish on this topic specifically. I found places that would let me publish on the intersection legally of Indian Child Welfare Act, ADA, and 504.

Then I also qualified my participation in other work, other publication work, on being able to include disability in these populations. And collaborated and support and disseminated any other work I found by anybody on this topic.

And lastly, I sought and secured moneys to conduct demonstration projects focused on this community and disability. We used research money to secure resourcing services to support families around disability. And demonstration projects that could deliver practical and useable information to tribal systems, enabling them to advocate for their own state courts.

So one example was we did a project looking at the national child of abuse and neglect data set. We designed it so we had questions in there to see how often are American Indian and Alaska native children coming into the system being taken from caregivers that have a disability. And we found that it correlated about with the level of disability, about 27% of the time. But we didn't have that before, to go out to make arguments that this was worthwhile to pay attention to as an issue for this community as policy around child welfare. Using the Native American Court Judges Association districts, we picked five and targeted them to come and provide knowledge transfer and trainings around all of the things that happened over the last year with the Department of Justice and Department of Health and Human Services handing down interpretations of how the ADA is applied to child welfare cases. Most native people live off the reservation and end up in state courts. State courts have obligations under the ADA and 504, but if tribes don't know about them, even if they have standing in the cases, they won't be making the arguments they need to make to ensure their people get good services and case plans.

The connections paid off. In summary, we've had about 1.4% of our consumers from this population. People would say, well you're coming out of that community anyway so those are easy connections to make. They're not. You're talking about the most rural community. The ability to actually have internet to find us? We're one office in Berkeley with one lawyer and one researcher. It's actually been, we've really had to be conscious and intentional about it. But you know, it's paid off because we've seen that we're able to interact and provide information in a way that makes a difference in the lives of these families. And the more good work you do, the more they refer other people to you. So hopefully we'll keep those numbers up.

In closing, you know, include American Indian and Alaska native people in your work. Include their governments. So often we think local, state, federal, but they are the fourth category of government in the United States. We think of larger or better resources to politically connected and minority groups but we forget about what native people call the fourth world peoples. Those people whose land we all stand on while we talk about our own struggles, while we talk about other communities' struggles. It's not that difficult to make these efforts. There are tribal governments. They all have websites. Reach out. Find out you who is in your state and make an intentional effort to be inclusive. It's the right thing to do.

Thank you.

(Applause.)

MARC MAURER: We have the director of the National Black Disability Coalition, Jane Dunhamn.

(Applause.)

JANE DUNHAMN: Thank you. I would like to first thank NFB for inviting us and for having a space to have really difficult conversations.

A disability rights elder and member of the historical 504 California sit in has written in her book, "If you only looked at photographs of the disability rights movement, who would believe that we are a multiracial community? But while people of all races participate in the hard work of fighting for disability rights, the rewards of that work, employment opportunities, leadership, speaking opportunities, have not been shared equally. One needs only to glance in a cursory way at the statistics of who is employed in disability rights organizations. They are by and large white people. The presence of disabled people of color, particularly in leadership positions, continues to be abysmally small.

If you follow even a few historical threads, the struggles of disabled people of color have been marked with incredible resistance from white disabled people in disability organizations.

When I received the invitation from Lou Ann to speak today, I thought, how can we expand the conversation and space about diversity in disability? Thoughts that came to mind were oppression and discrimination, power and privilege, diversity speaking to inclusion, disability justice speaking to internal account of how we treat "the other."

Disparities in access for people of color have been documented in every public system and evidence of growing economic inequality in our country continues to be the vicious cycle of limited access to employment, education, healthcare, housing, transportation, and other services for those struggling for a better life.

When people also have a disability barrier to necessary services, how these two interact is lacking.

Racial and ethnic disparities has been studied. This research should be applied to people with disabilities. Until there is research to demonstrate otherwise, the healthcare studies that conclude that race contributes significantly to chronic inequities, we should consider that people at the intersection of race and disability and the effects of race may be more detrimental than the presence of disability.

A concrete step to address barriers and/or reinvent policy or practice should be deep investments to facilitate building the capacity of disability organizations to have conversations about race, discrimination, and racism so that honest discourse to address barriers can occur. Such discussions involve sharing the power.

We must consciously and deliberately give voice to diverse groups of people with disabilities. The disability community has successfully embraced nothing about me without me. It is now time to apply those principles to those who are not at the table.

Thank you.

(Applause.)

MARC MAURER: Well, I think we should talk about it and I appreciate your bringing it to our attention.

Our last presenter is not with us but has a presentation. Yes, Lou Ann?

LOU ANN BLAKE: Yes.

(Laughter.)

MARC MAURER: Surely you're not over there drinking coffee or anything.

Alice Wong is from Asian and Pacific Islanders with Disabilities of California and here is her presentation.

(Video.)

(Applause.)

(Applause.)

MARC MAURER: Very well. Now we're going to have questions. I want to begin by seeing if Ella Callow or Jane Dunhamn have questions for each other. Do you?

ELLA CALLOW: No. That is a surprise.

MARC MAURER: No, no, they say they're perfectly at ease.

All right. Let me say this. The National Federation of the Blind is a membership organization. We permit people to join if they want to. If they are blind, we elect them to our leadership positions. If you want to be in a leadership position, you must share this characteristic. If you don't, you aren't eligible. That solves the problem of whether or not you've got blind people represented.

Now, the question of having American Indians or black individuals is different, and that is less clear.

But anyway, we do have a song in the National Federation of the Blind called the Big Old Blind Uncle Tom Pig. And that song is based upon how it is that an agency will very often look around for the most tractable blind person around and put that person on the board and say, oh, yeah, we have blind people, look at this guy.

And we think that's not a representative of the blind community. In order to be a representative of the community with this disability you have to be selected by either elected by somebody who is in that community and represents a constituency or appointed by somebody who has been elected. And if that doesn't happen, then you're not a representative of that community in our opinion.

Now, diversity is a difficult challenge. I'm going to ask you folks to comment about this in a second. I have been blamed for wearing a suit. I had a bunch of people in this building not too long ago who said, yeah, when you start talking about all these difficulties we have in our community, it's just a bunch of suits who get together and try to solve it for everybody.

I thought, but it doesn't make me a bad person. You know, I do wear this suit.

(Laughter.)

But somehow that hasn't changed my moral perspective.

I realize that there are people that we might want to invite who don't wear them, but, you know... and then I've been blamed for the same thing, for being white. I ran into that argument when somebody said "You discriminated against me!"

I said "I did"?

And they said "The picture of me is smaller than the white guy's."

First of all, I didn't know they were black. I also didn't know about the size of the pictures. There are advantages to being blind.

I'm not sorry about not noticing these things, though. I'm glad you're here.

But how do we solve the problem? What do we do specifically to change this perspective? And what am I supposed to do or what do you intend to do in order to make this different? Can you two tell me about this?

ELLA CALLOW: That was kind of the basis of my entire presentation. I think I said pretty specifically that I was focused on praxis, on how you take the idea of diversity and manifest it. That's why I went through in the specifically three things that I did to, as I said, hack my own work, things that anybody can do, right? Reaching out with your advertising of events and issues to communities and go, you know what? We haven't been including that community, let's reach out to them.

Finding out what their system is for education and training and community work and putting yourself in their spaces. That's one.

The other I named was to specifically in your published work make a conscious decision to address any specific needs. To do so, you have to educate yourself. You have to find out. How exactly is our issue relevant in this community; let's put some energy into writing on that, disseminating on that, knowledge transferring on that in the work that we're putting out into the world.

And I think -- what was the third thing that I said? I said that, oh, when you're going for money, make sure if you're doing research, you do surveys, if you do analysis, qualitatively or quantitatively, of a system, build something in, talk to that community, ask them what they would like to know. I've found this works both ways. So the native community would allow me to add questions to a survey about disability, so when I do disability research, I add questions about their community that they said they would like to know.

So those are really specific ways. I don't talk in generalities. I'm not talking to the ether. Give me praxis or give me death. If we're not doing something useful, don't talk about it. Hopefully I've been clear enough.

If anybody wants to talk about how to do this work, if you have any ideas, or if you want to find out what tribes are in your community, what villages that you could partner with, I'm totally happy to point you to websites that facilitate that information.

MARC MAURER: Jane?

JANE DUNHAMN: Yes. I too spoke about the need for funding for organizations, disability organizations, to really do an assessment of how they include, do they include, and what their own attitudes and beliefs are.

I really believe that if we don't begin to talk about racism and how that plays out with disparities and really take an internal approach and sit back and evaluate who we are and how we respond to difference, some of the other approaches aren't going to work that we really need to begin with yourself.

My background really came from doing anti-racism work long before I began to do disability work. And I've been doing disability work for 46 years, so as you can see, I did anti-racism work in the heat of the Civil Rights Movement.

So how do you connect the two? How do you have really tough, uncomfortable conversations where people have to do an internal look at themselves?

It's hard work, but it can be done. Because it's uncomfortable, because it's painful does not mean that we can't get there. We have to go through that. I'm sure we've heard medicine tastes terrible, but you will get better. So we need to begin to take the medicine to begin to get better.

ELLA CALLOW: If I could just add one thing too. This idea that it's really difficult, as a nonperson of color, going into a community of color and getting work collaborative, but the fact is, I'm mostly white too honestly. You know? And you know, whether or not that's relevant for my tribal community, that's another issue, what my racial designation might look like to others.

And the other thing is, if I'm going outside of my own community of people who know me, you know, if I'm going to St. Regis Mohawk, I'm not Mohawk. It's irrelevant that people look and say, oh, well, Indians. It doesn't matter because the identity is tribal. I'm not Mohawk. If I train at Navaho, I'm not Navaho. I have to educate myself. I have to read their tribal legislation. I have to understand their conditional law, their reorganization government law, how they intersect or do not anymore, so that I understand what I am coming to and I come there with respect. I have to do all the same work around cultural competency each time I go in these communities. It's not like I have some innate knowledge culturally of how to work with these communities. They're each unique and diverse; it's only a very topical treatment of the Native American Alaskan native experience that would make you think if you know one tribe, you know them all.

Everybody has to do that. You always have to do that. For the African-American community, it's the same. You don't necessarily understand the West African immigrant culture just because you're African-American. You have to educate yourself on that. You don't necessarily understand southern black culture just because you're from northern California and happen to share genetic material. There will always be differences. Everyone is educating themselves all the time. It just doesn't excuse the majority of culture from having to do the same thing, just throw your hands up and say it's too hard, because everybody has to do that.

(Applause.)

MARC MAURER: I could ask other questions but I'm sure there's a long line.

DANIEL GOLDSTEIN: Hi. First of all, thank you for fabulous and enlightening presentations. I want to make the observation that I can think of no better place than to make these observations than at a seminar for Dr. tenBroek since he wrote about Japanese internments and history of the 14th Amendment. There's a commonality in his mind at least as the founder.

I was sort of interested in asking a little bit about the flip side because for us in practice in the disability rights movement, it's a daily struggle to get acknowledgment that disability rights is a Civil Rights Movement and that it has a place at the table with other civil rights movements. And in that respect, it's nothing new. I remember the discussion in 1967, 1968, isn't this women's right thing a distraction from the real civil rights issues? We see the same thing again with the gay rights movement having to establish itself as a legitimate civil rights issue.

And so -- and a couple years ago, Wade Henderson said your problem is you're not at our table so how do you expect us to know about your issues.

And I thought, shouldn't we know each other's issues without keeping score?

I guess I wanted to ask you, what kind of representation is there in people with disabilities in the other Civil Rights Movement and is there some way we can work on the two in some kind of synergistic fashion?

JANE DUNHAMN: I am from New Jersey, and we lost one of our greatest civil rights advocates to Baltimore, Cornell Brooks, who is now the national director of the NAACP. Before he left to come to Baltimore, I really -- he headed up the New Jersey Institute of Social Justice, and I really pushed the notion of disability within the black community.

Through a lot of work, now the institute is really looking at those issues and they started off with the issue of incarceration, what does incarceration mean, what are the numbers, what are the percentages of African-American males who are incarcerated that have a disability.

It was a hard, hard amount of work to begin those discussions because the Civil Rights Movement, the African-American Civil Rights Movement, wanted to even in this day wanted to really stay within the confines of the black experience, the African-American experience, the descendant experience.

I also am the deputy chair of the New Jersey Black Issues Convention. The second day of our four-day conference is youth day. Just this last year I said to a roomful of youth, we love you because you're ours, but in disability, we talk about intersections. And when you come to the black issues convention, you can bring all of you, not just your blackness, whether you're gay, whether you're incarcerated. All of those make up your identity, but we must accept people in all of their identities and that will help intersect all of the different civil rights going on.

MARC MAURER: Other questions?

>> Yes. Matthew Dietz. I want to talk about "Nothing about us without us" and intersectionality and the disability rights movement and other folks. For example, in institutionalization or in dealing with children being taken away from their parents in dependency situations, a lot of the issues fall more on the communities of color or Hispanic communities except there may be different interests in the disability rights movement themselves. What is the responsibility of the disability rights movement to say this community of color has an interest in ensuring that 80% of the people in institutions are not black, or that Hispanic or black families, their children are not taken away more than white families that may have more resources?

So how do you think the old tenet of "Nothing about us without us" fits within a racial and cultural context?

ELLA CALLOW: I can speak in my own work, you know, working around issues of 14th Amendment, right to privacy, right to due process, losing your children to the state, etc. Nothing about us without us also implies that I'm an American citizen, and the constitution is precious to me and I don't want to see it abused or families you abused because they're being deprived of their constitutional rights. Federal laws are there for their protection. Whether it be the ADA or Child Welfare Act or 504.

I feel like in doing the work around making sure that the law is followed, we're trying to eliminate disparity in, you know, child custody loss. That will necessarily benefit some communities more than others because they're overrepresented. So you know, African-American and Native American children are highly overrepresented in child welfare cases already. So they will glean an additional benefit than other communities by merit of the fact that we are interrogating compliance with constitutional and federal law in a system where they're overrepresented.

So I think it tends to be more harmonious I think perhaps in this work simply because the communities that most need it will receive if. If we do the work, they will be benefited.

But you have to reach out to them at this point because we don't have mandatory screening. We know that they are overrepresented within an overrepresented population, right? We know there are too many people with disabilities in the child welfare system and too many of them are people of color. We know there's an overrepresentation there.

But at this point because there's no mandatory screening, which I really want, it's my big thing, that I would really like to see some screening so we can identify people, track their numbers and say, absolutely, look, this is the overrepresentation, we need money for services and resources, we need training on how to comply with the law and prevent disparity or entry at key points in the process.

But at this point we need the families and professionals to contact us. That's the only way we find out about the cases. If you don't reach out to those communities of color within the disability community, then we're not going to get a true representation of how things are working for them in the system.

So I think we have to do that work right now. Hopefully all of that work will benefit everyone, but for us to know that they're there and be able to bring their stories forward and talk about it, they have to contact us and that requires us to do the work to be inclusive.

JANE DUNHAMN: I think there is --

MARC MAURER: Your name?

JANE DUNHAMN: It's Jane, I'm sorry.

MARC MAURER: Pardon me. I thought you were asking a question.

JANE DUNHAMN: I think there is an opportunity for folks doing the work across the issues to come together. It is apparent to me that how is it that we have civil rights organizations that are specific to race doing work around incarceration and that leadership is not sitting at the table with the leadership from disability organizations? It is amazing to me that we have the LGBT community and their leadership, which may not be specifically around disability but who is not sitting at the table with the disability organizations? We need these diverse groups to sit at the table with leaders from the disability community so they can learn together and pool their resources.

I can speak specifically to my work in the research and what we've learned is that when we talk to black leaders and we tend to use "black" because of the diaspora rather than just African-American, that it's difficult for them to make that leap into disability. So we can't begin to make that unless we invite them to the table. And so it is not just people of color with disabilities, but who is doing the fight for the work for the disparities in prison reform and make sure that those people are at the table with disability organizations so that you can mesh the two issues together in a very thoughtful, proactive way.

MARC MAURER: I would be willing to come, and if you want to come, I would be glad to have you at the table at the same time. And if we could find a way to put this together, it would be a really good thing.

I notice we're up against time so I hope you'll get a chance to ask further questions during the break.

We do have a number of workshops. I want to thank you folks for coming to provide very thoughtful presentations today and ones that stimulate our thinking.

(Applause.)

ELLA CALLOW: Come on up.

MARC MAURER: Now, our disability and discrimination in the LGBT community is happening in the Zaborowski room. The second is in the fourth floor conference room. The third workshop, litigation tips for young lawyers, is happening in the Harbor Room. How schools are using truancy laws to avoid their responsibilities under the IDEA is the Utah Auditorium. We have fee petitions and how to do those in the tenBroek Library. And we have a great presentation at lunch. Please be there.

(Break.)

11:00 a.m.

“Fee Petitions: Lessons Learned on How to Maximize Your Rate and Recovery”

Jacobus tenBroek Library

LARRY PARADIS: So why don't we get started. We'll go around the table and introduce everyone. Maybe mention whether you've done a fee motion in your practice already, at least one, so we can gauge our presentation and discussion. I think the goal of this session is to share experiences and practice tips, so it's not just Mike and I talking.

I'm Larry Paradis, Disability Rights Advocates. Many, many fee motions over decades of work.

MICHAEL BIEN: I'm Michael Bien. Rosen, Bien, Galvan & Grunfeld in San Francisco. We live mainly on statutory fee shifting. We do some other work but that's the vast majority of our revenue source.

>> I'm (inaudible) and I've done fee petitions after jury verdict.

>> Hi, my name is Michael Stein. We've done fee petitions.

>> I'm Rick McPherson with the Minnesota Disability Law Center. Even though we're a P&A, I do mostly fee generating. Until recently, most of it had settled. I've been prepared to do litigation but it didn't happen recently. It's happened now a couple times.

>> Hi, I'm Glen Parker. I've done a number of fee petitions. Also practice in New York City, which I'm not sure, so we have fee catalyst theory, which is gone on the federal level but I can share the experience of litigating catalyst, which makes it a lot easier.

>> Hi, I'm Matt with the Washington lawyers committee for civil rights and we've done several fee petitions too. And I am particularly interested to hear how it works with the catalyst theory because we have a New York case where we may have to be using that soon.

>> I'm Susan from AARP, foundation litigation. I have a national practice. I was thinking it's been ages since I've actually done a fee petition because all my fee cases have settled.

>> I'm with disability rights Texas, and I teach at the law school. Thank you, Michael, for speaking to my class a couple years ago.

I don't think I've done a fee petition in a long time. I've been settling a lot recently as well.

>> My name is Melissa Keys from the Indiana P&A. Similar to the others, we tend to settle before we need to do fee petitions.

>> Larry Berger. I'm in private practice in the Philadelphia area. In my prior life, many years ago, I did a fee petition in a plaintiff securities case, which is a different animal in some ways but not in all ways. And more recently, because in Philadelphia it is the common practice that people who are successful in IDEA cases and have to file a fee petition to get their fees bring in somebody else to represent them for the fee petition. I did that in a case for a private attorney and we did settle the fee issue before it went to a hearing in that case.

>> I'm Linda from California. We do all civil rights class actions. So even when we settle a fee dispute, we still have to file a fee petition to get it approved by the court so we've been doing fee petitions for decades, like Larry and Mike, but I happen to have one that's due in two weeks so I thought I would come and get some tips.

>> I'm from southern California. I have worked on a fee petition but ended up settling that portion outside of court.

>> Melissa Gibson with the Virginia P&A and I'm very new to litigation. So I'm hoping to pick up some of your experience and wisdom.

>> Martie, disability rights Tennessee. We usually get our fees in settlement but I've done one fee petition.

>> I'm the current disability rights litigation fellow at Brown, Goldstein & Levy and I expect that I'm going to get thrown into the fee petition on the case that we just won.

>> Carlton Walker. I work here at NFB and I have my own private practice as well. I don't do a lot of litigation, but I want to learn more about this. I've done advocacy in litigation.

>> Okay. Over there?

>> Hi, I'm Sharon from Morgan and Morgan.

>> Marc Charmatz. I've done a number of fee petitions.

>> I'm Mary Vargas, Michael's law partner. And like he said, we have had to do a fee petition.

>> I've done a lot of fee petitions. I think it's been a couple years since I've had to do one. But we do them regularly.

LARRY PARADIS: Okay. Let's get started. We have like volleyball back and forth section of the discussion. I think we can present this at a pretty high level because almost everybody here has done multiple fee petitions already, one or more.

Obviously we are in a fee shifting world of the ADA and 504 and state laws. The right to fees is clear under each of those statutes. It's set forth in the statutes if you are the prevailing party. There's always a question about what is a prevailing party. But most of the law are clear that you have to have established a change in the legal relationship between the parties that benefit the plaintiffs. And that generally under federal law, no longer can be met by showing you're a catalyst. That's the Buck Cannon case. That was a Supreme Court decision that is one of many ways in which the republican majority undermines civil rights laws by reversing decades and decades of precedent through procedural changes that don't get a lot of attention by the press but really affect our ability to practice.

So we often are looking for other laws to establish a right to recover fees as a catalyst.

The catalyst theory, for many decades, is that if you have litigated and sought to obtain relief but during the course of the case actually got it through changing the practices and policies and conditions that the defendant's entity provide that were the subject of the case, so you basically won but did not get a judgment because it became moot, you could then recover fees for your work, if you clearly established the goal of the litigation. The Supreme Court said that's no longer sufficient. So a lot of cases now have been struggling over what does it mean to change the legal relationship.

And generally, most courts say if you have a settlement agreement that retains the court enforceability, you can go back to court to enforce it. So you need to know how much is enough settlement agreement to establish it. That's when you don't include a fee.

But sometimes defendants, you have to accept your right to go to court for the fees without a fee recovery provision, and you want to make sure you have enough in there to meet the circuit decisions.

And then there are some state laws and civil rights laws that do retain the catalyst recovery. Ninth circuit has allowed California state law, when you have pending state law claims, to encompass catalysts and multipliers. Mike will talk about that.

So we are always trying to find ways to resurrect the catalyst theory.

So tell me a bit about your litigating in a catalyst.

>> Sure. New York City, administrative code, what they did was they passed what's called a restoration act of New York City coding in 2005. Within it, they pretty much told the courts, you can't just say you're going to federalize New York City law the same. There must be a more liberal construction of the law.

They said, specifically by settlement, voluntary change of behavior, or judgment. That's pretty powerful because what can happen many, many times is you can get right up to the steps of doing a trial and then they say, okay, I'll do it. Which is sort of what happened in Cannon. You achieved your ultimate relief but you can't get any of the effort for it and can't get paid for it.

And catalyst has worked and it will get you your fees for everything that you worked on. And it is generously construed too in terms of establishing catalyst, I've yet to see a case, though, that goes into, well, were you the catalyst, were you not the catalyst, and how much is the court really going to indulge you in saying, well, I'm going to need to take discovery, is the defendant actually going to admit that yes, this action caused the change or were they planning it before, did they do it independently. That's something I haven't done yet, but we have done catalyst and been successful with it, even in times where there's been no judgment.

MICHAEL BIEN: One of the strategies that we've used sometimes is to move for an injunction anyway, and arguing that the fact that they changed only in the face of litigation is no assurance that once we go away, they're not going to go back. And there is a whole set of law about this, about when a government agency or private party changes their conduct, is it permanent enough that the court still should walk away and say it really is moot, it's finished, or is it something where there's still a need for injunction, maybe not as intrusive of an injunction, but for the court to retain jurisdiction. This isn't just for fees. It works for fees, but it gives you the power to help your clients once you go away from this moot case.

Quick summary of the law, the more permanent the change is, if it's a law, passed by legislature, that's pretty permanent even though it can be changed. If it's administrative regulation, it's less permanent. If it's just a policy or practice, you can really say this is not much of anything. But it's just another strategy to think about when you're in that situation, which is happening more and more, of people fighting you tooth and nail and then right when you are ready to win and get your judgment and eventually get other relief for your clients and fees for your work, they say, oh, well we'll just fix it this way. So you just kind of say, sign here, you need an injunction anyway.

>> Yeah. If I could add on that, because I've actually been litigating this for years now and written a lot of briefs on it.

It kind of goes into, there is a distinction between government actors and private actors in terms of how permanent they claim it is. But the thing is, when it comes down to policies, those are things you can definitely get an injunction for. If it comes down to something structural, like they installed the ramp already, then you're pretty much, it's going to be difficult. And you know, there's a case called Feldman out of the fourth circuit, I believe, involving the closed captioning of an NFL game. There's another case called Sheely MRI I believe tenth circuit, that gives you the whole standard to go through. So you could really attack it like that and really I suggest if you do this, look at those cases before you take a deposition or before you do some discovery, because you can actually elicit testimony as to how permanent the practice will be.

I recently did a case involving a municipal parking lot. They were pretty much segregating all of the disabled spots to the basement and weren't having anything on top. And so now, finally, at the very end, they're going to do it, but with the judge, what I've been arguing is, hey, they could change the spots at any point in time. It's just a matter of paint. And they're saying, no, no, no, we're doing all these other things.

During depositions, I asked specifically, how often do you paint, how often do you change these things.

And policies. That was also done I believe in the Molar case in the ninth circuit which involved a lot of policy changes. Once you do that in discovery and establish that things can change, even for governments too. You can get different administrations come in and change their policies too, and that happened in the Sombus decision, second circuit, I believe. It can be -- you know, you can avoid it, but you just need to keep it in mind before it gets there. And the retention of jurisdiction is absolutely critical for any settlement agreement that you're going to do if fees have not been established.

LARRY PARADIS: One topic I wanted to address is when you are negotiating a settlement, frequently the other side, when it gets to the provision on dispute resolution, will want to say the prevailing party in dispute resolution may recover fees and costs. So defendants want to incorporate a contract clause to a fee shifting into a dispute resolution clause. And of course that puts our clients at risk and is a disincentive to us pursuing enforcement of the settlement.

We always start out in the negotiation saying no, we want to adopt the same standard that applies to civil rights cases which is the Christiansburg standard one way fee shifting where the plaintiff recovers fees if the plaintiff prevails on the issue. Defendant does not recover fees if the defendant simply prevails; they have to also show that the claim is frivolous.

And what happens is most of the time the parties cannot agree on which standard should apply in dispute resolution and we end up with a clause that is vague, that basically says the prevailing party in the dispute resolution may recover fees and costs in accordance with applicable law. That's a phrase that we've now used at least 20 times. We have never tested it. Basically it moves the issue down the court, is what I tell defendants, and you get to preserve your right to claim it's too late, the settlement agreement is a contract, we get to preserve our right to say, no, it's the continuation of unrelying civil rights case so it should be Christiansburg standard.

Has anybody actually ever tested this issue?

>> I just had a case where they settled it, we got all the injunctive relief to the end, and then they made their motion for fees, we made our motion for fees, so we were cross moving against each other. And yes, I had to do the whole Christiansburg standard about that.

And also look at it in terms of it's very hard for a defendant to get fees, especially when you're getting relief. If you're getting relief, showing your claim is not frivolous. There's case law to that effect, where the court says we can envision no scenario by which a plaintiff who obtains relief, their case could be found to be frivolous.

And also the attorney fee standard is I believe unless it's unjust too, you know, I know a lot of times it says in the court's discretion, but that discretion is really very severely curtailed, at least where I practice in the second circuit, where it says unless it's unjust. And I believe there's Supreme Court case law on that too. So you do have an absolute right to it.

I think what you say in regard to applicable law, you'll be fine because that defaults back to Christiansburg.

LARRY PARADIS: That's what we think and have come to live with, that assumption, but I have yet to see anybody test out this question of what does that clause or wording really mean.

MICHAEL BIEN: I think that where it's been litigated in some longstanding civil rights consent decrees under 1988 or 1983 civil rights action for post judgment kind of fees like disputes monitoring enforcement, there's some really very good liberal standards. Not only have to be prevailing as a plaintiff, but as long as you're doing normal monitoring and enforcement work, which you're obligated to do, you shouldn't have to win to get fees. In other words, you're trying to help the defendants come into compliance and show they're in compliance and it shouldn't be about constantly achieving victories along the way. And if you really talk with defendants about that, it's do you really want us in the mode of trying to catch you on something and go to court? Or do you want us in the mode where we're part of a collaborative process moving forward? And I think the law, obviously there's some bad decisions in these areas too, but in general there's good law about when you are a plaintiff who has a consent decree or injunction and your responsibility is to monitor and enforce it, you prevailed already, in the past, and after that is the work you're doing reasonable and necessary. And if you do something that you lose on, the argument is not reasonable and necessary. But if you bring in a whole new argument and issue and the judge says this is beyond the scope, you may lose fees on that but ordinarily we've done pretty well saying this is just what any good lawyer would do given this injunction or consent decree.

LARRY PARADIS: Let's assume we've reached that and they can recover fees but they have to apply to the court and make a motion.

MICHAEL BIEN: This is me for a while.

It's got to be reasonable. And what does that mean? I think that there's one area, and I'm not sure how many people are in this area in the room, but a common fund. Where the settlement involves the creation of a big pot of money from this case, employment cases, other cases like that, then usually there's an analysis of the fees are looked at in two ways, one as a percentage of the common fund and different circuits have different sort of baseline, you know, numbers, 10%, 20%, 25%, sometimes it depends on the scope. You know, when you get over a billion, they tend to knock you down a little bit. Let hope we have this problem somewhere. But usually in those situations you want to prove your fees are reasonable both by the lodestar method, your rates times your reasonable hours, and by the percentage common fund method. So usually a good fee petition where there's a common fund does both and shows is our fees are reasonable under either method.

Another issue that comes up a lot is rates. And I guess the biggest thing, I do a lot of fees work where I'm not involved in the case, I come in as a fees expert or fees lawyer, and my biggest argument with people is your rates are too low. I'll say it to all of you. Your rates are too low. You are great lawyers. You're doing difficult complex cutting edge work. It's just as tough as securities law or anti-trust law. I've been both. It's not very tough. This is an area of law where we're making new law, we're dealing with very challenging new issues. We're dealing with, you have to be creative in your legal arguments, and the facts are difficult to obtain. We have clients that can be difficult to communicate with by definition sometimes. That is part of the area of the law about why you would be entitled to your expert in this, you know how to do these things, respect yourself. Don't compare yourself. Bring in a fees expert or do surveys or look, but don't look at the insurance defense bar which is where the defendants are going to look.

>> Or worker's comp.

MICHAEL BIEN: Or worker's comp bar. Nothing against them. But they have a different market structure. They have a constant volume of work from a single or two clients and it's not the same kind of market. So with that, setting your hourly rate is very, very important.

Yes.

>> So I was discussing my hourly rates in Rhode Island with a leading lawyer in the state who does phenomenal civil rights work. And it turns out that what she told me is that the rate she set was I thought incredibly low. And she said because she takes both paying clients and also does fee generating work, she uses the same rate in her fee requests for hourly fees. And so that because her -- you know, so that therefore she charges what I think would be a very low rate. And I wanted to see you what thought about that for those people who do both and to what extent.

MICHAEL BIEN: Let me tell you a secret about lawyers with thousand dollars an hour rates or $1,500 an hour rates.

>> I'm talking about --

MICHAEL BIEN: I understand. I have a $900 rate. Sometimes people pay me that. Same thing for lawyers on Sullivan Cromwell and anywhere else. Most of the time that's their rate and then they discount. Heavily. If you read any articles about the big firms now, they have these rates and then their clients are negotiating discounts.

So rates are rates. This is a capitalist economy and clients have a lot of power.

And so but if you start out low, you're never going to get any more than that. So this is my rate. We set it every year. We do a survey. Every year. Every December. I call Larry, I call other people. I call people in big firms. You can find out, where can you find out rates. Bankruptcy cases. Rates are public. You can find out what's being awarded. And for some reason the bankruptcy bar gets away with like the highest rates of anywhere.

Other areas where there are fee petitions, anti-trust, securities, you'll find cases. In California, a lot of the high tech firms, the patent cases, you know, those lawyers are, you know, for their cases, they can have five firms working for Apple, five different law firms, all charging these astronomical rates. But then if you're in a disability case against one of those firms, why did you have two lawyers at this deposition? They have five different law firms working on the trial. And it's all public. So be aware.

I've worked in -- I have different hats. I'm in different places. This is the community I respect the most in terms of the quality of the legal work, the quality of the reasoning. You guys undervalue yourself.

But anyway, each market, the law is that it's the rate of the location where the case is being litigated. That's the basic law.

On the other hand, there's also law that says if the client couldn't find a lawyer with appropriate skills, expertise, or willingness to do the case in that area, then you might be able to get that lawyer's rate. So frequently we can get our rates, the San Francisco rate, in another jurisdiction, say we had to bring in an expert for this. You have to prove that and have a client declaration like I looked, I tried to find lawyers, they wouldn't do the case, I had to bring in this specialist.

Question?

>> I have a variation. Because I agree with you. I've had fights in my office about where to set our rate. I have no trouble at all getting well-known civil rights attorneys, even friends who are defense bar folks, to say their rates, what they are, and we made a conscious decision to set our rate at the low end of what we saw.

And I thought for a long time, when looking forward to when there would be litigation, that the fight would be about am I good enough for that.

I'm learning now that there's a different fight that's now actually happening which is particularly because I come out of a P&A. We're not in a big firm structure. I end up having to do everything. And they say, okay, maybe you're worth 650 bucks an hour, but you don't have any associates. There's all this -- and it's never identified, but they'll say, he's doing associate work. We've already made an attempt to cut out the clerical work, but whatever "associate" work is, they're saying I'm billing for that and gee we have this structure, we have six lawyers working on the case, the partner is up here, but most of the work is being done by people at 200 an hour. Why should...

MICHAEL BIEN: Right. I think this is a common argument, not only but also applies to a lot of solos, employment lawyers and other people in those. We've represented them in many fee cases. And you have to come back. You know, of course if you use a traditional legal structure, they'll also say you use too many meetings and every one of these arguments is made on both sides. And they're both equally valid or invalid. So if you have this traditional firm structure with junior associates and mid-level associates and young partners and senior partners and paralegals, you have too many people and too many meetings and computer programs are looking at your fees and there are defense fee experts looking for the word meeting and telephone calls running them through their programs and saying, look, there are too many.

So I think the argument you want to make is, I've gotten rid of clerical things, and I'm actually a pretty efficient skilled lawyer. And a lot of lawyers now work on their own, technology is much better, it's easier, and I'm a pretty efficient guy. And look, rather than just saying I didn't use associates, I only spent eight hours on this brief. I could have had a junior associate, spent two hours talking to them, they would have spent 25 hours on it, I would have spent two hours editing it.

So rather than just saying, yeah, I don't have any associates, say point to something in my fee petition that's excessive. Because a lot of times, and that's really where we won some of these fee cases is burden shifting. If you as a plaintiff have a burden of establishing the reasonableness of your rates and the reasonableness of your hours, and that means you explain what you did, why you did it, how you supervised it, you know, why you did this, why you did that, you also have to explain your billing judgments. You always want to include that. I wrote off this, I wrote off this, and I've gone over it with a fine tooth comb. Make the jump comfortable. And just at the end I usually say, write off another 5% or 10% just for fun.

And then the burden is supposed to shift to the other side, and if they just throw things and say, he doesn't have any associates or he... You come back and say, your burden was to point out a specific work that was unreasonable and unnecessary or excessive. And they usually don't do that.

>> In the special ed cases around Philadelphia, the school district of Philadelphia is always represented by private lawyers because they have many IDEA violations, too many for their small staff to defend. So the plaintiffs will always get the bills from the defendant's lawyers and that helps them both with rates and also with, you know, if you spent 40 hours writing your motion to dismiss brief which was denied, then we ought to get to spend 40 hours in defending against it. And so that kind of thing could be helpful.

MICHAEL BIEN: That's very true.

Let me just point out one other thing as we skip along. Frequently you have a case where you've brought, you know, 10 theories against 20 defendants --

>> That was my question.

MICHAEL BIEN: And you don't win on everything. As we all know, there are some bad case law about whether or not you have to be cut for that. And I think this is a very important issue. I'm not going to use case names and stuff, but I think it's important just to think about the standard generally is if you can show that the specific work you did you would have done any way, it doesn't really matter that you lost -- again, it's coming back to the same point. Explain what you did and why you did it. So let's say I got an injunction but didn't get any damages. I'll explain which work I've given up on because I didn't prevail on damages and I would recommend as a fees counselor, you did give up something. Find something that you can write off and say, okay, I didn't prevail on damages. I'm going to knock off my damages expert. I'm not going to ask for that. All the work for that. And this one other witness. But every other witness, I would have taken that deposition anyway. I would have written that brief anyway.

So the people, the bad case law, the -- and some of the courts actually say it. The plaintiff's lawyer refused to allocate any of their fees to any of their lost defendants or causes of action. It actually says that in some of the ninth circuit cases I have to deal with. I say, why did you do that? So the court has actually held, under these circumstances, we can knock off 25% or 50% because going to this crazy theory, well you had four theories, you prevailed on two, therefore, could you get half your fees. You actually won several hundred thousand dollars at a trial for your client in a discrimination case but you didn't win on every theory. She's a winner, but the way they structured that fee petition resulted in them losing half the fees. So again, it's really, really important to explain. You'll see that there's very little work that you would do differently because of theories, different legal theories.

Anyway, so again, it's the fee petition that's the key.

>> So my question is related about different defendants. So the same thing would be like when we did an additional complaint on some litigation we were doing against three housing facilities, and we're settling with one. So they want us to divide our fees for drafting the complaints in thirds. And it's like, no, because we wrote really one complaint and then changed the names. So we would have pretty much had to do -- you know, we could discount it by like 10% because like we had to change some facts or whatever, but we would have had to do the same work, even if we were suing just you.

So you would use the same kind of thinking in that. We might give them a little discount for being prompt since they're the only one settling.

MICHAEL BIEN: That's really what the law is. But you have to prove it. You have to prove -- because if you don't, the judge is going to do something very -- well, it sounds rational, you had 10 defendants, only judgment against 3, so I'll knock off 70%. Whoa, I just lost 70% of my fees. That happens.

So I think that defendants will make this argument. It's one of their good arguments. And I've actually had a judge say go to every deposition and you'll get 30% of the deposition time. Didn't make any sense. This witness would have been deposed either way.

>> So you're always weighing purity against practicality.

MICHAEL BIEN: Multipliers. You know, in my practice, they're a dream. And again, this is another area with a very important case for civil rights lawyers, nobody else cares about it but the Supreme Court has done to multipliers and expert witness fees. Luckily in the ADA, we have market rates and experts. And the other area I practice in, prisoner rights, we have a cap of approximately $200 an hour on the upside and no expert fees. So it's a really lucrative area I encourage you all to get into.

(Laughter.)

But the answer again is be smart. So we always use ADA and Rehab Act claims in these cases which is also important to get good relief for your clients. That's the real reason I do it. But again, if you -- you have to think about fees when you draft your complaint. There's nothing unethical, even if you're an NGO, whatever it is, get the money. It's sitting there on the table. Just add that theory in.

There's a little bit of room on federal multipliers. The Perdue case left an opening in the Supreme Court in 2010. But I haven't seen a lot of good results in this. Again, it's an area where, you know, only in civil rights you get screwed. Anti-trust lawyers, securities lawyers, you know, thanks to the Anita Hill amendments employment cases, you can get good big fee awards, but so what do you do?

We have state law in California, we had state law claims and luckily, as Larry mentioned, the law in ninth circuit says if you have state and federal claims in a case, you can get the better fees law for the same work. I'm going back to lair ray.

LARRY PARADIS: We have a lot more on our list than we're going to get to in an hour. So I'm really trying to focus on what are the hard issues that we all deal with at a high level where the answer is not always clear.

So back to the negotiation process. When to put the fee issue on the table. Defendants will always say I want one number. You know, tell me everything. What you want for the fix so I know the cost. What you want for damages. What you want for fees. And I won't negotiate them unless you put it all on the table.

And Supreme Court even in class actions in a case said that is not a violation of any ethical duty that the plaintiff's counsel have.

MICHAEL BIEN: They were wrong, though.

LARRY PARADIS: So you can do this. And we tell every lawyer that we work with that it's terrible practice to let the defendant bargain away the fix in return for your fees for the fees in return for the fix. And defense counsel will always say, well, we can't work this out unless you put it all on the table at once.

If you have a mediator, they are very helpful in working through this process.

There is one mechanism we've found that we use over and over that generally works and that is to say to the defendant, and often through a mediator, we need to stage the negotiation, we need to focus on the class issue or the fix and class damages first, and the agreement that we reach will be contingent on then resolving the remaining issues, normally fees, and if we don't reach agreement on all issues at the end of the negotiation process, then the whole settlement is off.

And the one thing you need to know and we want the mediator to tell the defendant is, we never go backwards. Once we reach a tentative agreement on a class fix, then when we move on to the fees, if we can't reach a resolution on fees, we are not going to be willing to reopen the renegotiation of class fix. If the defendant says you want 50% of the fees, you have to give up something on the class fix. Well walk out. Your clients have to support that, but it works for us. It works for most class action lawyers will follow this approach. It tells the defendant, okay, this is the phrase, they always say, we can't buy a pig in a poke. I don't know what that means or where that comes from, but we all know what it means and they say, we can't agree to spend a billion dollars on fixing L.A. sidewalks if we don't know what your fee claim is going to be and we don't factor that in. And the answer is, you can negotiate it contingent on resolving the fees so you're not buying a pig in a poke but you're staggering a negotiation.

I will say defendants' counsel say, can't you at least tell me off the record what your fee claim will be so when I go to my client I can get authority for money sufficient to both fix the problem and pay you.

And I have to say, that is the difficult issue. We try avoid that. But there's actually some jurisdictions that require class action plaintiffs to tell defendants where their fees are periodically throughout the case. I've found that very odd, but it clearly, the courts differ in how they approach this.

>> In Maryland, it's unrelated to class versus nonclass. It's in any fee shifting case except for like social security or something, you need to send quarterly letters saying how much the value or the dollar value of the work has been done in the last three months. And if you don't, this is sort of complicated, but if you don't send the letter, you don't get fees, except there's this out that the defendant has to actually ask. If they don't get it, they have to ask before they can use that as a basis for not getting an awarded fees. But so there's no mystery at the end of the case.

MICHAEL BIEN: I just want to add one thing Larry said that I think is so critical here is from day one with your clients, you have to talk about money. And your money. And that you're working on a contingency, you're not charging anything, you're going to be laying out money for experts, this office you're meeting in is not free, you have to pay rent, these are employees. Everything. But you're willing to do that and go all the way with them, but at some point the defendants are going to try to split us. They are going to come in and say, we'll give you more if you screw your lawyer or they'll say to us, we'll give you more fees if you screw your client, and we're both going to stand tall and stand together. If you tell them in advance, these bad guys are going to do this, they'll look at you and say, oh, wow, you're right, those assholes.

(Laughter.)

If you don't talk about fees, and if we don't like talking about ourselves and money and it comes up and you're uncomfortable with it and you think you have an ethical problem, your client feels very uncomfortable and they think you have an ethical problem because you think you have an ethical problem. You don't have an ethical problem if you talked about it with your client. We put it in our retainer agreement. We talked about it. It says, I will stand by my lawyer -- now whether that's enforceable, I've never had to, but it's basically forcing me to talk to them and explain to them about this. And I really urge you to do that. And that will help down the road when those difficult moments come. You'll be the hero rather than the bad guy.

>> By the way, my experience, at least in the P&A world, I do have that discussion early on, and I say, they're going to try to split us. They say, we want to make sure you get paid. And when we're in negotiations, sometimes I've been in the situation where the client is saying, you should be getting more. And I say, for other reasons, no, this is fine, this will work. But maybe my experience, I'm sure it's not universal, but I've always had good experiences talking about the split with my clients.

>> I mean, I go through this all the time but the biggest problem I have is in fair housing cases where you get somebody who needs an accommodation right away and like a ramp and they're in a wheelchair and the defendants come in and say, we'll pay the money for the ramp, we'll do that, but we won't pay anything else. I've been there. And it's awful. Because at one point your heart breaks for the person, and at the same time, it's like, well, and the client wants this thing and the money is kind of not that important and it's very, very difficult.

>> I have a question. Like I said, I have not done litigation in this field. I'm actually a municipal attorney. So I do subdivision land development types of things. We have fee shifting that way.

The question you ask, oh, what will your fees be, my answer always to the developer was, a whole heck of a lot less than what you're paying your lawyer. Would that be accurate in most cases in this field as well? Or maybe not?

>> Maybe not.

>> Okay.

MICHAEL BIEN: And when that happens, when you look at the defendant's fees and they're lower, there's a lot of law that says, well the plaintiff had the burden of proof, they had to go out there, all the information is in the hands of the defendants. But of course it's always better if they have a lot of fees.

>> Plus a lot of times, in my experience, the defendants, because they don't have the burden, they can do a lousy memo. We have to spend a huge amount of time educating the judge. So it doesn't always work out as nicely.

>> We had one defendant and I'm not sure if other P&As have experienced this, but they tried to make the argument that since we get federal grants, say it's just for legal services, that we are in essence double dipping by recovering fees.

>> Yes, we've had that as well.

>> That's ridiculous.

>> And it's been... I mean, eventually they agree give fees, but it's -- I hesitate to litigate to the point where they make that argument in front of a judge and we get a bad judge.

>> There's good case law. U.S. Supreme Court.

>> I had a case where Florida in a P&A case, they said we're entitled to market rates. It was like they were just doing it to delay us because, you know, there are a lot of tactical advantages for them in denying you fees until the bitter end. I mean, the law is good on getting paid.

But my question is, I think being able to walk away from a case and say, well, we'll litigate this to a decision is really premised on you have a great case and you're going to win. The problem comes up if you have a case where maybe you thought it was like the most wonderful case in the world in the beginning, and maybe sometimes you take some nice case for some poor person who has kind of an ambivalent case. But I think there are issues of malpractice and other things from walking away from a case for fees if you wind up litigating and losing.

MICHAEL BIEN: Well --

LARRY PARADIS: Those are strategies and decisions you want to work out in the beginning of a case, obviously, and have an agreement with your client about not caving in to the strategy, if that's what the other side asserts.

But sometimes you do need to walk away from your fees. And live to fight another day if your case develops some weaknesses.

MICHAEL BIEN: I always have these fee agreements that talk about damages can be less than fees and so you can win 25,000 for your client because can you get a million in fees. You want to talk about that in advance. But, you know, when push comes to shove and there's a good reason to settle, you know, I always want to make my client happy. I've never enforced my retainer agreement against my client. I want my clients to be happy with what I'm getting and they're getting. And if the case is terrible, it doesn't help anyone litigating it. So I think what Larry is talking about is when you're in a strong position. But obviously if you are bluffing, you're risking a lot of stuff saying I'm going to walk away from this great settlement because you didn't hit this fee number. We all have to do that every day. But you have to start out, like I said, high and then you can go down lower.

LARRY PARADIS: So in class action law, as Linda mentioned, we have a unique world where we have to get court approval of fees. Even if we've reached an agreement on the number with the defendant. When you reached agreement on a number, that's generally called a clear sailing agreement until that the defendant is not going to oppose your fee request.

Courts look with some skepticism on these clear sailing clauses. They factor it in as one of about eight factors they look at to decide is the settlement overall fair and reasonable.

When we tell the court we didn't negotiate the fee number until all the other issues had been resolved, they say, well then that shows a lack of collusion. So it helps to tell the mediator and the defendant, it's going to help get court approval to this whole settlement if we don't put everything on the table at once. We have some good court decisions that say that's actually a factor that helps support final approval.

There is a new requirement, not really new now, but in the last 10 years, that you give notice to the class of a fee motion in class actions. 23H. Rule 23H. It hasn't been tested very well as to what that means. Typically, if you have a specific number you have agreed on, you want to put that fee amount into the notice that gets distributed to the whole class about the settlement itself. And then the class can object if somebody wants to and the court will rule on the final approval.

If you haven't reached agreement on a number, there is a question whether to say in the notice how much plaintiffs will be seeking in fees. Some practitioners will say it's enough just to put in the notice that plaintiffs are seeking fees and costs and the amount the court will determine. That's reasonable.

I'm not that secure that that's sufficient for due process under rule 23H. So generally what I do now is I put in what is our lodestar amount that we'll be seeking and say in the notice that plaintiffs will be seeking up to that amount in fees and costs for work up to that date.

Has anybody had any court rule on what is notice to the class of a fee amount? I don't think anybody has really tested it. But I think the spirit of this 23H is that you want to give the class enough information for a class member if they want to to object to your fee request. And if you're not telling them how much you're going to be seeking, I think a class member could come in and object to the whole settlement and say, I don't know how much plaintiff's counsel are seeking so how can I object and this is a deficiency in your class settlement. That would be my concern.

MICHAEL BIEN: I think I've talked about a bunch of things. One thing I wanted to mention, historic rates versus current rates. So there's some good law that you can seek current rates, the rate at the time of your fee petition, rather than historic rates. I have an experience where the defense said and convinced the court that we were getting historic rates and I said, well if that's the case, we get interest. And it actually turned out to be a far greater amount than the current rate because it also compounded. Like a six or seven year big long litigation and they thought they were getting this boost up in rates, which we were, but there was a lot of work, going year by year, and then adding interest and having that turned out to be a much greater amount. So you can always say to them, sure, you want historic rates but then we're going to do compound interest. But current rate is always the easier, better thing to go for.

Even though fees motions are motions, use your evidentiary skills. I think this is important. Things have to be by declaration. The declaration should be real declarations where people say things that they know and have knowledge of. If someone's an expert, qualify them as such. Why is it that you know what market rates are. I think any lawyer really could do that but they should say why they know. I've been practicing in this jurisdiction, I regularly get information about rates.

I also think it's -- I routinely do declarations for free for other lawyers. You should get in practice of doing it for each other. People need some supporting declarations. It doesn't take that long just to support someone in their case. You can usually do that in 5-10 hours. I sometimes charge for it, if it's last minute and somebody is a big money case and they want me to do -- if they want know do a review of the whole litigation, reasonableness of their hours and their success, and I don't really know them from Adam, then it's going to take me a lot of time.

But normally, just for their hourly rates, I'll do that for a plaintiff's lawyer. And really the more you just do it for each other, the stronger the community is. And of course it should be true and real. If I see somebody whose rates I can't support, I say that and I don't do it. It has to be real and not make believe.

>> Could I ask... So you actually do some review of the reasonableness of the time. Do you recommend that?

MICHAEL BIEN: From an outside person? I mean, obviously you have to do it. If you're the supporting person, yes. But I don't think you have to, but it's, in some large cases where we have thousands of hours and complex litigation, I think it's a good idea to have somebody -- if I think -- you have to think about what the litigation is going to be about. I've seen more and more it's about the reasonableness of the work rather than the rates. And the arguments we talked about before. Why did or did not this guy use associates.

>> Why did it take this long to do this.

MICHAEL BIEN: Yeah. And by the way, I frequently, when I'm looking at a client, a fee client, tell them that this has to be cut out. You know, you have all these people doing 20-hour days. They may have put that on their time record and I'm not saying they didn't work them, but you're never going to get that. That's a vulnerable thing. Try to get the vulnerable things out because that's what a good defense lawyer will pick out. A guy who puts in 20-hour days and, you know, writing bad time records is also a related thing. By bad time records meaning entries that don't really reflect substance of anything. You know, just says worked on case. Or legal research. You know, those are vulnerable entries. So you really have to work with yourself and staff on that.

>> Motions to file.

MICHAEL BIEN: How do you turn secretarial into billable. Make sure people in your office know what they're working on. Assisting lawyer on cross-examination looks better than copying big stack of paper for Mike.

(Laughter.)

That's not compensable. Assisting on preparing for cross-examination is. Even though the person was doing the same thing. You know, pure secretarial, you have to be careful with. And we try to send things. Rather than having someone standing at a copy machine, send it out. But anyway. So what you put in your time paper matters.

>> Quick question. So you were talking about looking for things that should come out. Are those things that you would take out entirely or that you would put in and sort of write off and say I'm not going to charge for this because...

MICHAEL BIEN: I want you to get credit for all your write offs except maybe things you found from a different case wrongly put on your computer.

>> So you leave it in and just say reducing down to 20 hours instead of 100 hours or whatever.

MICHAEL BIEN: Right. And by the way, I recommend reducing the number of timekeepers. So people have two or three hours on their case or 10 or 20, or big case maybe, if under 100, knock them out. It won't cost you a penny in the end and it looks great. You knocked off all these timekeepers. It looks pretty bad when you have five pages of timekeepers and you don't even know the names of half the people. So you reduce the number of timekeepers, low billers, and then the judge will feel comfortable that you actually looked over your work and made reasonable and appropriate judgments. And then on the reply, you can say, yes, they did find 10 hours that we shouldn't have put in but I already knocked off 10% of all my hours, judge, so I'm sure I've taken care of it.

>> What's the current thought on quarter hour versus tenth of an hour billing?

MICHAEL BIEN: I think it depends on jurisdiction. You have to know your local --

>> Where I am, they don't want that. It should be .6. .1. Everything like that.

>> So tenth of an hour?

>> Yes. But for things like that, you could also do it as ministerial. Bill at 100 an hour. There are cases out there that say if an attorney does put an exhibit binder together, you are entitled to the paralegal value rather than writing it off.

MICHAEL BIEN: I'm just saying be straightforward about it.

>> And travel time should be 50%. That's how it is in my jurisdiction.

MICHAEL BIEN: Not ours. And again, you have to say, an advantage of being -- I was a big firm partner and that's the law, right? The practice in this community was to bill clients for travel time. I swear that that's what I did for my big corporate clients. That should apply in my civil rights cases. I mean, if it's not the practice, then you shouldn't get it. But it really comes from that. And it could be very different community to community.

>> The district of Maryland, which I don't know may be the only one in the country, has published in the local rules presumptive rates for various levels and rules --

MICHAEL BIEN: D.C. still has Laffey --

>> That at least gets adjusted for inflation every year and isn't that bad. But the Maryland rules --

MICHAEL BIEN: By the way, I litigate these issues. Don't accept it. Courts are wrong on these things. They're violating the Supreme Court, who says it's a market rate driven thing. The ninth circuit has rejected Laffey. I think one of the things is you have to come back to the law of fees, the Supreme Court decides these, they're pretty good on market rate and hours. And you should fight back on the right case. It's not easy. But I think judges are sitting on the bench and what's a federal judge making now? 160 I think it is?

>> 203 because the chief judge in D.C. just retired at 203.

MICHAEL BIEN: I think it's only the chief. But you come in and you say you want this and they practiced 30 years ago and they start screaming at you. So there's always that problem. But that's something I'll have to look at.

LARRY PARADIS: Let me just mention because we're running late already, when to hire a fee expert like Mike is important. If you know you're going to have a battle with the opposing side over your rates and over the lodestar how much time you put in and you have multiple cocounsel, it's helpful to bring in a specialized fee counsel like Mike and a few others who do this regularly. Two factors there are they need to be paid for their work, and in some cases they'll come in on a contingency basis the same way that you've taken the case which is they'll apply for fees on fees and the judge will decide how much of the work they spent on fees is compensable. But these are risky cases for them too. So more and more often now, the specialized fee counsel will want to have an agreement that you as the merits counsel will ensure they get paid. And so if they don't get paid fees on fees by the court, then it comes out of your own merits lodestar.

And this can be a very judge specific issue. If you've got a judge who is notoriously bad on fees, then you have to assume they'll be rough on the fees on fees. And it can still be worth it to bring in a specialized fee counsel and pay out of your share because it's not always comfortable when you're up on a fee motion telling the judge, here's why I am so great, here's why I should get the thousand dollar rate because I'm the best thing since sliced bread. It's better to have specialized counsel making that argument about why all the plaintiff's lawyers are stellar in the case.

But you have to make a decision based on the judge and your sense of the judge that you've learned through the case and from talking to others about is this going to be a hard one or not.

MICHAEL BIEN: I recommend and I'm sure there's various people around the country doing what we do, most of the time I don't think it's good to bring in fees counsel and appear unless it's a pretty substantial motion. But we can still be advising you from behind the scenes or doing a declaration. There's different levels. One, call me up, I give advice, no charge, all the time. Next level is I'll do a fees rate declaration, your rate is reasonable. I can't necessarily do that all over the country, but I can in some jurisdictions. And then the other level would be actually appearing in the case as cocounsel for purposes of fees. And then, as Larry said, sometimes we do it always straight contingent but sometimes if we get screwed by the judge, we need some backup from merits counsel.

12:30 p.m.

Lunch and Keynote Speaker

MARC MAURER: All right. If I may have your attention. Give me your attention, please.

As you know, we're talking in this law symposium about disabilities and other characteristics that identify populations that we have come to regard as diverse in our society and the intersections that occur there.

It has been a wish of mine expressed at more than one of these symposia event that we find a way to get more of our colleagues on the bench. It is a pleasure for us to have a United States district judge to make our keynote today who is from the district court for the middle district of Alabama. He was nominated by President Carter, which shows you some about his legal career. He was confirmed by the Senate in 1980.

He was at the time the youngest member of the federal judiciary, the second African-American appointed to be a federal judge in Alabama. He has served as chief judge in Alabama for ten years.

Before he was appointed to the bench, he was the first African-American assistant attorney general in the state of Alabama. He served there for two years.

And then he began a private practice. His firm handled labor law, civil rights, school desegregation, sex discrimination, and first amendment matters.

He is the recipient of numerous awards, including the 2015 national public service award from the John and Jerry Levin Center for Public Service and Public Interest Law at Stanford Law School; the 2013 Thurgood Marshall Award from the National Bar Associates' Judicial Council; the 2008 Judge Jane Bolin Service Award from the Yale Law School Black Law Students' Association; the 2005 Mark De Wolfe Howe Award from the Harvard Civil Rights Civil Liberties Law Review for his unyielding commitment to advancing the personal freedoms and human dignities of the American people.

He received his undergraduate degree from Yale University and his law degree from the same institution.

It is a joy and an honor to present to you Judge Myron Thompson.

(Applause.)

MYRON THOMPSON: Thank you, Dr. Maurer, for having me here today.

While I am from Alabama, in fact, Montgomery, Alabama, I just flew in yesterday from San Francisco, where I was on a three-judge panel that judged a moot court competition at Berkeley Law School on Tuesday. I had already accepted the Berkeley law invitation when I received the invitation to speak to you here today on Thursday of the same week.

Because the two events were only two days apart and because the two events were split, one was on one coast and one on the other coast, I would typically have declined the invitation to speak to you here today, mainly because I just wouldn't have had the energy to do it.

But I couldn't. This was a defining event for me, and it was really a defining invitation. Never before had someone extended an invitation to me, and unabashedly, unapologetically given one of the reasons for inviting me that I am, quote, an African-American judge with a disability, end of quote

(Applause.)

To this invitation, despite the great inconvenience, I just -- Nancy Reagan is going to turn over in her grave, but I just couldn't say no.

(Laughter.)

Instead, in fact, if I were to give a reason for why I'm here today, it would be to -- and if I were to give a title to my remarks today, it would be "Why am I here today?"

To do this, let me begin with the tale of Esau. This is not a biblical tale. I'm not a minister. I'm not going to put you to sleep with a sermon. So you can rest easy.

In fact, this is a tale of Mrs. Esau. To me, Mrs. Esau was an elderly woman, at least she appeared to be when I knew her, for I was only about 12 or 13.

She lived across the street from me in a small town in Alabama, where the institute founded by Booker T. Washington resides. My stepfather was a minister when I was growing up and was the field secretary for the NAACP.

My parents were both involved in the Civil Rights Movement and in particular in the right to vote.

When my parents were otherwise engaged with their activities, they would send me to stay with Mrs. Esau, who had married late in life, had no children, and I rather think that to the extent that she viewed herself as having a child, I was that child. Quite often she would, in addition to taking care of me while my parents, as I said, were otherwise engaged, she would ask my parents to take me on Saturdays to go with her on errands.

Now, she drove this huge, big black Cadillac. I mean, it was so huge that I would wonder how she could get around in it, because she was a little lady, she could barely see over the steering wheel, and I don't know how she ever reached the gas pedal and even more so, how she ever reached the brake.

(Laughter.)

But she did. And I think the only reason my parents had no fear of my ridding with her was the fact that that car was so big, it would demolish anything she hit.

But I would sit next to her in the car and we would talk and we would go around on her errands. And I grew to love her. She was a big part of my childhood.

One Saturday she needed to go to the doctor. I asked her, "What's the problem?"

She said "No big problem. I just have a doctor's appointment."

I had polio. I had had surgeries at the hospital where her appointment was. I had had numerous therapy sessions at that hospital. And the hospital, because it was sort of the center, especially for black kids who had polio, it actually had a national reputation. Some of the doctors there would go around giving speeches because of the concentration of polio victims there, and the doctors had done all these things in trying to work with these kids.

And then also the hospital just had a concentration of black doctors from all over the country who would come and work there. In fact, the black doctor who delivered me and all the other black babies in our community was viewed as a god.

So when she said she was going to see a doctor, I said, "Go to John Andrews. I know the doctors there. I'll go with you." John Andrews was the name of the black hospital.

She said, "I don't go to black doctors and I don't go to black lawyers. They're not as good as white ones."

I don't think I responded to that because I was only 12 or 13. When you're that age talking to adults, back then, you called everyone by Mr. or Mrs. I was like a sponge. I just absorbed all this and thought about it.

But there's no question it impacted me, because I told my parents about it, in particular, my mom. I said, "Mom, Mrs. Esau says that black doctors aren't very good."

My mom's only response was, "Oh, that's Lottie." That was her first name.

I had also known that in other areas of Alabama, in particular where my mother's folks lived in southeast Alabama, if you were black and you went to the hospital, you were put in the basement because the hospital was segregated. All the black patients were in the basement, and I had heard tales of some doctors would not touch black patients and some nurses refused to touch black patients. In fact, my grandfather had taken my grandmother to Vanderbilt University because he could not stand the treatment she was getting in that small hospital, and the fact that she was getting such second rate treatment.

At 12 or 13, I was old enough to realize that Mrs. Esau considered all black people inferior and considered all black people not worthy of treatment with dignity.

This also meant that she considered herself inferior and that she would subject herself to this inferior treatment also meant that she was not worthy of being treated with dignity.

I sometimes think that the indignity that she internalized with that comment was worse than any indignity she suffered outwardly by being denied the right to vote or being segregated.

You can reach outward to redress indignities. You can go and demonstrate. You can eventually let people know you need the right to vote or you don't want separate but equal.

But how do you redress when the human spirit is destroyed?

My mother's only response when I told her was, "Oh, that's Lottie." In other words, there's very little we could do about that.

Not until years later did I realize that Mrs. Esau and I shared more than I thought. Like her, I had internalized my own shame in my disability. For her, it was race. For me, it was the disability itself. I went through seven years of Yale, being a judge for decades, high school, and not once did anyone mention the fact that I had a limp. Or when I went swimming, that I appeared different in my clothes. Or that I had scars from surgeries. It was unmentioned. It was unacknowledged by them and perhaps more tragically was unacknowledged by me.

In a way, I lived, as gay people would say, in a closet. But mine was a glass closet. But nonetheless, a closet. Mine you could see. But it still meant that I was kept inside.

Dr. King, when he would talk in private about why he engaged in public demonstrations, he would usually give the first reason which is to appeal to the public conscience. But in private he would add another reason, which was to demonstrate to all the black people out there that they are worthy of dignity.

His public demonstrations were aimed at Mrs. Esau and all the Mrs. Esaus in the world who internalized their own second class citizenship.

A few years back, I had dinner with some friends, and they were setting up a special opportunity for me to meet with Judge Taylor, an incredibly well-recognized federal judge. During the conversation, I asked Judge Taylor in so many words, I don't remember my exact words, what was it like to be blind.

He answered my question, and then we engaged in a sort of repose to the conversation about how people react to disabilities in this country.

Afterwards, the people who had hosted the dinner, and one of them was taking me home, said, "I cannot believe you did that."

I said, "What?"

He said, "No one asks Judge Taylor about being blind. It's the no-no question for everyone."

I said, "Well, no one told me."

(Laughter.)

"As far as I could tell, he answered my question and we had an enjoyable evening."

I recently saw at another program where Judge Taylor had come out and was talking about his own disability.

At this conference, I see where you're going to talk about outward barriers, barriers that the disabled face. I ask you also to consider what I consider inward barriers. Barriers that are in some ways more difficult because they are elusive, because they are less concrete, and because sometimes you never know whether you have eliminated them or not.

Relatively speaking, it's easy to build an incline for a wheelchair. It's easy to increase the size of a doorway. It is much more difficult to address the human spirit that has been led to believe that it is not normal and that it is less worthy of dignity.

I was thinking in my own career as a judge how perhaps I myself have been guilty of not recognizing full dignity. For a number of years, I ruled on a case or presided over a case, Wyatt versus a state mental health system. Halfway through that case, at a conference, I don't know whether I did it or someone else did it, but someone said to the plaintiff's lawyers, "Who are your clients?"

The plaintiff's lawyers said, "We don't know."

I said, "When was the last time you talked with one of your clients?"

They had not. The original judge on the case certified the class issuing one line that said, "Class certified." And Wyatt was the plaintiff and Wyatt had long left. The case was being decided on what the lawyers were saying, what the doctors and the institution were saying, what everybody on earth was saying about the people on whose behalf the case was brought.

I recertified the case, and I said, "You find me some plaintiffs, some people who can speak on behalf of the people who are affected." It was not only to make sure that the court was informed of the people affected; it was because by not hearing from them, we essentially were telling them that they were not worthy of being heard. That's a killing of the spirit.

Many of them probably had to speak through guardians. Many of them may not have been able to say directly what was in their best interest. But there were some mentally ill people who could tell me exactly what was wrong. Not all of them were unable to communicate with the court.

And in that sense, the court, as well as the lawyers, were essentially viewing them as not worthy of being heard. And by saying that they are not worthy of being heard, we are saying to them that they are not worthy.

Another case I had was Lee versus Macon, a big school desegregation case, and again I had lawyers come before me and I asked them, "Where are your clients?"

This case dealt with the fact that most black kids in Alabama were being funneled into special education programs and as a result were being essentially resegregated. The white kids went into the normal programs, the black kids in the special ed programs. And the determination as to whether these kids went into those programs was purely subjective, depending on the teachers. No testing. You can guess that virtually all the black kids were in special education.

To make matters worse, they were being warehoused. They would send them to the gym. And if they had any type of problems, conduct problems, they were expelled.

And so we made that a statewide class action. We eventually settled it and set up criteria that would only make sure that kids who really were worthy of special education got it. And secondly, that the kids who got special education got education.

But nonetheless, also it was critical that the people affected, their parents, the kids, be heard from.

You know, I was thinking about when I was making my remarks today and growing up, as I said, with a disability, and I've often been curious, and I'm an incredible movie buff. One of my favorite movies is "The Usual Suspects." I don't know if any of you have looked at it from the perspective of someone disabled. It's like looking at a movie from the perspective of someone who is Jewish. You catch all of the underlying stuff directed at your group.

There's a great line in the movie where Kevin Spacey, who is the demon, the bad guy, and yet everybody thinks he's okay. In fact, everybody thinks he is not even worthy of being considered. He's invisible. And what they do and what he does is he's a cripple. And, in fact, the main guy says, the police officer, says, "You're stupid! But you're a cripple. Because you're a cripple, you're weak." They could not perceive him as actually being the mastermind.

And throughout literature, you know when you think of, what is it, the evil nurse, they put a hump on her back which makes her evil, right? Or Frankenstein. There's a hump on your back to make you evil. In other words, if you're crippled outside, you're crippled inside. Those metaphors permeate literature.

I'm not saying that movies and literature are not fair game. But I also think we have to be sensitive to stereotyping disabled people just like we're sensitive to stereotyping black people or gay people, and knowing that sometimes you can overdo it. The fact that you're a cripple doesn't mean -- I used to say when people said I had braces on my legs, they were saying I had braces on my brains. Kids, you have to remember this too, kids hear everything. You might think they don't hear it. And sometimes they even hear you when you are not talking.

(Laughter.)

The words I got were, we've got a kid who is paralyzed, he has polio, and we're going to have to take care of him for the rest of his life. That was the message I got from my own family.

And you have to be careful not to say that to your kids, even through your actions, because you can cripple their insides too.

But I think the important point is to make sure that everyone feels that he or she is deserving of dignity in this world, and in your own families themselves.

And I'll even point the finger even more homeward. I did a study. First of all, I went to Pace Law School about four years ago and I was walking around the clinical program, and I came across a disabilities law clinic. I said, "You all have a disabilities law clinic here? I have never heard of that." So I did a study of what schools have disabilities law clinics. Yale does not have a disabilities law clinic. Yale does not have a course that has disabilities in its title.

Harvard does not have a disabilities law clinic. Stanford, where I went there a year and a half ago and visited them and said, "Where is your disabilities law clinic," they do not have a disabilities law clinic. Some will have a veterans law clinic, a social security law clinic. I'm not mocking that. Don't get me wrong. It's just not enough.

Columbia does not have a disabilities law clinic. Berkeley, where I just came from, does not have a disabilities law clinic.

They all have LGBT law clinics, immigration law clinics, but why aren't we worthy of that?

(Applause.)

Now, I know I have some former law clerks here from Yale and Columbia. I know there are others here from Harvard who I met earlier. We have a lot of work to do in our own backyard, in our own schools, to let them know that disabled people are worthy of -- we're just as sexy as immigration clinics.

(Applause.)

(Laughter.)

We're just as sexy as LGBT clinics. And it's us to do it. When I go around, I ask that question. I'm a judge. I can do it.

(Laughter.)

I have to admit, I am new to the party and I'm late to the party, but you know what they say, well, my son used to say when he didn't do his work, "Better late than never."

(Laughter.)

I haven't talked about some of the substantive issues you're going to talk about in your various groups, things like the poor black mother who has to take off from work to deal with a disabled child. I know what that's like. My mother before she married my stepfather was a single mother and she spent many of her weekdays carrying me for treatment. I know that firsthand. But I thought you would deal with that nonetheless in your other programs.

And I also know that there are issues within the disabilities community about, you know, you call someone a disabled person, or do you call someone a person with a disability. For those of you who think that disagreement is bad, let me assure you that if you're not stepping on toes, if you're not engaged in heated debate over where you should be going, then you're not doing anything.

(Applause.)

I lived through the civil rights period of the '60s-'70s and there were no more heated debates than whether Dr. King was right or wrong. There were many who said he was wrong, including my own stepfather at times. But unless the debate is heated, you're not adding anything. You've got to be engaged in hot debate.

I'm going to close with a crib from Dr. tenBroek. He basically said, and it's all I'm really saying here today, asking you to remember as you go out to engage in both the external and for me I hope I've emphasized the internal barriers that we as the disabled face, and that means having disabled people on your panels when you talk about the disabled. If you're going to talk about black people, have black people on the panel. If you're going to talk about women, have women on the panel. If you're going to talk about gays, have gays on the panel. If you're going to talk about disabled, have disabled on the panel.

And what that means, in Dr. tenBroek's comments, you're preparing people to live in the world. Those are his words. That's a real challenge.

And thank you very much.

MARC MAURER: Don't go away, Judge, there may be questions.

There was one line I liked especially in what you had to say, and it had to do with, why aren't we good enough for that. That tells me that you're part of us. We're part of you. And we're glad of that.

When we recognize the humanity in one another, we can enhance that humanity.

I notice that you are no longer a young man.

(Laughter.)

Yes, the truth does come out.

And that means that one of these times you won't be with us on the bench anymore, and I think that will be too bad for us.

I would like more like you on the bench. One of the efforts we have to do with this group, with this symposium, is cause the appointing personnel to know that those with disabilities have to be represented as well as others on the federal bench.

Now, let's see if there are questions. And as you will remember, your task is to identify who you are. I remember who I am. So tell me who you are.

>> Bob Dinerstein.

Thank you, Judge, for your wonderful comments. And I will point out, given what you said, I've read American University has a disabilities law clinic.

(Applause.)

My question is this: So we have a student in school this year who is blind and who is a wonderful student and has done terrifically. About last fall she was applying for a clerkship and the question came up whether in applying for a clerkship she should disclose that she is blind.

It was very interesting. I was asked my views and I said, I think you should and there's a way to talk about this as part of who you are.

To a person, other faculty she spoke with, including some who had clerked and some who worked closely with judges, said, absolutely not; it will kill any application you submit. The judges will not be responsive to that.

I'm curious what you think your colleagues' response will be.

MYRON THOMPSON: I can give you an idea. I would hope that she would be able to disclose that. The reality is, and I'm sure there are judges who will not consider her because she's blind, but I can assure you there are judges who will.

I've had clerks who said, you know, should I disclose I'm black, should I disclose I'm gay, should I disclose all these other characteristics that were once viewed as reasons judges might reject you.

If you look at it in the long term, and if she feels very strongly about it, I think she definitely should disclose it. Because now I think if you were to talk to most law school applicants, no one would have hesitancy in disclosing they were gay. Ten years ago, no one would do that. It takes someone to break the barrier and stand up and say, I am who I am.

There are judges I think who would not have a problem hiring someone who was disabled in any way.

I would even say that to the extent, in fact, I was on a law clerk panel discussion, some chambers actually look for diversity and I hope I'm one of those chambers. I'm looking for people who have varying backgrounds, and I'm also looking for people who will just enrich my life. I've hired someone who was disabled before. Obviously disabled. But I can't say that was the reason, but it was a nice difference in the chamber.

So I don't want to tell this person what to do, but I would hope that she would.

I really feel pretty confident that if she were to do that, there are some judges who would.

Now, I would add this addition. I would probably have a number of professors call certain judges whom they know would first of all not look upon that as a reason not to hire. I would also have a professor call certain judges who might actually view that as an opportunity for enrichment of their chambers. And there are judges out there.

MARC MAURER: Other questions?

>> Eve Hill, disability rights lawyer. I have a question about approaching judges about disability issues.

One of the experiences I've had, including very recently, is judges who view perceptions of the lived experiences of people with disabilities as not very credible. And the judges explicitly and less explicitly turn to the lawyers or the experts or the doctors to state the individual's experience. This is much different from your approach in Wyatt, but I wonder if you had ideas for approaching that and changing that framing from the decision makers' perspectives.

MYRON THOMPSON: You mean your client testifies and the judge is basically waiting for that to be confirmed by some expert or not confirmed by some expert?

>> Correct. A level of not listening to the client. You can see it in body language if it's not specifically stated, that the experience of the client is considered not credible. Considered either because the person has a mental disability or a cognitive disability to me to be confirmed or displayed as an expert.

MYRON THOMPSON: I would make that explicit to the judge, that you have that concern, without insulting the judge. The way you could do that is to say something like, before the hearing begins, Judge, I really want to bring to your attention, I think it's really important that my client be carefully heard. In other contexts, people tend to defer to experts, but I'm sure this court will not do that.

(Laughter.)

But unfortunately, you also have a bias among judges. I'm not going to give names. I was in a judges' conference once and the issue came up about people who go around to various commercial institutions and try to use bathrooms and so forth. Some of my fellow judges said they thought it frivolous.

I'll be honest with you, 20 years ago, I might not have spoken up. And this is what I said to those fellow judges. And it ended up that the judge saying this was black. And it was hard for me not to be -- it was hard for me to be calm.

(Laughter.)

So I said, "You know, in the 1960s and 1970s when they passed the public accommodations laws, they had test groups go around to desegregate all of these facilities. My mom could not have taken us there without being turned down and followed up with a lawsuit. It took test people to go first so that we as private citizens could actually use them. But for the test groups, these places never would have opened up. They would love it if it took a private person to do that because they knew that your average person on vacation was not going to file a lawsuit or suffer the indignity of being turned down. They'll just go somewhere else. So they're insulated. Do you think that the testers for blacks were frivolous or abusing the process?"

I didn't get an answer.

(Applause.)

MARC MAURER: We could take one more.

>> Rabia Belt from Stanford.

(Laughter.)

As a correction, Stanford will be teaching a disability law class because I'm going to be the one teaching it.

(Applause.)

MYRON THOMPSON: I won't let you off the hook. Columbia has disabilities law class during the summer. Nice. But it's not a clinic.

(Laughter.)

I want a clinic. When you're out there, I'll be lobbying with you to get a clinic. In fact, you can be head of that clinic!

>> That's sort of my question. So I was -- in terms of diversity, I think I was mostly hired -- well, they were considering it because I was the black woman because they don't have any of those and I fill that box. But they weren't thinking about the fact that I'm a person with a disability because that's not a box that they cared about checking.

So how do we move these other institutions to actually diversify their ranks?

MYRON THOMPSON: I'm going to put that back on you all, as I said before. You're here. You come from all these law schools. Until you educate, in the words of Martin Luther King, it's not going to happen. I'm willing to do my education. The question is, are you willing to do yours. It's wonderful to have one at American, but it should be at all law schools. It is a sad state when you realize those law schools don't even have disabilities courses. Yale doesn't even have a disabilities course. Nothing! Two big fat zeros.

>> Our law school has a disabilities rights course.

(Applause.)

>> Ours does also.

MARC MAURER: Thank you. Thank you, Judge, for that challenge. I'm going to see about getting one where I went to college. It sounds like a great idea. I'm sorry I didn't think of it myself.

I wonder if I can get mine there faster than you at Yale. We'll find out. How about that?

It has been a joy to have you. It is wonderful that you are with us, working on this, and we look forward to interaction as things go forward.

Our next panel begins at 1:30 on the other side of the room. It was a great lunch and a great time with the judge.

(Applause.)

(Break.)

1:30 p.m.

“Does Title II of the ADA Cover Arrests?”

MARC MAURER: Let me have your attention, please.

So let me have your attention, please. Scott is going to get the folks who are in the other room and they're going to come in quietly. And your attention, please.

All right. Now, we are going to get underway here. First panel of the afternoon is "Title II of the ADA: Does it cover arrests?" We have two people to present. We have Michael Bien, a managing partner with Rosen, Bien, Galvan & Grunfeld; and Claudia Center, a senior staff attorney with the disabilities rights American Civil Liberties Union Foundation.

I hesitate to tell you all the details, but anyway, Michael Bien is coming. Sam was supposed to come. Michael said that he needed the opportunity to speak to you, so Sam -- is that how it went, Michael?

MICHAEL BIEN: That was it, yeah.

MARC MAURER: Anyway, apparently Sam had some reason to invite Michael to participate today as he's unable to come.

Michael Bien is the managing partner at the San Francisco litigation firm of Rosen, Bien, Galvan & Grunfeld, where he concentrates his practice on constitutional civil rights law, complex commercial litigation in trial and appellate courts, and anti-trust and intellectual property. He has successfully litigated a series of major civil rights actions against various private and public entities on behalf of persons with disabilities, including class actions against state and federal corrections agencies regarding unconstitutional conditions of confinement, denial of mental healthcare, unlawful discrimination against persons with mental and physical disabilities, unconstitutional revocation procedures and other civil rights violations. And he has done a lot to argue about the overcrowding of the prisons in California.

Claudia Center is senior staff attorney with the American Civil Liberties Union disability rights program. Prior to joining the ACLU, she was at the Legal Aid Society Employment Law Center in San Francisco. She has litigated cases that secured workplace accommodations and increased protections for workers with disabilities. She played a key role in the passage of an amendment to the California Fair Employment and Housing Act that broadened protections for persons with disabilities in employment and housing.

These two folks are going to give us the topic of, does the ADA cover arrests, and if so, how. And I gather that they have a plan for how to approach this topic, so which of you will begin?

CLAUDIA CENTER: I'm going to begin, then Mike is going to go, then I'm going to go again.

MARC MAURER: Go for it.

CLAUDIA CENTER: These mics are on, right?

So for those of you who haven't been participating in social media or reading the newspaper in recent years, I'm going to do a little introduction to why the question of the ADA and police interactions with people with disabilities is so important. And the answer is, or the spoiler alert is that people with disabilities, and particularly people of color with disabilities, are at enormous risk of catastrophic outcomes during police interactions. We already have a really just terrible situation in our country with police interactions resulting in fatal outcomes or terrible injuries, and these terrible outcomes are much more likely to occur if somebody has certain characteristics. Obviously being a person of color, being a person with a disability, being a person of color who has a disability also, and other factors that can lead to a terrible outcome.

Surprisingly, we do not have reliable data sources for the demographic information regarding people who are killed by police in our country. This is something that is sort of shocking. If you go to other countries, it's hard for people to believe.

But based on the data that we do have, we think 25-50% of people shot by police are people with disabilities. These may be people who are deaf or hard of hearing who may not be able to hear or comply with commands from police officers. It may be people who have disabilities such as epilepsy, diabetes, stroke, or being autistic or cerebral palsy, people who may be unable to comply with commands. Autistic people, people with intellectual disabilities, and of course people with psychiatric disabilities. People with psychiatric disabilities, that group is the largest number and percentage of people with disabilities who are killed during police encounters.

So this is why it's so important to figure out if the ADA applies to these encounters and also to take a step back and try to figure out why is the death rate and the morbidity rate these horrible outcomes so common that we read about them virtually every day in the newspaper and on social media.

There are many factors. Some is the overpolicing in situations that don't require police. Some is racial profiling. Some is police reaction to traits associated with disability. A lot of it is the culture of compliance, the idea that making someone comply or reacting to a failure to comply is more important than safety. That's my editorial view of it.

And so that's why we're here, to talk about this issue and to do this panel.

If you would like more information about the background of this problem, I would recommend that you look at the amicus briefs submitted by the disability rights organizations in the Sheehan case, San Francisco versus Sheehan, that went to the Supreme Court.

Another source of good information is the report on media coverage of police interactions with people with disabilities. A lot of great stories and information about this problem in the Ruderman report that came out just 2-3 weeks ago.

And there will also be community responses to that report and just social media in general is just a very good source of information about this problem.

So we're going to talk a little bit about the Sheehan case. Basically the answer is, yes, the ADA applies, Title II applies basically. But that's really just the beginning of the conversation.

And then we're going to talk about what we want to see in terms of public policy and remedies around this horrible problem.

And if we have time, there are a few people in the audience I would like to speak for a couple of minutes because they represent disability groups and I may have missed some of the important aspects of the problem from their perspective.

So Mike, take it away.

MICHAEL BIEN: I am not Sam Bagenstos, but I'll try.

The story of Teresa Sheehan. She was a 50-year-old -- she is a 50-year-old woman. At the time of the event, she was living in a group home. She was a person with a psychiatric disability. What is so true about many of these police encounters, this encounter was done for her own good. She did nothing wrong. The police were there to help her.

A social worker assigned to this group home was worried about her and knocked on the door. She didn't come out. He came back a couple days later, knocked on the door again. She didn't come out. The social worker asked around and decided that she needed to be 5150, which is California lingo for involuntarily psychiatrically committed for 72 hours for evaluation.

The social worker filled out a form, saying she wasn't eating, she was offered psychiatric medications, she wasn't changing her clothes, she was acting a little bit weird. And actually, when the social worker went in to talk to her and used the pass key, she screamed at him, "Get out of my room! I'll kill you if you come back!" So he included that too, that she had threatened to kill.

The social worker checked the box that she was, in his opinion, danger to self or others. And as he was supposed to do, he called the San Francisco police.

The cop on the beat was a woman, and she and another woman police officer responded. They talked to the social worker. By the way, when he filled out the form, he also evacuated all the other residents. He said everyone has to get out of here now.

So the police officers came back, they talked, they got the information, and they went up, took a pass key, and knocked on the door. She didn't respond. They opened the door. She screamed at them, "Get out of my room! Get out of my room!" She picked up a knife and they slammed the door and went outside.

They called for backup. Which was good. And San Francisco actually has some trained crisis teams that would have responded. But the two of them decided to go back in. And there's a lot of discussion about why they decided that and why it was urgent.

She was in her room, and she was angry about people coming into her room, but she was in her room and the door was closed.

They couldn't open the door. Either she had locked it from inside or done something. So they repeatedly smashed their shoulders against the door. They finally kicked it in and went in with their guns drawn. One of them had pepper spray.

She lurched at them, picked up the knife. They pepper sprayed her in the face. I did a trial about pepper spray. It doesn't feel very good. It's very, very painful in the face. And she, as she was lurching forward with pepper spray in her face, she kept on coming towards them.

The two officers were in a very cramped space and they saw this woman keep on coming at them with this knife.

So they started shooting. The first officer shot her three times in the body. All to help her, remember. And she didn't fall down. She moved to the side and lurched toward the other officer, so she shot her three more times, the last shot in her face when she was lying on the ground.

She survived. San Francisco criminally prosecuted her for criminal threats and attacking a police officer. The jury hung.

They decided not to retry her.

And then we have a lawsuit. So the lawsuit is brought for fourth amendment constitutional violations, for excessive force, for unlawful arrest, various state law claims, and also for violating Title II of the ADA.

This court judge is Charles Breyer, kid brother of Stephen Breyer, liberal, San Francisco democrat. He grants summary judgment on all claims. No claims to go to trial. As a matter of law, the case is dismissed. I won't go through all the fourth amendment issues, but basically there's an emergency aid exception to the fourth amendment, they reasonably believed it was an emergency, that they didn't need a warrant, they were worried about her.

Plaintiff's lawyer argued, what about that second time you went in there. Like, the door is closed, you called backup, why did you go in again.

They said, well, the same reason, they're worried.

And in terms of excessive force, once you're making an arrest, then everything else that happens is reasonable, and she was coming at them with a knife.

And I think also when you really look at Judge Breyer's decision, and I was reading the transcript of the hearing, here's this tremendously educated, distinguished man, who has the same biases and prejudices about people with disabilities that pervades our society.

CLAUDIA CENTER: I just want to share, he calls her a "deranged woman with a butcher knife."

MICHAEL BIEN: Right. It's not a matter of equal treatment. People are frightened of people with disabilities. It's unequal treatment. In other words, because she was mentally -- had a psychiatric disability, then it was even more reason for the police to be afraid of her and scared of her. And you just see that fear factor as a justification for the violence by police officers or correctional officers.

The ADA analysis is almost nonexistent in the district court. He follows a fifth circuit case that found that it would be ridiculous, unreasonable, to have police officers to stop and think about the ADA after they're doing all the other parts of their job, as if it's two different parts of your brain. You know, the arrest part and, oh, shit, I have to go through that ADA stuff too?

So that's kind of one attitude towards does Title II apply is this whole separate crazy thing on the side we have to do for some people and, you know, it would be crazy to have a cop do that. And that was the extent of his analysis.

On appeal, the ninth circuit panel reversed on both the fourth amendment and on the ADA, finding there were issues of fact that should go to the jury. For the ninth circuit, they separated the first and second entrants into Ms. Sheehan's room. They said the first entrance was appropriate. There was a reason to go in. They went in appropriately, they used a key, they talked to her, they slammed the door, they left. All was good.

But the ninth circuit looked at the police practices expert that plaintiff's counsel put in his testimony. This is what he will testify about at trial and there's a declaration to the court. And he explained that modern appropriate practices for police would apply both to the fourth amendment issues and to the ADA issues, that there's lots of things you do in a situation like this. You weigh why you are having a police interaction. It matters that you're doing this supposedly to help this person and it's not like a felon escaping from something. Not every arrest is the same.

If you have information about the person and what they're like, they may be intoxicated or they may have a disability or they may have a psychiatric disability, whatever it is, take that into account in your interaction. Don't do things that are going to piss them off, make them angry, make them frightened, back them into a corner.

And I think there's lots and lots of good training on this, and we'll talk about this some more. But the court talked about this is something a jury should determine. Was it reasonable for the police officers to go in. Both of them had been trained, by the way, and it was undisputed they had violated their training, what they were doing. And should the jury evaluate all those factors. The rule 56 standard is, as a matter of law, there's no set of facts that a jury can consider here about the fourth amendment.

As to Title II, they found that there was a conflict in the circuits and that the ninth circuit should join the circuits that said Title II does apply to arrests, but of course that's just the beginning of the story. Because, again, it's a reasonable -- what is a reasonable modification? What's a reasonable accommodation, given her needs?

They said it was a triable issue, but the officers forced their way back in without taking into account her illness or police practices for peacefully resolving a situation with a person with a known mental illness.

You know, I think another area that unfortunately made this case ripe for Supreme Court review was that the ninth circuit has a doctrine under the fourth amendment that says if police officers act reasonably initially, but then they have a chance to like back off from the situation and they choose to provoke, that would be a separate fourth amendment violation. They actually said for excessive force, the first shot might have been justified but then you could have backed off.

I think a lot of other circuits sort of laugh at this. That once the police officer has a gun out and is shooting, they can shoot as much as they want. That's a problem in the law. There's a lot of police experts that train that way, that if you're a cop, you shoot to kill. You keep on shooting. You're justified in as many shots as you want. And some analyses, the subject has to do with that kind of training, which is very common, unfortunately. And that's why you get so many of the tremendously bad outcomes.

I'm going to turn it back to Claudia.

CLAUDIA CENTER: Sure. So I don't remember exactly when it was. A couple years ago. We led or it must have been about -- yeah, a year and a half ago, a year ago, we learned that the Supreme Court had granted cert in the Sheehan case, and I know that some of you in the audience know that feeling of utter terror and disappointment to hear that the Supreme Court has granted cert on a Title II case. We were certain this was very bad news because the cert petition had been written broadly to take the position of the fifth circuit, one of the most conservative circuits, that Title II did not apply to interactions between police and individuals with disabilities.

So our first reaction was, okay, okay, we've got to get together, get our amicus strategy together, but then our second reaction was, we've got to get the community together. So the disability community organized to try to convince San Francisco to drop their cert petition. And so there was a sit in at the city attorney's office in San Francisco, several hundred people. There were meetings, blog posts, Twitter conversations. And so a lot of organizing. There was a meeting with the city attorney to explain why it was so important that the ADA's protections be sustained for people with disabilities interacting with law enforcement.

And yeah, it was quite an effort.

In the end, even though it was a little bit of a different pathway, the disability community really did succeed. Although most people don't know this. The disability community convinced the city attorney of San Francisco to modify its position on the ADA in the merits briefing on the Sheehan case. Which is why the poor city attorney who went to D.C. and argued got yelled at by the Supreme Court for changing their position. The Supreme Court believed that the city of San Francisco had tried to emphasize the split in the circuits on Title II's application in order to get review of their qualified immunity fourth amendment question. But, in fact, it was a political -- it was the community organizing that had resulted in that change in position.

It was really, really important that the city change its position, and it wouldn't have changed it but for the disability community. And because the city changed its position at the Supreme Court of the United States, of course the disability amicus, and both parties, the Sheehan side and the city of San Francisco, everyone was saying that, yes, Title II applies to both sides.

So the Supreme Court dismissed the question about the ADA coverage as improvidently granted. And this was, you know, sometimes the greatest victories is what they don't do to our civil rights laws.

Now, maybe this will change in the next few years, if we all vote in November. But, yeah.

So they dismissed it as improvidently granted. That part was basically unanimous. There was a dissent from two justices who were still so mad that they would dismiss the fourth amendment questions also to punish the city of San Francisco for changing its position, but they also reversed the ninth circuit on the fourth amendment questions, showing that this is not a court that's friendly on these issues. So I won't get into the fourth amendment part.

But basically on remand, Teresa Sheehan's case is still alive on the ADA questions, and so now -- oh, wait, let me go back a minute to the Supreme Court. Another reason that it's great that they didn't decide is they also sua sponte raised the question of vicarious responsibility, can you get damages for the actions of a city's police officers. We already knew we had a deliberate indifference barrier to overcome for damages. But the portion of the Supreme Court decision that dismissed the grant to review as improvidently granted on the ADA also raised the question as to whether vicarious liability was raised under the ADA, which was another hurdle we hadn't even thought about, so you can see how important it is that the Supreme Court didn't decide this. We've had time to organize and get media out to the public. The next Supreme Court will be different. So this delay is incredibly important to this issue.

Back to remand. Teresa Sheehan's case is alive before Judge Breyer. They have now filled another motion for summary judgment, this time on whether Teresa Sheehan was a qualified individual with a disability or if -- I know. Or if she --

(Laughter.)

And/or if she possessed a, quote/unquote, direct threat when they barged in on her while she was in her room saying, "Leave me alone."

So you can see, Teresa Sheehan in a lot of ways is a case that shows how possible disability sensitive policing is, and yet even with these very good facts of her from an objective, empirical point of view, that she really wasn't a threat to anyone, the courts have been quite hostile towards her and certainly Judge Breyer has been hostile.

But in any event, in the post-Sheehan world, I did read a number of opinions since the Sheehan nonopinion has issued from the United States Supreme Court, and so now everybody is sort of saying, yes, the ADA applies, which is kind of what we all thought all along, but a lot of the opinions are still, you know, that's only step one that the ADA applies. A lot of the plaintiff's claims are being thrown out on motions to dismiss or motions for summary judgment.

One exception, there's a good case out of New York, Williams versus City of New York, that's published and had a statement of interest from the U.S. Department of Justice. It was an issue, a deaf woman arrested and kept overnight and the police officers did not bring interpreters and gravitated toward the hearing person during the interaction and took the hearing person's version of events as the truth. And on that basis, they arrested the deaf woman, who spent the night back and forth between the jail and the hospital because she was having anxiety attacks.

So that was a good outcome.

But there have been several cases where the judge has ruled that there's no disability, even though the person is psychotic at the time of the interaction. A couple of them are fatalities. In one of them, the case was dismissed and the family decided not to appeal. And the other one, the 1983 excessive force was kept alive but the ADA was dismissed, purportedly on the grounds that they had not shown evidence of this person's impairment because he had only had this single psychotic episode. Now, this was a fatality. In other words, they couldn't show he had an impairment because he was dead and they could no longer get medical records to show his impairment. I mean, it was horrible. Yeah, anyway...

Yeah, that was a published case, so that's very frustrating.

There's a case out of eastern district of California, Trevino versus Bakersfield, where they found training the officers in crisis intervention who the officer who did this action that was completely contrary to the training, that that training established that the municipality was deliberately indifferent. So there was no way to get damages where the training program was in place and where the officers had been trained under the ADA. So that's a trend that I expect to see a lot more of on the deliberate indifference.

So where I think we want to reflect at this point is that when you're thinking about remedies or when you're thinking about public policy in this area, it's not enough to talk about training. It's not enough to talk about reasonable accommodation, although those elements are very important. What's really important is to take a step back, to look at the system of emergency response as a system, not just police encounters but the entire municipal system of how the government responds to emergencies. So take a step back and look at that entire system, and where are those policies and procedures functioning to discriminate against people with disabilities.

Now, there's another question about whether you can get damages under that kind of theory, but look at the entire system. Because once there's an armed responder on the scene, interacting with a person in a mental health crisis, you are already in an extremely dangerous and potentially lethal situation. You want to take a step back. So not only do you want to look at the entire system, but you want to look at the entire interactions. Not the first or second time the officers come in the door with Ms. Sheehan, but all of the steps that lead up to that. You know, go back a half hour, an hour, even several hours or days and look at the entire interaction.

So system wide, I never thought I'd agree with the treatment advocacy center, but I recently read something they wrote and it's an issue that will unify us all, which is that what we really want are fewer numbers of interactions between armed officers and people with disabilities.

So what can we do to reduce the numbers of these interactions? How can we respond to emergencies without sending armed officers? So if there are ways for communities to respond without armed officers, for example, sending EMTs or the fire department, not armed. Or in some jurisdictions you can call a number that's not 911. It's a number for other types of emergencies and they will send a trained mental health professional to talk to someone in crisis.

So trying to think of all of those types of alternatives. If you do have to send an armed responder, couple that armed responder with a mental health professional or someone who is not a police officer, someone from a different discipline.

And if you do end up having to send an armed responder, or if it's a situation that emerges on the street and so the person who is there is an officer who has a gun, then and only then think about the training and the reasonable accommodation. That's when that comes into play and that's when we hope that can operate to increase safety.

But really we have to increase safety by thinking big picture about how to change the overall emergency response system and to decrease those armed interactions.

Another issue, in terms of once there is an officer on the scene who has a gun, we really need to change the use of force policies in jurisdictions about suspects who have knives or other bladed instruments that aren't guns where there's a perimeter. Because right now police officers are trained that knives and bladed instruments, and a lot of times people in mental health crises will have a pocket knife or a screwdriver. A lot of times they're in their home. So when officers are responding to a 5150 in California, of course someone in their home has access to knives or tools. We need to change use of force so that officers don't automatically assume that lethal force is okay where a suspect, or the Ms. Sheehans of the world, have something that's not a gun. Because if you look at the research that Professor Zimmerman has published out of the University of California, Berkeley, there's no empirical basis for treating a person with a gun where there's a perimeter of any kind, for treating that situation as requiring lethal --

MICHAEL BIEN: You said gun.

CLAUDIA CENTER: Oh yeah. Not a gun. There's no basis for treating that as a situation for lethal force. We need to train and change use of force policies to demand that officers use that perimeter and use reasonable accommodations in that situation to resolve confrontations peacefully.

And we know what works. Assuming a perimeter can be established, we know what works is communication, calm communication, coordination with resources in the community, creating the perimeter but with some room, leaving people room, some comfort space. Using time and patience. In the Sheehan case, the officers entered the room twice in maybe 2 or 3 minutes. She was shot multiple times in just a few minutes. And if you read case studies of people shot by police, often it's just within a few seconds of the arrival of the armed officer. So trying to do a culture change and trying to get police officers when they are on the scene to use time and patience, calm, and use time as a tool.

So I'm going to turn it back to Michael to reflect on some of these issues.

MICHAEL BIEN: I would just emphasize that if you wait for that moment of confrontation, when someone is standing there angry and upset for some reason, the, quote, victim or person about to be arrested, and the police have their guns drawn, it's way too late. Way, way too late. So I really want to emphasize that if you're involved in a situation like that or working with a police department, correctional agency, the key is to not just focus on the training for that moment but focus on how do we get there, how can we avoid people decompensating to that point, how do we avoid calling the cop with a gun rather than calling a social worker. Again, some communities now have crisis intervention teams, which are mental health teams, and 911 can make a decision about which team to send if they have the right information. Crisis intervention teams don't come with guns. And if the person has a weapon, they deal with it other ways. They talk, they wait it out, they may have some police in the background.

Another model that some communities are using successfully is a social worker who arrives with the police on the night shift, which is when a lot of these things seem to happen, just to be available. Police love to have someone else to deal with these situations. It's very difficult, even with -- by the way, training might be an hour or two that they get. The training they get is not adequate to deal with these situations. So you really need to have a good policy to have an intervention by a clinician, some sort of person, doesn't have to be a high level clinician, somebody who -- we have LVNs in California called psych techs. Two years of college, but they're trained to deal, they work in mental hospitals, they work in institutions, they work in clinics. They're trained to also, by the way, something called management of assaultive behavior, how to restrain someone who is violent and how to control without killing them. They don't use weapons. In other words, there are ways of restraining somebody other than killing them, believe it or not.

And you know, I think now there's an argument in San Francisco about bringing tasers back. We had banned them. I don't think these other tools, tasers, pepper spray, are the solution. Obviously they're less lethal, but they're still not engaging the person in conversation, bringing in a clinician. They're dealing with people with disabilities as if they're wild animals or something, right? It's not how you interact with a human to pepper spray them or tase them, let alone shoot them with a gun. You can reason with somebody. Even if somebody is having a difficult time, you can find the right person to reason with them.

Or you can walk away. This is always the amazing thing. What? Walk away? I gave them a direct order. No. That's what most of this training is about. Cooling down. When you're dealing with your teenage screaming in the room, right? What do you do? If you're having a hard time, that's not the time to confront this person and force them to do something. And then if they don't, take out your gun and shoot them. That's not helping them.

So that's our American model right now. There's a lot of things we can do short of litigation, which I think we should all think about. Think about all of the ways that we interact with the criminal justice system and the police. 911. Is your system accessible? Most are not. Don't take cell phone calls. You know, is 911 accessible? Are emergency people trained? If you go in and file a police report, do they have sign language interpretation? Do they have ways of taking that information? Do they know how to interact with people? Do they have that available to them? Are their websites even accessible? No.

So work on your local agencies from a position of we're here to help you communicate with your citizens. We're not here to fight with you. You can't communicate with a major part of your citizenry, and that's a problem for you and for us. There's so many places where people get in trouble because there's just a total lack of communication.

And then there's a fear and misunderstanding, which is a much longer problem to work on. What you really need to work on are the people with psychiatric disabilities and other disabilities, that they're not violent, they're not dangerous, and we need to learn to live with them in our community. And they are us. They are not them. They are us. And we're a long, long way from that. And we see a very distinguished federal judge still have those kind of biases and prejudices. I'm not accusing him. He's the same as many people in society are. We need to do a lot more in education, and that's where our advocacy groups can really help. We need to educate the public about people with disabilities. It's not scary to have them living in your community. They're there anyway. And embrace them and work with them.

CLAUDIA CENTER: And part of the problem with the litigation that comes out of these catastrophic events is that we end up focusing on these sort of outrageous things that happen in a few minutes and we talk about how the police officer should have done this and they were trained to do this, and so we and the media ends up focusing on the training. But training by itself, it's essential but it is not sufficient. A lot of the -- you know, now that training has become sort of in vogue, a lot of the more recent high profile police shootings, now the media will ask and it will turn out that all of the officers had gotten the training. So the training by itself doesn't work. You need the infrastructure, the dispatch to be trained, the crisis intervention teams ready and all of that.

So that's what we want everyone to remember.

MARC MAURER: Now, you said there were others you wanted to comment on this.

CLAUDIA CENTER: Yeah. There are some folks in the audience who work a lot on this. I was hoping that T.L. or Alison from New York, if you could just share your experiences. I don't know where you all are. Oh, there you are.

MARC MAURER: Which of you wants to begin?

>> I'm Alison Lynch with Disability Rights New York. Thank you for the invite. I was talking about this a little bit earlier this morning so this is on the spot. It won't be as extemporaneous as it may have otherwise been.

But unique to the New York situation right now, something we're looking at is the infrastructure and in particular how groups like mine who have offices all over the state can translate a lot of the training that's happening and good things that come with that to different types of communities. Right now New York City is rolling out this new model crisis intervention training and new drop off centers where once someone is picked up on what we consider a nuisance charge, if it's obvious they're in some kind of mental health crisis, they'll go to a drop off center.

However, when you move out of New York City, our organization also serves people who, you know, live in a town of 500 people up at the Canadian border. And that model is just not reasonable for so many different reasons. The funding isn't there in the same way that it is for a city, for an urban population, and the resources just aren't there. The police force won't have the time to send what would amount to their entire force away for a five-day crisis intervention training.

So a lot of what we're working on and what we always give input on is how do you use these different models to not only provide the groundwork for a lot of the good work that comes out of these, but to also then have these structures in place for a number of different types of communities and make sure it is kind of evenly applied in these populations because you have people in the same amount of mental health crises in upstate New York as you do in New York City, maybe not in terms of numbers, but the incidents you have happen, you see a lot of people equally affected. So that's always something we're kind of considering and hoping we start to have a little bit more of a discussion on. Because as you both said, it's great to have this initial conversation of what can we do, but then there needs to be something else to bolster it and make sure it's applied evenly and relevantly for the populations we're going to be dealing with.

MARC MAURER: Okay. And you have another person?

>> Hi, I'm Talila Lewis.

MARC MAURER: It's on the record.

(Laughter.)

>> So I think at the end of the day what we have to acknowledge is -- well, let me first answer the question.

We need to be cross movement building. There's no reason why at a conference like this we haven't invited every civil rights organization that has lawyers in our area, right? So the NAACP should be here and invited annually, etc., right?

But I think what we have to acknowledge is that the longstanding ignoring within the disability and Deaf communities issues of racism have really led to and society at large have led to what we see with police militarization, because for so long, what we thought as a society was, oh, the police are only in black and brown neighborhoods harassing those individuals. It's the other, it's them, it doesn't apply to us, we don't have to address it.

And that holds true still to today for most disability and deaf rights organizations. And so I think at its core we need to acknowledge, as the first panel said, discussing the importance of understanding intersectionality.

So even here, right? What we see among disability justice advocates is we like to discuss disability and race, and I don't mean to -- but Teresa Sheehan is a person of color. We have to have nuanced conversations about the intersections of these things to actually be able to address them.

I think we have a huge issue of assuming that police officers are good. Right? And black and brown communities? We approach this from the opposite direction. We say, okay, let's assume that law enforcement is not a good thing for our community. How can we come together as a community to advance the rights of each other within and of ourselves. So we focus on restorative and transformative justice practices rooted in our black and brown communities in which I think we as a disability community could learn a whole lot from communities of color in terms of how we approach restorative and transformative justice practices.

I think that we need to reframe how we understand the criminal legal system. So I do not use the word "justice" in referring to the criminal legal system at present because, as most of you in this room know, it's not actually just. And so long as we as attorneys kind of embrace this notion of justice in a system that we know is not just for so many different communities, right, communities of religious minority, black and brown communities, disabled and Deaf communities, we're not seeing what we need to see.

So I think we need to actually understand that what we're dealing with is a system that's entrenched in colonialism and racism and ableism and audism, and all of these things combined have led to us this place where we are now.

MARC MAURER: Okay. Are you done?

>> One more comment. Sorry. I was reading my notes.

The last comment is, what I will say is that acknowledgment of white privilege is really, really critical here. So what you'll find is often in organizations that are trying to address this issue, white people are given trainings in a very white privileged way, and they're shocked when I come in and say to deaf and disabled community, don't breathe. Literally. Right? Because that's what I've been taught. Everyone in this room who is black or brown is nodding their heads in the affirmative, and that's because that's how we have been steeped. We were raised to not trust law enforcement, to understand that there are things that we could do that would be deemed dangerous just because we exist, because our skin has been weaponized, right? Like our simple existence is a danger to law enforcement in the same way law enforcement views our communities of color, who are deaf and disabled, it's very, very similar. So this is why cross community building is critical.

In these stories of Sheehan, we've been seeing this in black and brown communities for hundreds of years. This isn't some new thing. Everyone was upset about the white autistic transgender person that was murdered by law enforcement. That outrage is righteous and we should all have it, but we should have had it a long time ago. We need to unpack our privileges and remember what the first panel said. It's so important to have people of color not just at the table but leading organizations. And that will really lead us to a space where we no longer have to have conversations about hashtags.

And speaking of hashtags, Claudia forgot to mention ours. She was involved in creating them. One is called #carenotkill. Another one is #decriminalizedisability. And another is #disabilitysolidarity.

If you all are interested in these issues, those hashtags are where you should go to network with folks on the ground working on these issues and get more information.

And with respect to the Ruderman report, there will be a community response coming out in the next couple of weeks that I think is important for you all to read.

So thank you so much for your time.

(Applause.)

MARC MAURER: Thank you, Claudia, and thank you, Michael, and your helpers here.

I want to start with a question for you. And then we'll get to others, and we'll see if you have questions for each other. But it looks to me as though you've discussed this a lot ahead of time so I doubt that you haven't covered what you had in mind.

Let me just say this. I know of one blind person -- I deal with blindness more than other disabilities, although I get there too. I know of one blind person who was wrestled to the ground by an officer for carrying a folded up white cane because the officer said that the officer thought it was a weapon. And the guy was waiting at the bus stop and the officer though he was doing something aggressive to another bystander.

So that case never got to be a case, but it was an incident.

I know of three blind people who have been wrestled to the ground either by airline personnel or by agents of the TSA for apparently being blind people. I don't know why precisely. It's just that maybe they didn't obey orders fast enough or something.

And my impression is, therefore, based upon a very small anecdotal sample, that the approach to disability is often, I'm in charge of you and you will do precisely as I say instantly or you are subject to force. I don't like that formulation, but I come to it and I do my best to avoid it. As I have said to some of you in this audience, when people grab me, which they sometimes do, my automatic sort of visceral reaction is to punch somebody. I attempt to avoid that too, but the reaction of defense is one that has to be regarded as fairly reasonable under certain circumstances.

Is this a thing that you have found with sufficient background to have an opinion?

MICHAEL BIEN: I think, unfortunately, the experiences you talk about, Dr. Maurer, are quite common in that people are actually arrested or assaulted or accused of something directly because of who they are and what they're doing, which may have some relationship, usually not a strong relationship, to disability that makes them somewhat different from what the police officer or official is used to.

So the speed in which you respond, for example, I think this is, again, these very dangerous situations. Like in a car stop, if you reach for the wrong thing in the car, and the police officer is standing there, and all the police officer is trained to think about is you're reaching for a gun, and you're reaching to a card that explains that you don't speak or you don't hear, that's dangerous. And we really need to -- I have to agree with T.L. The training has to be also for people. I mean, I don't have that training. I'm a white male. I walk around. I don't have that training. But I work in the criminal justice system. Sorry I called it justice. I agree with you completely. And I think that I've seen so many incidents where the activity is charged as a violation or the justification for use of force is exactly what you're saying. So I think it's unfortunately quite common.

MARC MAURER: All right. Let's see if there are questions. Tell me who you are, please.

>> Hi, I'm Samantha Crane.

I agree with Dr. Maurer. We see this a lot in the autism community too, that our first response of someone getting in our space is to push them away or flap, which can look like hitting someone. So we see a lot of autistic people, especially those of color, getting arrested for assaulting police officers and brutalized under that rationale.

But one thing I wanted to respond to is Claudia's discussion and also Michael's discussion of mental health calls. Because I'm seeing -- I actually suspect there is an invisible death toll from these police violence cases in which people have gotten to the point where they're no longer calling 911 in situations where the person needs immediate medical attention. And I'm not talking about psychiatric crisis cases. I'm talking about the person has grievously injured themselves or is just about to and we don't even know because they've posted a suicide note on Facebook that says "By the time you read this, I'm probably dead." And so you have to assume that the person is injured. You have to call EMTs to that scene, but especially if it's a person with a disability and a person of color, it's gotten to the point where people simply don't want to call the police. And we have seen people trying to drive like an hour or two away to go personally to that person's house and try to intervene when it's really a very time sensitive issue. And even the crisis diversion, if there is a crisis diversion call, you call them and say "This person has a gun and is about to kill themselves," that crisis team will say "Call 911." They can't respond to that because by the time they get out there, the person could be dead.

So I was wondering, probably something along the lines of making sure that 911 is specifically accessible to people with disabilities. You wouldn't have police responding to your heart attack so you really shouldn't be having police respond to a mental health related injury situation.

CLAUDIA CENTER: I think that's a really good point. I think there are many communities who will not call 911 for the reasons that we're discussing, and that means that 911 is a service that we're being excluded from. And you're right, there is a death toll from that.

>> Thank you.

>> I'm Nancy, disability rights New Mexico. Our city is under --

CLAUDIA CENTER: Some very high profile deaths have happened in New Mexico.

>> Yeah, and I'm in the middle of that in more ways than I can say.

I have two really concrete issues that the DOJ, the case that went viral with a shooting, no CT called, the knife was two inches big, 43 cops. It was -- anyway.

So certainly not something our city is proud of, and it's the first time we've gotten tear gas in that protest.

But two things here. The Ruderman report, spell that because that's something I should read.

And the other is the notion of first responders not being police officers. What we're dealing with this now, our advisory committee formed because of this, that police have to go to secure the site and then once it's secure, then perhaps having somebody with mental health training will be okay and we're trying to break through that one. And so suggestions about where to go, what to read, what to look for, and perhaps we could do that offline as well. But that's where I am right now and trying to push.

And the other thing is, we're reading policies and procedures and trying to address, and right now it's all about people with mental illness. Well, people who were drunk, seniors, autism, someone deaf, I mean, the whole thing, trying to push through the consent decree so that it's not just about people with mental illness but recognizing that we are, and there are lots of people among us who don't immediately respond, so trying to push the envelope there. Suggestions? And we can do that offline as well, but trying broaden the conversation.

New Mexico is a majority minority state. However, I think there are communities that are not represented in the discussion at all, and that's going to make this a problem. So I bring that up as well. But again, just the notion of do the police have to secure a site before someone with mental health training is on board and how to push the envelope to include other disabilities. Not just mental illness, though those are the people most often shot and killed in our area.

CLAUDIA CENTER: I don't have any simple solutions. I think trying to get your foot under the door a little bit on our nonofficer response. You know, maybe if someone is having a mental health crisis and that's all, you know, there's no other information about a threat or any kind of weapon, you know, why wouldn't it be the fire department or EMT or crisis trained individuals who aren't officers? I mean, maybe if there's a way to create a subset of calls where nonofficers can respond just to get that started.

And I think a lot of it is networking among us advocates so that you and I all learn about all the models and try to point to other models.

Ruderman is how you spell the report we were referring to. I see nodding. So yes.

MARC MAURER: I was going to move to another question unless you're not done.

Other questions?

>> Yes. I'm Jennifer Alde, disability rights California, and I'm a native San Franciscan. Any progress made with the SFPD I feel like was completely wiped clean with the shooting of (inaudible) a few months ago, and I'm just wondering what specifically the San Francisco disability advocates are doing now and what's it going to take to make any sort of progress in that city or any city.

MICHAEL BIEN: One of my comments as a San Francisco resident, one of the statistics I'm least proud of, our black population is 7-8%, and 90% of the people in our jails are black. So this is San Francisco. I think that is the fundamental problem. And that's really a deeper problem in our society that we have to address straight on. The police department is fighting tooth and nail against any kind of reforms right now. So not good.

CLAUDIA CENTER: Groups have asked the DOJ to come in. I mean, it's just horrific. There's no words that are adequate.

>> Thank you.

>> Hello.

MARC MAURER: And you are?

>> Victoria Rodriguez. I just wanted to raise the fact that these are concerns that are extremely common also within the LGBT community in general. In the case of the trans community, when we intersect with mental health, it is particularly stressing, since we see the statistic as far as national transgender discrimination survey, 2011, 41% of respondents have attempted suicide at one point or another in their lives. This is combined with a very large proportion that has had very negative experiences at the hands of law enforcement, ranging from violence to humiliation, misgendering, and so on.

And they're disproportionately more likely to experience contacts with police due to poverty, four times more likely to live on $10,000 or less and similar.

In that sense, I would just like to welcome that, and I'm also making, since we have only started getting involved in the disability world, namely I got on board in November, I would like to welcome everyone to reach out to us at the task force. I do want you to reach out to me at some point, Claudia. We're here and we're an LGBT voice in the disability community.

CLAUDIA CENTER: Thank you so much.

MARC MAURER: We're coming to the end of our time.

>> This gentleman has been waiting. Here he is.

>> Steve Mendelsohn, San Francisco.

We're all aware of the shocking statistics about death or injury with police combined with mental illness.

If you're an unarmed white person, you're killed -- (inaudible) white people don't get killed unless they have mental illness.

MICHAEL BIEN: Unless they have a threat/weapon situation. And yes --

>> Michael, sorry. We're representing the estate of a young man who was unarmed and overstayed his welcome in a movie theater, trying to sit through a second show, and was killed by the off duty police officer.

CLAUDIA CENTER: So that, for everyone, is the Ethan Saylor case which led to the Maryland commission on I don't know all the words, but it's about police interactions with people with disabilities.

>> If I could just quickly ask, can you recommend - I'm Kristen in Maine.

Can you recommend a settlement agreement that's been published maybe that either you have handled or DOJ has handled for ideas or injunctive relief for these sorts of cases?

CLAUDIA CENTER: I think that the DOJ website is probably the place to go.

>> Right.

CLAUDIA CENTER: And I think that, as with all of us, over time, maybe the first settlement back when was probably about training and then people said, okay, that's not enough, we have to do more. So I think the more recent, the better. And I think we all need to work on the settlements.

>> They can be really helpful when you have those cases.

MICHAEL BIEN: We have a model. I do a lot of work inside of correctional institutions, but it's the same issue of use of force on persons with mental illness for purposes of psychiatric care. They're actually common. They go in for psychiatric care and they're beating the hell out of them or pepper spraying.

So we developed a remedial process. I don't know if it's good. But again, it's the same -- it's really all coming down to the same thing, training and supervision and bringing in nonviolent people, clinical people, to actually deal with the situations. But I would be glad to share what we have. And if anyone else has any ideas.

This is an area that needs a lot of work. So I think it's an area where there will be hopefully a lot more focus. Guess what? In countries where the police don't have guns, they don't kill as many people.

(Laughter.)

And they're very safe places too. That's really remarkable.

>> Thank you.

MARC MAURER: Now, before we close this panel, I want to say this. I know we're going to get to this break and then we get all these workshops and then we have another session that starts at 4:15, and I don't want you to miss all that. So we're going to do that.

Some of you asked some questions for which there have not been answers. At least not today. And some of you have presented problems which seem intractable and they seem very different and very awful. And I noticed that after they've been presented and somebody said, what do we do about that, there was a big silence in the room.

I would point out that though there are these problems and they are intractable and they are bad, they're less bad than they once were, at least some of them are. And I come with that in mind because I think there are solutions if we will put our minds to it, and it is up to us to figure out what they are. If we don't, nobody will. And we're here because we're on the cutting edge.

So I urge you, think about them but don't despair about them. At least that's the approach I intend to take.

Now we have a break.

(Applause.)

(Break.)

3:00 p.m.

“How to Ensure Compliance with the Affirmative Action Requirements of Section 503”

HEATHER ANSLEY: Anybody else have devices where you can't remember your passwords? You just witnessed that.

All right. We got bought up by DHS.

Ready whenever you are, Jennifer.

JENNIFER MATHIS: Okay. I am ready.

HEATHER ANSLEY: Thank you for coming this afternoon to talk about trying to ensure compliance with the affirmative action requirements of section 503. We'll also talk about the Veterans’ Adjustment Act that came out at the same time.

My name is Heather Ansley, I'm the associate general counsel for corporate and government relations with Paralyzed Veterans of America, and I focus on mainly advocacy issues related to veterans as people with disabilities but I also do veterans' work with VA as well.

JENNIFER MATHIS: And I am Jennifer Mathis from the Bazelon Center for Mental Health Law. And that awkward title is my fault because I told Heather we can't ensure compliance with 503 because we just can't control DOL. We're aiming to try, though.

HEATHER ANSLEY: If you throw in enough qualifiers, you take care of yourself, right?

The first thing we thought we would do is walk through some of the basics of the rule of what did or didn't get included, talk about some of the work we've been doing with the disability advocacy community, trying to work with DOL, and then finally what we can do moving forward to try to ensure compliance with this rule.

So section 503 prohibits, as we all know, employment discrimination based on disability by federal contractors and subcontractors. And it also requires the same entities to have affirmative action to recruit, employ, retain, and promote qualified individuals with disabilities.

The original regulations, looking at implementing section 503, were implemented in the 1970s. And of course in the 40 odd years, decades, four decades since that time, the employment of people with disabilities unfortunately, the rates have not significantly improved. And so in 2011, OFCCP decided to act to try to strengthen some of the 503 regulations to improve the employment of people with disabilities, the numbers in the workplace.

So in December of 2011, office of federal contract compliance programs, which is the part of the Department of Labor that works specifically in this area posted a notice of proposed rulemaking. They received over 400 comments including veterans’ rights advocacy groups.

A final role was published in September of 2013 that went into effect on March 24 of 2014. And although the final rule went into effect, there was an affirmative action program in place.

It's worth noting here that OFCCP at the time sought to strengthen protection in veterans hiring by implementing and enforcing the Vietnam era veterans readjustment assistance act. Has anyone ever heard of VEVRAA? A few.

In some ways it is similar to 503, prohibiting federal contractors and subcontractors from discriminating. It protected veterans and requires employers to take affirmative action for veterans, including disabled veterans, those that are recently separated, those who have active duty, wartime, or campaign badge veterans and also armed forces service modal veterans. So it's called Vietnam era but it applies to a broader group than the name might indicate. They considered changing the name to be more inclusive but didn't. That went into effect in 2014.

OFCCP estimated we may have hiring of up to little over 200,000 veterans under this issue, many of which are also people with disabilities. And so very significant and relevant to this conversation.

JENNIFER MATHIS: And my role is to interrupt Heather. So I just want to say a couple things. The 503 regulations, originally on the books, as Heather noted, they've been on the books since 1970s. Larry had to retire because of their mandatory retirement policy at 70 which is interesting because Larry kind of worked a lot with the Chamber of Commerce and was a big champion of retirement polices until they applied to him.

But anyway, he was the head of OFCCP at the time in the 1970s. What was significant to me, even folks like him said, you know, the original regulations are fairly toothless. It was something of a joke. People all knew that you really didn't have to do a lot under the original 503 regulations as a federal contractor. You had to have an affirmative action plan. And it didn't have to have a lot in it. They had a template online that you copped and you were kind of done. That's a bit of an exaggeration. There was enforcement. But it really didn't have a lot of teeth. So this was really the new regulations that OFCCP promulgated in 2013 were seen I think as pretty significant, particularly given the number of people that we're talking about. This is essentially a workforce that's about a quarter of the entire national workforce. It's a lot of people, just to give you perspective. I think the 7% rule, I think it's like 500,000 people with disabilities is what they anticipated under the 503 rules including the 200,000 under VEVRAA.

HEATHER ANSLEY: Looking at some of the overviews of the changes they did make, establishing a utilization goal for people with disabilities. As Jennifer mentioned, they established a nationwide 7% utilization goal. OFCCP estimates that that would translate into about 594,000 people with disabilities being hired. Because there are intersections again between 503 and VEVRAA, a disabled veteran is also a person with a disability, so they estimate 84,000 disabled veterans would be hired and thus there would be some intersectionality between those groups.

JENNIFER MATHIS: And I just would add, the 7% goal is also not 7% of your entire workforce, but actually 7% of each job category. So I guess the workforce broken down into like managers, clerical folks, every job category, the goal is supposed to be 7% people with disabilities.

HEATHER ANSLEY: And that is of course unless it's a small contractor and then it could apply to the overall workforce. They have to conduct an annual utilization analysis, an assessment of problem areas and so forth, but defining this whole utilization goal, it's not a quota, it's not a ceiling, failing to meet it is not a violation, won't get you a fine, penalty, or sanction. Is that enough qualification?

JENNIFER MATHIS: Aspirational goal.

HEATHER ANSLEY: Yes. So it's very much there and it exists, but they don't have a lot of teeth. They did decline to adopt a targeted sub goal within that.

JENNIFER MATHIS: A lot of us in the community had really thought this was an important opportunity to ensure that in addition to focusing on people with disabilities generally being employed, that they also gave some specific attention to ensuring that that included people with significant disabilities, people who had historically been excluded from the workforce, and EEOC and OPM have had this category of what they call targeted disabilities, folks who are blind, folks who are deaf and hard of hearing, folks with mental illnesses, psychiatric disabilities, folks with intellectual disabilities, various other categories of folks. There's a significant list. 20 something different groups of folks with disabilities on this targeted disabilities list. It was actually developed a long time ago for different reasons, but it really I think mirrored to a large extent those particular folks segments of the disability community who really had been least included in the workforce over the years. And so there was I think a desire to say whether you do the targeted disabilities list or whether you do some other list, most of us said, you go figure it out, talk to some data people like Steve Kay and folks that sort of focus on disability employment data and just, you know, pick out whatever makes sense, but you have to have some sub goal. We're not only looking at people with disabilities at large because after the ADA Amendments Act, that shook everybody, but people with significant disabilities have been historically excluded from the workforce to make sure you're also in addition to hiring people with disabilities, you have a separate goal to ensure that you're hiring folks who are blind, folks who are deaf and folks with mental illness, etc. And that was a real disappointment to a lot of folks who basically said, no, we don't think we have the authority to do that. That we can only focus on people with disabilities generally. Very different approach than the EEOC is taking in its 501 regulations currently in proposed form, but that's affirmative action for people with disabilities employed by the federal government, and EEOC is doing sub goal for people with significant disabilities. And just ensures that you can make sure that some of these folks are included in the efforts to employ people with disabilities generally. So we didn't get that, which is a real shame.

>> I have a question. People often are confused about whether the 7% aspirational goal is 7% of new hires or 7% of the net that you try and hire for.

JENNIFER MATHIS: That's a good question. It should be 7% of your workforce or each piece of your workforce and not new hires but 7% total.

HEATHER ANSLEY: The requirement also, the new regs require a lot of data collection. So there is a requirement updating annually, you know, comparisons of the number of people with disabilities who apply for jobs, the number of people that are eventually hired, and that information must be documented and updated annually. I'll go through a few of these. It includes the total number of applicants for employment and the number of applicants were people with known disabilities. Two, the total number of job openings, number of jobs filled, number of people with disabilities hired, and third, the number of job opportunities and number of jobs filled. And the information three years, it's to be retained. So you can look at are there trends and look at the effectiveness of the outreach and recruitment efforts that the contractor is supposed to be undertaking.

There is also the invitation to self-identify. And this required contractors to voluntarily invite people with disabilities at both the pre and post offer phases, using language prescribed by the office of federal contract compliance. And the issue of this preoffer identification was, there were a lot of comments around that in the proposed rule and concern, I think mainly from the contractor community that somehow this was going to violate the ADA and Jennifer, I'll let you --

JENNIFER MATHIS: Yes, because the ADA says that generally you can't ask people disability-related questions before you've given them a conditional job offer. There's an exception. There has always been an exception for affirmative action efforts. Because there have been so few affirmative action efforts that it hasn't really come into play very much.

So when the 503 rules were proposed, the contractor community went wild because they said, oh, my God, people have been telling us, our lawyers have been telling us for decades that we're not allowed to ask. What do you mean? We can't ask.

So the only way that this reg got through was actually with EEOC's legal counsel writing a memo, even though there had been prior memos and guidance and lots and lots of stuff out there from EEOC saying, yes, this is fine under the ADA, they had to specifically write a memo to DOL saying we give our blessing, this is fine, you're allowed to do this under the ADA, if contractors invite people to voluntarily self identify, that's okay because it is an affirmative action effort, and has to apply the rules if they're doing that.

HEATHER ANSLEY: The comments were, we're suddenly very, very interested in following the ADA.

(Laughter.)

There's also a requirement for contractors to invite their current employees to self-identify as people with disabilities every five years. I don't know if you've had any comments about that.

So basically trying to gather some data about who is and isn't applying for jobs, who is being retained, who actually works for the contract and providing the voluntary options for there.

There's also a requirement for prime contractors to include specific language in their agreements with their subs to make sure they're aware of their responsibilities under 503. That doesn't always translate down. My husband works for a federal contractor and he's a sub within a sub of, you know, because if you really look at who is working, any of you agency folks know, how many contractors and subs you end up with sitting in the same room. So making sure that everybody understands what their requirements are no matter what level they're at.

And then lastly, the requirement with the ADA Amendments Act and the definition of disability, they made some changes to reflect the new statute and definition of disability.

Any other things you want to comment on that weren't included? This is the time.

JENNIFER MATHIS: Yeah. No. That's right. I think what was really interesting about the changes from the proposed rules to the final rules in this particular reg was really just the degree to which there was kind of a backward walk from what was proposed originally to what came out. I mean, that reflected a political context which was really hostile for the Labor Department. When these regs were proposed, as I said, the contractor community went wild for a variety of reasons. Just the voluntary self-identification piece was one. But there was a lot of vitriol, a lot of kind of hype about how burdensome these regulations were, the kind of data collection that was required, the original rules -- the proposed rules rather required contractors to give you reasons if you didn't get did a job. They required written reasonable accommodation procedures which actually the federal government requires for affirmative action purposes anyway, but they required accessible online job applications for contractors that are subject to be 503 rules because they're getting large federal contracts.

All of these things I think we thought, many within the disability community, thought were perfectly reasonable to expect of people benefiting from large federal contracts with the federal government. All of those things I just mentioned were eliminated in the final rules. I think also was particularly, there was a series of requirements around linkage agreements that contractors had to have with vocational rehabilitation agencies. And this was to help with, we're going to find folks with disabilities who qualify for these jobs because if you talk to any sort of group of contractors about these rules, what you will hear over and over and over again is, gee, we just can't find them. The people with disabilities just aren't out there or they're not qualified for our jobs.

I think everybody's experience has been that one of the most important things that folks need to do if they actually want to hire qualified people with disabilities is to really establish relationships, arrangements with folks like the VR agencies, like disability mental health systems, DD systems, etc., human service agencies, state, local, independent living centers, the local ARCs and to have arrangements with at least some numbers of those people where you're going to work with them, collaborate, so that you can do outreach, recruit folks with disabilities for jobs, so that you have places you can go to circulate job announcements that will reach the audience you intend to reach.

And that I think many of us thought was really key. And so you have to do these linkage arrangements and they were very specific. One had to be with either the VR agency or with employment networks through the workforce improvement investment act or whatever it's called now, WIOA. One was with, you know, a variety of different groups that could be either an independent living center or some other disability services organization. One was an educational institution or you had different choices for each category.

And none of that made it into the final regulations. Or they made it in but all of it is optional. So basically in the proposed rule, you had to have job fairs, you had to do a variety of things that were specific steps to do outreach and engagement of folks with disabilities and recruitment so that you would be able to accomplish these goals, these aspirational goals.

And the way the rule came out in the end was basically, here are a bunch of things that you could choose to do or not but we expect you to meet your goal but we won't tell you how to do it. If you're not meeting your goals, then we're going to look at what you're doing but you don't have to do any of these specific steps.

Really the linkage agreements and the accessible online job applications I think were really a surprise, that they were eliminated from the federal rule. The idea that you're getting a lot of money in federal contracts and you have these obligations to do not and nondiscrimination but affirmative action to hire people with disabilities and you don't have to have accessible job applications seemed just odd in this day and age, I mean, 2013 these regs were promulgated. We had the technology to do accessible job applications, but the final rule said, well, it's too hard, the technology is not really readily available. And so you know. We would expect contractors would have to do it if it is a reasonable accommodation in particular cases for a job applicant, but we won't require it as an affirmative action measure.

So yeah. There were other things, but those are some of the I think most significant things that didn't make it into the final regulations.

And I think it's significant. Many of us wrote a letter to the Labor Department, to the head of OFCCP at the time, to say we're disappointed that there was such a significant roll back we listed and it was like three pages of things that were in the proposed rules that didn't make it into the final rules. And that's unusual. I think unusual to see that amount of roll back and it really was because of this push back they had gotten from the contractor community, but it really, I mean, this is why we're here today. It really puts us now in a situation where you have this regulation that has extraordinary potential, it's a huge number of people that are covered by this regulation in terms of the workforce, and you know, Tony Coelho always says this is the most significant law since the ADA in this century for people with disabilities and yet a lot of it seems to come down to probably a judgment call about what's enough to do. If you're not meeting your 7% goals, did you have a job fair for folks? Do you have any linkage agreements? Do you have to, no, but are you doing something? What is the something? How much are you doing? Did you pick up the phone and call disability organizations? Did you go visit with anybody? You know, what did you do?

And because there's no longer a series of A, B, C, D that you have to do and that you're expected to do in order to meet this goal, there's a lot of questions about sort of what it will take to enforce this rule.

HEATHER ANSLEY: I won't go into all the detail but I did want to note that in instead of the utilization goal we have an annual hiring benchmark, which is a yardstick less than a goal. And a contractor may choose their benchmark, so they can either choose to establish it equal to the national percentage of veterans in the civilian workforce published on the OFCCP website or you can make your own looking at five different factors which take into other labor statistics data from the veterans employment and training service, also part of the DOL, and also published by OFCCP and other factors that may reflect your unique needs.

Jennifer had mentioned a letter sent to DOL about the 503 reg once it came out and we also sent a letter on the VEVRAA act, and basically what OFCCP had said was they couldn't find sufficient data to demonstrate the availability of protected veterans to be in the workforce because the data says that they have looked at all veterans and all veterans aren't eligible, it's a subset of veterans.

We just felt that the department of VA for one could have assisted OFCCP in understanding at least the universe of veterans with service-connected disabilities. They intimately know who those individuals are. They could have provided that information. The department of VA also has its own VR program. So they are training veterans who want to go to work. And there were certainly, at least even with that entity, there were places where you could define that.

And certainly DoD, the Department of Defense, is aware of who has been recently separated and who had active duty service and who has campaign badges. Those were all very defined things. It's not an amorphous group. And it really seemed to be more of a difficulty in getting that information from those departments that have it to those departments that don't. And so certainly we think that we could have come up with more in that area, but we didn't.

They also removed the linkage agreement requirements from the VEVRAA reg as well and we have the same -- sometimes I feel like if I close my eyes I can have the same conversation in a room about how do we have veterans’ employment, we hear the same things. We don't know where they are. We can't find veterans who want to work or veterans with disabilities who meet our qualifications. And so we ended up in the same boat.

So as we look at implementing the requirements, we want to talk about some of the work that we've been doing in working with OFCCP since this rule came out. And the consortia for citizens with disabilities, we have three task forces that have been working on this, employment rights and veterans and military families. And also the National Disability Leadership Alliance has been working with us on this. As recently as January we had a meeting with OFCCP because we're chomping at the bit, do you have any data, how is this going.

At that time they told us that most contractors have begun their transition affirmative action plans as of January. They are doing reviews of the plans. Most common errors they were seeing is VEVRAA has a requirement to list jobs and that wasn't happening. Lack of outreach, no affirmative action program, particularly in construction which I think fought the rule to the bitter end. But they found so far not many violations related to self I.D. Again, this is all still very, very preliminary. They have informed us that officers have been retrained about the rules but I remember in questioning them, it doesn't really appear that agencies that are letting these contracts are really made aware of which contractors are doing a good job of complying unless there's some serious violation that nets some sort of agreement.

OFCCP also appears to have trouble understanding their universe of federal contractors. They tell us that they wish they had a list, that the system they have is overinclusive because it includes not just people who have contracts but people who also want contracts. And so they annually evaluate about 4,000 contractors themselves. They estimate there are 200,000 federal contractors, but that was quite a subject of our discussion, was the number of contractors.

We've also been through our work with OFCCP, they connected us with the national industry liaison group, and it's basically an employer association of federal contractors, and this group is interested in affirmative action, equal employment opportunity issues. There are local and regional industry liaison groups around the country.

And so we have had some meetings with this group. We had a meeting that was facilitated at the Department of Labor last spring. And then we got together without the Department of Labor and shared information, and then we had some folks at their national conference last July. We're hoping to get together with them this year, but we have struggled on both sides I think with the best way to work together. That they would like centralized point of contract, when I need an employee, I go here and I will find qualified employee.

JENNIFER MATHIS: Yeah, hasn't really worked that way. I think it's interesting. This is a trade association of some of the largest contractors, and our hope and anticipation was that in building these relationships, that we might actually start getting some inquires, as sometimes we all do, from the contractor community, sort of where do we go, we want to focus, here's where we're focusing our efforts right now, in this jurisdiction or something, which groups would we go to to help us with recruiting folks with disabilities. And it hasn't really turned into that at all. I think we've gotten very little collaboration. I don't think it's so much from the lack of interest, but it's not -- this connection between sort of grass tops disability groups and trade association contractors is not kind of leading to any real sort of things down the line, real connections in the way that we hopped.

HEATHER ANSLEY: Right. And I would say that there is definitely interest on both sides. From the NILG has said this is kind of new for them and they are interested in figuring out how we can work together, and quite frankly, I think from where we are in a policy level, it's interesting for us to figure out how we can work with them because we're trying to -- you know, there are some groups that have employment programs. Paralyzed veterans has its own VR program and we have sites around the country and certainly we can connect them to disabled veterans who want to work in a particular field that they may be hiring in. But it's been challenging to figure out exactly how we can bridge that gap to have I guess those informal link ands that were envisioned.

>> To what extent is it possible to develop those linkages and bridge that gap by studying how it is nowadays that large employers actually go about filling jobs, using social media and the way that whole process has changed? The process is now evolving and may now have a better effect.

JENNIFER MATHIS: I think that's right, and I think one of the things we want to talk about here is just, you know, personally, like I'm done with the kind of efforts of trying to build these relationships to hope that somehow what will come out is sort of meaningful connections with the disability community that will lead to contractors really effectively using disability groups to recruit large numbers of folks with disabilities for contractor jobs and really want to focus on the next step. Like let's start filling complaints. Let's start getting information. And not just sort of keep meeting and meeting and meeting and hopping something will happen. Right? It's not been happening.

Kelly.

>> I have encountered this weird issue in employment generally, let alone with federal contractors where people are very, very interested on the employer and contractor side of hiring people with disabilities.

But then they proceed to do things that make no sense in terms of that context, like saying that you must be able to lift 25 pounds in order to do this job or creating websites and applications that are inherently inaccessible for the population they're trying to hire.

It seems like if there was some way -- I think it's less an issue of them deliberately doing this so much as it's an issue of misunderstanding or miscommunication on lower levels of the organization, but I sometimes wonder if the disability grassroots and the employer side could just have a conversation about accessibility.

JENNIFER MATHIS: I think you're right and that was one of the things that we sort of offered that was part of why we wanted to do the collaboration. Partly it's recruitment, we can tell you where to turn but partly if we can also help with you reasonable accommodation issues or with accessibility issues, we can help you with all kinds of understandings of cultural competence and all these different areas, that would be sort of useful. But --

>> And other cases in which an employee with a disability might take something that the job app says one thing but they're taking it very, very literally.

JENNIFER MATHIS: That's right.

>> This gets at what I wanted to talk about a little bit, because over the years, I've known lots of people who call about bad technology or being fired. People already working there and you find out they're a federal contractor.

What is your assessment? I know what mine is. What is your assessment of the effectiveness of the Labor Department for regular people who say, oh, my God, now they're going to fire me, I couldn't make it work and they said I have to go.

And I say, oh, what company?

Oh, well, you know, they might be a federal contractor. You can call the Labor Department.

JENNIFER MATHIS: And you raise a good point, Charlie.

>> Yet I've hardly seen any success.

JENNIFER MATHIS: That's true. And there are different types of complaints. People have always been able to file these complaints, nondiscrimination complaints. So there's a long history of dealing with those. Yeah. I mean, overall, my view is there has been that I'd rather go to EEOC generally, although, DOL has done some interesting enforcement of nondiscrimination complaints and pick some interesting issues here and there. They've got some interesting administrative law judge decisions.

But yeah, I mean, overall, I think folks have, I don't know, generally my thought is folks have done better at EEOC, but this is different. This is affirmative action complaints. There is virtually no history of those being files because there was never anything much to the affirmative action requirements until now.

>> The one situation in which I did have some success, I think the company got nervous and said, oh, yeah.

But mostly, EEOC, and I don't know how DOL is on this, retaliation issues, if you file at EEOC, at least you have some inoculation, that if there is retaliation, it goes right to the front. And I don't trust that we see that.

>> I'm just curious, like what prompts someone to file a complaint? Like what is it we're relying on to incentivize a complaint? The only thing I can think of is a whistle blower from HR. Who knows whether the plan is just someone checking the box or actually being implemented?

>> I'm talking about individual people who are being fired or discriminated against.

>> Short of the nondiscrimination claims.

>> It would be nice if we could even get at least that.

>> Well, for these affirmative action cases, who is filling a complaint? Where are these coming from?

JENNIFER MATHIS: They aren't.

HEATHER ANSLEY: They're coming mainly from if OFCCP does an audit of your plan and then they do what they do. If it's terrible, you can get a conciliation agreement. Theoretically you can be debarred though that doesn't typically happen.

>> What trigger and audit?

HEATHER ANSLEY: They do 4,000 a year. But those can be just desk audits, not necessarily in the field. And if they get -- I think if they get notification, they can also pick up those organizations to audit them, but it's -- in many ways I feel it's a pretty toothless tiger.

>> Yeah. And that's probably because other than having people of a certain race, gender, ethnicity, disability in your ranks, it's extremely difficult to prove that someone hasn't been following affirmative action regulations. There's a certain level of what burden of proof is that?

JENNIFER MATHIS: That's right. But that's what I think I'm interested in now is sort of what are the best things to focus on if you were going to try to put some teeth into the enforcement of these rules. So what is required that you can actually get DOL to enforce? I mean, voluntarily self-identification, one of the top things that apparently the contractors are not doing currently is they're not doing even the voluntary self-identification. So that seems like an easy one. That should be violation, DOL has authority to pursue.

>> We don't know that because there's no public data. I can look down a website and say, hey, these guys, let's call up a few of our friends who work there, file some complaints, get an audit done, because they're not doing anything.

JENNIFER MATHIS: What I would like to do is get a group of people to actually strategize on this to pick some ideas. Do you want to focus on some industries or focus on large contractors or on particular issues like accessible job applications or accessible technology? What can we do? Do you want to focus on sort of people who have really low rates, not anywhere near the 7%, they're at 3% or something and not doing anything? Can we do like class complaints or something? An individual complaint isn't necessarily going to get you to the same remedy as a class complaint.

>> Do they collect information by category or just I have a disability?

JENNIFER MATHIS: You means in terms of --

>> Gathering their data. Like EEOC, there's nine targeted areas. They have to do a report on those. But in general, what is it for OFCCP?

JENNIFER MATHIS: I think they do have a target because I've seen some references to targets but we don't know what they are. And I think --

>> It's not transparent.

HEATHER ANSLEY: Yeah. There's a lot that's not transparent.

>> Do competing bidders ever use theses as a way to knock out or challenge --

HEATHER ANSLEY: Not that we're aware of.

>> Is the data public? A contractor submits a report that says they have 1% people with disabilities, is that public?

JENNIFER MATHIS: I think we can FOIA it. And DOL has suggested we FOIA it. We have asked for information and haven't gotten much out of them. I think as they see it, it's still early because the regulations didn't go into effect until 2014 and then basically contractors had a year to kind of, you know, they had to come up with this data. So they're really just at the point where they've gotten affirmative action plans from people in the first place, where they're just starting to look at enforcement. And so they haven't had data until now and we've kind of said what data do you have and they have kind of what are the top violations. I don't think they can just give you, if you say, you know, they have I think some overall data on where contractors are in terms of the number, the target, but I don't think they can -- you can't just say, well -- I think we have to FOIA some of it.

>> If you're going to file a complaint, I suppose one of the things you could do is file against the company, get a FOIA on the company.

JENNIFER MATHIS: Exactly.

>> Do you all get the impression that there are enough teeth in 503, formal or informal, for industries that are subject to want to comply?

JENNIFER MATHIS: It's a good question. I'm not sure. I don't think anybody knows at this point.

>> Washington metro wants to comply. They're scared about everything.

(Laughter.)

JENNIFER MATHIS: I mean, I think it will depend on how DOL makes the cut, what they say. And that's why, you know, we've been trying to get this information and we really can't get what their thought process is and sort of what's enough and what's not enough. That's why I mean, I think we would like to try to just start file something complaints and see what they do with them. But we need --

>> The reason I'm asking is for the hard of hearing community at least, it's really a chicken and egg thing. We're always asking, should we disclose. And my thinking is, if 503 really means something, then yes, absolutely, you want to disclose.

My personal view is that people who don't disclose are putting themselves at a great disadvantage because people might not think we're hard of hearing, they might think instead we're rude or stupid or crazy. But anything we can do to encourage people to actually, you know, take ownership of this and disclose would help.

JENNIFER MATHIS: That's why I think we would like to kind of get in now when it's still early enough to see if we can make this into something that contractors take seriously. If we just sit and kind of watch it happen, our impression is not a lot is going to happen. And maybe we're going to give up. Maybe we'll say it's futile. But we should try I think now.

Steve?

>> Certainly no accident I think that companies are not embracing the voluntary disclosure because the implication of that is if someone does voluntarily disclose, that means for example an accommodation that might be costly in the company's opinion and if they refuse to give it, they expose themselves to discrimination charges they would rather avoid. So the risk on their side of enforcing a voluntary identification program, in the absence of any enforcement of 503, it isn't worth it to them.

I know you put it out more as a rhetorical question, but in terms of what we might do, we want to do something to make a difference, the first thing would be to find a way to get 503 compliance written into the criteria for federal contractors. Of course they haven't done anything with 508.

HEATHER ANSLEY: That's exactly what we've said, in talking to your contracting officers, they're the ones letting these contracts to companies that aren't necessarily complying so where is the information for them to say, yeah, you know, I'm the Department of Veterans Affairs and Is like to have somebody who is just doing a great job with VEVRAA and 503. It's not clear that information is available to them and they can look at that and make that determination.

>> Someone should bring contracts action in GSA to prevent the implementation of a contract which was included in the interrogation of any 503 complaints. They might lose but it would be a big jump.

>> You might find like a losing bidder, a big company that had lost a bid more willing to try something.

>> Exactly.

>> Whether that's crazy or not, they may be more willing to try that with their fancy procurement lawyers.

JENNIFER MATHIS: Are you saying a third party beneficiary claim?

>> There are all kinds of ways through GSA. Procedural requirements surrounding the contract enforcement make anything else look simple. The losing bidder can do it. Sometimes a third party beneficiary can do it. Employee who thought they were denied a job might be able to do it. You look at any contract, any award, you can find that information.

HEATHER ANSLEY: We just had a case that went to the Supreme Court that my organization had on an amicus court with a losing bidder in department of VA because of requirements of veterans' preference in contracting. So having a losing bidder, I've seen it in other contexts and that may be something to consider here.

>> You can jump in on the side of a losing bidder.

HEATHER ANSLEY: I wanted to point out about the discrimination complaint, I was online trying to find out if I felt like I was a person who had been discriminated against and 503 was an option, how do I even file a complaint? Anytime I went to the website where it would say file a complaint, when you click it, it just brought you back to the same website. Finally I took the name of the form and said, I'll Google it.

The first time, I couldn't get it to load. It took me like two or three times to actually find the form, which looks like it was made on a manual typewriter. I printed it out.

>> It probably was.

(Laughter.)

HEATHER ANSLEY: It does mention 503 and executive order and VEVRAA, it's all there, but I knew what I was looking for and I couldn't find it.

>> I tell people to call.

HEATHER ANSLEY: I almost called the website to say, can you tell me how you're supposed to file, it seems like you don't want people to file because I'm having trouble here.

>> I thought the same thing.

HEATHER ANSLEY: That's on the nondiscrimination side but I think emblematic of what we see across the board.

>> The form hasn't been updated since the Rehab Act was passed.

>> Probably not.

(Laughter.)

>> There are several areas in the federal government where it's difficult to file a complaint on one thing or another. I think it would be great for a nonprofit to take on a project where they set up a nice, accessible, easy to use automated form where you just type your information on a web page, hit submit, and it would machine gun the complaint to the relevant agency.

>> That's interesting.

>> You could do it with DOJ, Title III complaints, with 3508.

JENNIFER MATHIS: You can just talk to all the 503 folks who are here.

>> We do need a strategy.

JENNIFER MATHIS: So we have like, I don't know, four minutes left. And I was going to actually ask, are there -- if I sent around a sheet, like a sign-up sheet, would folks just put their name down if they would be interested in kind of just, you know, having an email correspondence, just having a chain so that those of us who may want to explore working together in whatever level of collaboration to see if we can generate some FOIA requests and maybe some complaints to see where we can take 503?

>> Rather than writing it down, I'll give you my card.

JENNIFER MATHIS: I got you, Charlie.

>> If I write it down, you won't be able to read it mostly.

JENNIFER MATHIS: Any other thoughts?

>> I'm curious, when it comes to some of the same affirmative action requirements regarding gender and minority status, how are those things being addressed and how do they compare?

JENNIFER MATHIS: It's an interesting question I was trying to figure out. For race and gender, you have this executive order 11246. They have a lot more very specific -- although I don't think there's private enforcement of 11246. It's also just DOL enforcement. But I think there's more specific kind of requirements.

>> When you look on OFCCP's website in terms of enforcement actions, that's who it is. Those are the individuals that you see there was some big, you know, action against some contractor for not hiring men or women or whoever the classification is.

>> But you as an employee can always bring a discrimination suit against your employer, the contractor.

JENNIFER MATHIS: Exactly. For the most part, folks will be covered under Title I of the ADA and you can file suit or file complaint with the EEOC.

But yeah, that's different than these affirmative action -- I mean, the whole purpose of this affirmative action piece is really to be able to do something more than what you can accomplish under the regular nondiscrimination requirements. So that's why I think this is such a significant opportunity.

Every year, you examine the physical and mental qualifications for a job to see if they are needlessly screening out people with disabilities. Then the final rule came out and said, no, you can do that whenever you feel like it.

>> In terms of voluntary disclosure, in my experience, when people are asked to voluntarily disclose they have a disability, you have to remember that the population you're talking about is unemployed in huge numbers and sometimes these people are terrified of never achieving anything. So a lot of times people may have a disability but won't disclose if they can get away with it because they're scared of being discriminated against.

JENNIFER MATHIS: That's right. And same in the mental health world, and it's been basically something that when people disclose, bad things happen and so there's good reasons why people are afraid.

And one of the things that Pat Shoe has said, to her credit, this is an opportunity to we're taking to educate contractors to really try to build kind of a better environment for people with disabilities because they need to have that. That's like key to the whole thing working is to have an environment where people feel like it's okay to disclose. I mean, making that actually happen translate into reality is a many-year project obviously and we're not there. That's why I would like to just sort of use this opportunity to do as much as we can to see where we can get because we're not getting anywhere talking.

Anyone who hasn't signed this?

Okay. Thank you.

(Applause.)

(Break.)

4:15 p.m.

“Ethical Issues in the Representation of Persons with Disabilities”

ALISON LYNCH: Okay. Up on the screen, I have rule 1.1, competence. One panelist said earlier today, just because I don't have a certain background, that doesn't mean I can speak to anyone with my same background. Same goes for me or any other attorney representing a group different from themselves. I can speak very well for an individual who also might happen to be legally blind and color-blind and light sensitive because that's what I know. That's what I see every day.

But I can't speak to the experience of someone who is completely blind or someone who is deaf or someone who has depression. Those are things that just because they're a disability doesn't necessarily make me competent immediately to speak about. So I think it's important that we teach people coming into this field that it's equally important for us as people with disabilities representing other people with disabilities to do just as much research and introspection as someone maybe without a disability who is coming in to this field. You know, the issues that we're going to face in these representations are not necessarily going to be things that we're familiar with. And so as part of being a competent attorney and being able to represent a client, it's really important that we do the legwork and set the groundwork and the foundation for what we understand about a person's experience. And a lot of that can come from doing outside research but a lot of it will come from sitting there and listening to your client tell you what their reality is.

I think a lot of the time in law school, you don't always get the advice of, you can become competent in representing a client with diagnosis X by sitting there listening to them describe what it's like for them. Because a lot of times you don't have time for that as attorneys or we're not taught to make time for that. So I think when I interpret this rule or think about representing an individual where I'm not necessarily familiar with the background they're presenting, one thing I want to do is not just read the medical journal articles about some diagnosis I've never heard of; I want to talk with them and ask the questions, what's really going on here and what's important to you and what's it going to be like, what do you hope to get out of this.

So I think that's an interesting framework for the idea of competence and not one that's necessarily always brought up in the course of law schools.

Rule 1.4, communication with your client. It basically says talk to your client, which is a great reminder for all of us with heavy caseloads. It's still important to communicate frequently.

The reason I put this up here is not just to remind everyone to talk to their clients, but because in some of these representations, clients might be hard to talk to. Clients might not be wanting to talk to you. I have made a number of phone calls where the client will immediately upon hearing my voice say "I have nothing to say to you, I don't want to talk to you anymore" and hang up on me and I'm just trying to say, hey, you have a court date coming up that you should prepare for.

Sometimes they are not going to want to have the kind of communications that you want to have, but it's equally important regardless of whether they have a disability or not to make the effort to communicate as frequently and clearly as possible. One thing that this rule sets out is making sure that a client really understands what's happening throughout the scope of the representation, throughout the course of whatever is happening.

And again, some clients, it may be very difficult to sit down with somebody who is off medication and extremely manic and pacing around the room and responding to internal stimuli. There can be a lot going on. But that doesn't mean you walk into a room, you see that happening, you say, yeah, no, I'm not going to get through to this guy, and you turn around and leave. That's not appropriate representation for the individual. So I think this rule really reminds of us this fact and it's a good idea to keep that in your mind as being prepared for any number of different receptions when you try to communicate with a client. It might not always be the very straightforward easy email or phone conversations that you might be expecting.

So the next role is one they spent about four weeks on in law school, 1.6, confidentiality of information. We all know the importance of it. Keep it confidential. I feel like I have to put it in here because that's the big one, but we all know that. Regardless of disability or whatever other characteristics, don't break confidentiality. It doesn't matter if the client has a disability and someone says, oh, tell me about this. Still. None of their business. Keep it confidential is. I'll move on. You guys know this stuff.

I have a second slide on confidentiality because I have to. But again, time permitting, I'm not going to do this right now. I'm going to go to one of the more interesting rules, 1.14, client with diminished capacity. So this rule, if you will excuse me, I am going to do a little bit of a dramatic reading for you because I do want to spend a little bit of time going through what this rule says specifically and I don't want to screw it up by summarizing it.

So this rule says:

(Reading slide.)

So A is interesting. Maintain a normal client relationship. "Normal" is a broad term to leave open-ended and let you interpret as you will. But I think it's telling that the American Bar Association, in all of these rules that they've come out with, says specifically, when you represent populations that might have a disability, I'm reading this really broadly and saying diminished capacity in this sense, in my practice area, is some form of mental disability. When you're representing a client, you have to start with the assumption that you are going to have an entirely normal client-lawyer relationship. And I think that's really significant. In some law school courses, this is skipped over a little bit unfortunately. But what I think lawyers understand really quickly when they come into practice, especially if they start working for a public interest group or as a public defender or in any way in the system, I like the term criminal legal system from what we heard earlier and I'm going to kind of start to use that, but especially in systems like those, you're going to see a lot of clients who might fall under this rule of diminished capacity, whatever you want to classify as that. And I think it's a really important assumption that you always have to make when you go into meeting with a client, even if you've been told already, this person is crazy, you hear that a lot. If you follow someone else into a room after someone's just been arrested or going to a hospital to meet a client for the first time, you might hear a staff person say "Oh, yeah, that guy, good luck. You're never going to talk to him." And the staff person looks into the room and goes "Good luck." I hear that one a lot. That's not how you set a normal client-lawyer relationship. In very few other populations would you have someone so blatantly say, this guy is not worth treating like any other client. And I think it's really important to recognize that the American Bar Association has taken the time to specifically state that, no, that's not how we're going to view this and we're going to put this into writing that lawyers need to maintain the normalcy of any client-lawyer relationship regardless of ability or diminished capacity.

So I'm going to do some more reading here. I won't take you through the rest of this rule because I want to leave enough time for Jonathan and for questions, but essentially, that's all I have on the big rules. You know, what I really wanted to emphasize today was just the importance of starting from a framework that says, I might have a client with a disability, however, that is not necessarily going to impact the way in which I represent that client. And to me, this is a no brainer of a few years doing this. But to new attorneys, this can be a daunting prospect, especially if they haven't heard that sentiment before. As simple as it sounds to us, it's a really important lesson that we internalize when we talk to new lawyers who are entering this field who may have absolutely no experience with this kind of representation before, learning this stuff takes time and I think it's really important to put ourselves in a position of someone who has never done this before and to remember what it was first like when we've made a mistake or we use a term we shouldn't use. It happens to the best of us, and we just have to be as empathetic as possible to people who are coming in for the first time and kind of teach them the ropes. And I feel like these rules are a good place to start in terms of where you can have conversations about appropriate representation or when you disclose information or how you handle a client who has diminished capacity. There's a lot here and a lot of good conversations that can be brought.

So I will turn it over to Jonathan and I'm happy to answer any questions that you might have.

MARC MAURER: Jonathan Martinis from Burton Blatt Institute.

(Applause.)

JONATHAN MARTINIS: Please stand by. We're having some technical difficulties.

MARC MAURER: We used to have microphones.

I'm told we're about to be over with this difficulty.

All right, Jonathan.

JONATHAN MARTINIS: Thank you so much. My name is Jonathan Martinis, senior director for law and policy for the Burton Blatt Institute. Thank you, Alison. My presentation will focus specifically on the interplay between the rules she went over and our practice, specifically applying what I would call the moral requirements of the ethical rules to our practice, not just our representation but our practice, the remedies we seek, the work we do, what we do in negotiations.

And confession, I say that knowing that I am speaking to a roomful of literally the greatest legal minds in civil rights who have a really long list of great accomplishments. So the obviously the one thing missing is someone like me telling you what you to do.

With that in mind, think of some of the rights you've defended, some of the settlements you have achieved, the way you have expanded opportunity for people with disabilities, and answer a simple question: Which one is your favorite? What's your favorite right? Not just a thought exercise, by the way, but the number one ice breaker for the reception immediately following this presentation.

But think for a moment. What's your favorite right? Free speech? Accessible elections? The right to access public accommodations? Is it community integration?

Ask yourself this question when you're thinking about that: What do all of those rights have in common?

Choice. The right to free speech, the right to say what you want, the right to choose where to live, the right to supported employment, the right to choose your place to work. The right to make choices is what makes all of the other rights worthwhile.

On your screen is a quote from Jean-Paul Sartre, who is not the sunshinyest of writers, but he gets it right. He says this:

(Reading slide.)

Amen. Our choices define us. Good, bad, silly, significant, casual, critical, they say who we are, who we want to be. They teach us. Our mistakes, just as much as our successes.

The right to make choice undoubtedly the most important of the rights we have. In my opinion.

We call that self-determination. Which as we know is control over your life. Acting rather than being acted upon. Doing rather than to having things done to you. And we've known for four decades of research that when people with disabilities have more self-determination, they have better lives. Study after study finds that when people have greater control over their lives, they are healthy, more independent, more well-adjusted, better able to recognize and avoid abuse. When they have more control over their lives and their situations.

Think for a moment about rule 1.14 which says that our obligation as attorneys is to ensure that clients with, quote, diminished capacity, unquote, have an equal opportunity to engage in the representation, that if a person has diminished capacity, whatever that means, the lawyer has an ethical obligation to ensure that that person is able to participate in the representation, going so far as to say it is the lawyer's obligation to seek out assistance and support. To say that a person may want someone in the room with him or her, to help that person understand his or her choices and make his or her choices. That right there is a call requiring lawyers, ethically, to ensure that your clients can exercise this exact self-determination. It is the key to good representation. After all, if your client is not an equal partner with you, you cannot have effective communication. You cannot ensure confidentiality. And you certainly cannot make an effective representation or even a settlement offer.

So about those rights. Those ones that are so important. Self-determination among them. Are they worth anything if you're not allowed to exercise them? If you've gotten a great settlement that ensures someone access to community integration and you say, good news, you can choose where to live, bad news, you don't have the right to make that choice. Good news, you can get out of this sheltered workshop. Bad news, there's someone with the power to say you can't. Good news, you can go where you want and see who you want. Bad news, there is someone telling you won't be doing that but will only go out when I say you can. In those situations, are they even rights? Are you a citizen? Professor Dinerstein calls people in those situations as having civil death. People under guardianship specifically.

For 2,000 years we've been doing that to people with disabilities. In Roman Empire, you were put under a curator for someone to make decisions for you if you were quote feeble minded. You were put under a committee empowered to make decisions for you.

Here in America, that is guardianship. Guardianship, a different thing in every state but every state has the same essential requirement. If a judge decides that you cannot make decisions, that you are incapacitated, the judge will take your rights and give them to someone else. That other person becomes you. Again, a civil death because you cannot act or interact with society except through the auspices of your guardian.

It's worse than you think because the studies say that 90% of guardianships are plenary or full, where the guardian has the power to make all decisions for a person. Truly a civil death.

Another thought exercise. I want you to think back to 1995. Think back to what things were like for people with disabilities in 1995. I also say that knowing there are people in this room who were probably in grade school in 1995. Alison, from the bottom of my heart and on behalf of everyone in this room, we hate you very much.

(Laughter.)

Everyone else, think about what things were like for people with disabilities. 1995 was only five years after the ADA was passed, four years before the Olmstead decision, so it was still perfectly okay to warehouse people with disabilities in institutions. Sheltered workshops were not only an employment option; they were a preferred employment option in vocational rehabilitation. We did not have Medicaid waivers like we do now.

Now think about 2016. Supported employment is an expectation. Community integration is a right. Probably everyone in this room is carrying a computer in their pocket more powerful than anything on a desk in 1995.

We have more ways now to make more people independent than ever, yes? Then why are there now a million more people under guardianship today than there were in 1995?

So those questions, were they so stupid?

When you can fight for someone's rights, when you can achieve rights for an entire class of people, understand this: There are a million people just in the last 20 years who have been left behind because they are not allowed to exercise their rights. And we've known for the same amount of time that we've known self-determination is a good thing, we've known that people without it is a bad thing, they are less healthy, they live less long, they have lower self-esteem, worse objective and subjective health, they are less able to adjust to increasing care needs.

So where do we go from here? If we take it as a given that rights are a good thing, and that self-determination is a good thing, if we take it as another given that losing rights or the inability to exercise rights is a bad thing, then we also must take it as a given that some people need additional assistance to exercise their rights. If someone in this room never gets help doing something, please raise your hand. I would like to see you afterward. No, we all need help doing things sometimes. But it's a truism that some people need supports like assistive technology, they need people to talk to, they need support in the way they live their everyday lives or balance their budgets or do their activities of daily living.

If we take that as a given, that some people will always need additional support due to age or disability or just because they're human, we need a third way, something that's not no support or full guardianship. That is supported decision making.

Lots of words up on your screen now. I know because I wrote them. It goes like this:

(Reading slide.)

I hope everyone noted I was not looking at my screen at that time.

And I feel bad for Professor Blanck is not here today because I messed up when I wrote all those words. What I should have just said was, what is supported decision making? Think about the way you make decisions. Think about what you do when you are faced with something that confuses you, when you go to the doctor and the doctor speaks jargon. When you go to the mechanic and he speaks jargon. What do you do? You say, English, please? Or explain it to me like a five-year-old or stop talking down to me and help me understand what it is I need to do.

And when the doctor says, you have a crick in your neck rather than a subluxation in your cervical area, and you say, thank you, I get it now. When you've done that, you have exercised supportive decision making.

So what I should have said is it's just getting help when you need it. Just like you and I do every single day. That's supported decision making.

The difference is when you ask for assistance, when you get a second opinion, when you ask for clarification, you're smart. You're judicious, you're wise, you're examining your options.

The person with a disability does it? They're weak, stupid, they need to have their rights taken away. Because only peck with disabilities are held to the Mr. Spock standard. You are either 100% logical and able to do everything yourself or you are unable to do everything.

Why do we do that? Where do we create that kind of dichotomy when it is a truism as much as anything else that all of us engage in supported decision making every day.

And doesn't supported decision making sound just like rule 1.14? The comments to it make it really clear that a normal attorney-client relationship is based on the assumption that the client when properly advised and assisted is capable of making decisions. "When properly advised and assisted." We have an obligation to properly advise and assist the people we work with. We engage in supported decision making with and for our clients.

And the purpose of my presentation is to say that this ethical obligation carries beyond the discreet attorney client relationship. If we take it as a truism, as the research says, that when people have more control over their lives, they have better lives, if we do what researchers like Professor Wayne Meyer from Kansas says, that self-determination is across the professional spectrum a best practice, then we have an ethical obligation to provide this support when we speak with our clients. I think we have an obligation to ensure this type of support is available when we speak for our clients, when we seek remedies for our clients, when we advocate for our clients, because supported decision making can bridge all of the gaps that have separated people with disabilities, people specifically with disabilities in decision making or perceived cognitive disabilities, separated them from everyone else. You know, someone says I need help, explain that to me, person who doesn't have a cognitive disability being smart, person with a cognitive disability, they obviously can't make decisions.

Supportive decision making can do for them what you do with it every day. It can help you weigh your options. You might just need a friendly, hey, can you explain this to me? I'm not getting it.

You can have a formal relationship like powers of attorney. You can ensure decisions are based upon your preferences and opinions. You can help communicate.

Has anyone here ever said, hey, please explain it to this person, they're not getting what I say? You've engaged in supported decision making.

So people who are quote, nonverbal, unquote, when they're called incapacitated, think again. There are many ways you of communication. Through the use of after appropriate supports, we can ensure that people who use every means of communication have the same right to make the same choices as everyone else, because if we accept that self-determination is a good thing, then supported decision making increases self-determination. Think about it. It's obvious. If you are the time decision maker in your life as opposed to someone else, you by definition have a greater degree of control over your life and therefore have an access to the study supported research related benefits of supported decision making, including greater community integration, including greater employment, greater financial independence. If these are appropriate goals for our clients, then we must include them in the work we do and opportunities to do that are all around us. Here are just a few.

Any special education lawyers in the room? Great. Special ed. You know what schools never do? They never read the purpose of the IDEA. They all say FAPE. And we have to get educational benefits, right? Congress actually told us what the schools are supposed to do. It's in bold at the bottom of your screen. The purpose of special education is to, quote, prepare students for further education, employment, and independent living. It is the school's job, K-22, 3-22, to ensure that students have what they need to live independent lives. Yet studies have shown that the number one referral for guardianship, the first source for people losing their rights, are schools.

I've been around the country in the last two years talking about supported decision making and every state I go to, multiple parents tell me, my school sent me a letter saying when your child turns 18, you better get guardianship. If you don't, you won't have a say in your student's life. Multiple parents have said, teachers have come to me saying, you have to get guardianship or you won't be able to have a say.

So schools, with an obligation, I say again, to ensure independent living, are the number one source of dependency.

Why? Especially, especially when transition services, for my money the most important part of special education, specifically require schools to provide coordinated services that ensure that students have access to, quote, post school adult living objectives and, when appropriate, acquisition of daily living skills.

Transition begins no later than age 16. Several states age 14. So whenever I hear schools telling parents to get guardianship, I ask, what have you been doing? You haven't been doing your job, schools.

Starting from age 3, starting from the very first IEP, you should be asking, where are the self-determination goals in the IEP? Your job, school, is to ensure independent living. What about your policies for developing self-determination goals?

If we develop self-determination and decision making supports at a young age, then independent decision making is an expectation and habit and guardianship doesn't come into the equation, does it?

(Applause.)

One of the greatest accomplishments of my former office who I'm still a partner with is D.C. public schools. Until a few years ago, D.C. public schools had a written policy requiring teachers to refer parents to guardianship at 18, literally in writing. Thanks to the legal director at one agency, they changed that and got with the program. Their policy now and curriculum now begins teaching supported decision making and self-determination in pre-K. I know that sounds funny, getting support to make a decision between milk and juice, but again, think about it. If you're 3 and you know you have the right to make that choice, and the right to get support in that choice, then as you get older and the decisions get more complicated, you have more practice in making decision making. You have an expectation in decision making. And if we do best practices, the student-led IEP, we have a laboratory of supported decision making, parents, teachers, everyone working together to make the best IEP with the student leading the meeting.

What does that sound like? Supported decision making, rule 1.14. So the special education attorneys, I ask you -- all right, I charge you to the extent that I have that authority, and feel free to call me, I have charged you. When you are in your mediations, when are you in your IEP meetings, when are you in your settlement negotiations or at due process, ask that question of the school and demand that remedy of the school. Where are your self-determination goals? And God help the school that is recommending guardianship and has not taught the students self-determination skills.

VR, who has so much power, I tell people, don't roll your eyes. Know your rights because VR has the ability to provide anything. Literally anything a person needs to get a job, prepare to get a job, keep a job, advance in a job, or retain or regain a job.

What if the exact same thing keeping you from working is the whole problem? What if interpersonal skills or keeping up with your own high general is weighing against you? VR says those are independent living skills that we don't fund. I say, would you hire someone who yells at his coworkers or isn't able to take care of him or herself and is a huge drag on your insurance claims? Would you hire someone disorganized who can't get to work on time? Of course not. These are employment skills. At the same time, they are the kinds of skills that we need to build independent lives.

And think about the things that VR can cover. The code section. The reg act. And I'm a reg head so forgive my geekiness. But if you go to the code, you will see a list of mandatory VR services from A through S, very specific services like assessment and counseling and medical and mental healthcare, transportation, service to family members, education. Oh, and I was wrong, it's not A through S, it's actually A through T because T is anything else a person might need to work.

So VR attorneys, ask yourself this: Isn't self-determination built into the VR system? Isn't building a person's decision making skills already part of the system and shouldn't it be? Code section after code section, reg after reg requires VR to inform choice. Informed choice is by definition the counselor and VR working with the person, informing the person, making the person an equal partner so that person is able to identify and choose his or her preferred employment goal and the supports and services needed to get there.

I repeat: The person chooses, using the input from VR, his or her goal. What does that sound like? Sounds like supported decision making, rule 1.14.

So I charge you VR attorneys, ask VR. What are you doing to make sure this person is self-determined enough to get and keep a job? What assessments have you done to examine this person's self-determination? We have Medicaid. Medicaid introduced to the person-centered planning, that wonderful phrase. There's a requirement that says person-centered planning, services under Medicaid must be driven by the person, including people in the planning process chosen by the person and occur at places and times and cover subjects desired by the person. I cut and pasted this slide directly from Medicaid.gov that says:

(Reading slide.)

Put those two together. What does that sound like? Sounds like supported decision making. It sounds like rule 1.14.

Olmstead attorneys. Who here has run into what we call the step 27 problem for Olmstead? Yes, the person has been found ready for discharge. Yes, there are places available in the community. But how do we tell step two, the person wants to be discharged or the person does not object to discharge? Especially when there's a guardian who does object?

So we see, Olmstead settlement agreement after Olmstead settlement agreement that has to go through multiple steps around that step two about trying to determine the person's desire and the guardian is supposed to be working with the person. We could resolve that entire issue if there was a requirement in these agreements that required the use of supported decision making in the selection of whether or not to be discharged and a guardian who does not adhere to that or who overrules the person's informed choice to be discharged is not an appropriate guardian.

Just about every state guardianship law actually already says that. They say it's the guardian's obligation to maximize the person's self-determination. It is the guardian's job to make sure the person is involved in decision making as much as possible.

So why are we not challenging them? When a guardian says no, you may have the right to live in the community but you are going to, quote, stay in the only home you've ever known, why aren't we challenging that? You haven't done your job, you have prevented someone from exercising the rights that too many people have already fought for.

Go back to effective communication in hospitals. There's been so many cases recently about VRI to sign language interpreters to language interpreters. Think about what doctors do. What doctors do when they're faced with a person who they think may or may not be able to make decisions. They say, "Where's the guardian?" They talk past the person. So we need to argue for decision making. Hospital, what is your policy around ensuring supported decision making for patients?

Oh, we can't have a third person in the room when there's decision making. That violates confidentiality.

Oh, we can't engage in support because we have to make sure the person has capacity to make those decisions.

Doctors always give that argument. I say, every time I go to a doctor, I have to sign a HIPAA release, and that HIPAA release says who the doctor can release my confidential medical information to. I can give permission for a person to give my records to my wife, my kids, my brother, and you are absolved of this confidentiality problem, yes?

So what if we just put into every HIPAA agreement, "and also for decision making," have we not just created a legally binding document that hospitals and doctors must adhere to?

So when we are arguing for effective communication, it's not enough just to have the access to language. We must have the access to choice. The right to communicate is worth nothing if we also don't have the right to choose what to communicate and what to do with the communication I have.

And with that, I'm just going to say one thing only. Again, I am so very cognizant that I am in a roomful of people who change the world every day, who have gotten some of the most far ranging rights, protections, and expansions. And I'm humbled to be here. I ask you, I do not charge, I ask you to consider your clients' right to make choices. The incredible class action relief that you have gotten is unavailable to people who do not have the right to exercise it. So if we take the presets of rule 1.14 into our practice, if we demand that others do what we must do, if we give them access to the research-supported benefits of self-determination, then we will arrive at the interplay between ethics, morals, and rights. And when we do that, that's when we're going to change the world again and again. And I'll be honored to do it with you.

Thank you so much.

(Applause.)

MARC MAURER: So there you go, Will, an observation or two and then we'll see about questions.

There is one thing. You who read the regs, it's realistic, but everything else, you have to want to. You have to figure out how to make it want to. That's no small task from time to time. But if it can give you anything else, but it can't buy you real estate. It can help you rent it, but it can't buy it for you. But that's the only thing.

The thing is wide open if you can just figure out how to get the bureaucrats to want it. Some of them do. Most of them don't.

Other observations.

JONATHAN MARTINIS: I understand the strategy when it comes to VR. You will hear no a lot, we can't, we won't. My usual response is, can you please tell me which regulation says that you can't do that?

They scuttle into a back room, you hear furious whispering and they'll say, we still don't think we have to do it but we'll do it this one time.

MARC MAURER: Yes, I've had some of those experiences. I ran a few rehab people off from time to time. They were going to come to listen to my impassioned speeches at certain places and got tired of me after a while and left. I thought, well, that's an advantage. But we win now and then.

Secondly, the case belongs to the client, not the lawyer. It's the client's case 100% of the time. The lawyer can do what the lawyer does. But it never has to do with what the lawyer's case is. We might think this is my case and the judge might think this is my case. Ultimately, it's the client's case. It never changes. And the lawyer's obligation is to understand that the client gets to decide. If you're not prepared to do that, represent somebody else who gets to decide. It's always the client's case.

And it's the obligation of the lawyer to believe in the client. That has to do a lot with that competency we heard about earlier. You have to learn enough about the client to believe that the client has something to represent. And that you are in an honored position to do it.

Those are my comments.

I wonder if there are questions.

JONATHAN MARTINIS: Yes. Matthew Dietz.

>> I would like to reiterate what you said. The hardest thing we do, especially in an Olmstead case, is deal with the guardian. As a lawyer, no matter how much you want the child to go home or how much you want something to happen, I don't know what as a lawyer I can do to override a client's choice for a nonverbal child or another person who is their guardian. And in Olmstead, when you are thinking about choice and you know in your heart as a lawyer that there are many ways for them to get equivalent services at home, that's the hardest part for any lawyer, any disability lawyer, to say, my client is the guardian. How do you say, no, my client isn't the guardian, but my client is the person with a disability? How do you change that? And how do you deal with that?

MARC MAURER: Which of you would like to tackle that one?

JONATHAN MARTINIS: Both. I'll let Alison start.

ALISON LYNCH: All right. Great. Yes. That's the first easy question. Thanks for starting us off on that note.

No, it's really important. This is one of the most difficult things in this area is when you're faced with a client who says, yeah, I am so ready to be out of here and the guardian says, you are so not leaving.

And there's such a tension there at all times. You know, the only thing that we can do as advocates is to advocate. We can be as zealous as possible in trying to connect with the guardian about why this is critical. Not the fact that it can happen. Not legally. Not we won an Olmstead case, yea. This is our barometer and what we can do now.

But why is it important? We fought for this case. Why? For this individual. Why? Here, guardian, are the reasons this is so impactful and can make such a difference in this person's life. You, guardian. Not to put a guilt trip on you, but you want the best for what this person, don't you? That may very well be doing what you don't want to do for them and giving them that recognition through the voice of someone that they might listen to.

Here's what's unfortunate and realistic in many ways. The guardian might not listen to the client in the same way that the guardian will listen to the attorney. Because of that power, we could potentially wield, we have to make it our obligation and responsibility to do as much advocating in the time that we have as possible. There's no way for us to override the guardian. There's never going to be a time where we can say, well, judge, the guardian doesn't agree but we're going to do it anyway. Unfortunately. We have to start with the foundation that that's just not the way that our system works at this time.

So what we can do is, in the nicest way possible, pressure the hell out of them and make them understand why this is so critical and make them understand, from the client's perspective, why this would be such an impactful move for them. It takes a lot of time and effort, and as we heard, it takes a lot of believing in the client's position. Not just being an advocate because that's your job but believing that's what's best for the client. I think everyone in this room would not be doing this work if they didn't believe in a lot of these positions. So I think coming at it from that place where we all know, this is really a good thing. We can work as hard as possible to make guardians see that as well.

JONATHAN MARTINIS: Everything Alison just said plus this. I'm not telling you anything you don't already know. The fact of the matter is, when you have a guardian who has the legal right to make a decision, you cannot override that.

With that said, something else everyone here already knows. The sign says attorney and counselor at law. We have the ability to counsel and to advocate. And one way I recommend doing it in this situation is spelled out in rule 1.14 comments, which talk about creating networks, bringing in people to help make the decision, to understand the situation and choices at hand. I've always been of the opinion that decision making is not a discreet thing, black or white. It is not one moment. It is actually the sum total of our experiences and our input. And that's the way we as attorneys can have the most effect, by creating networks, by creating, by using connections people have and creating other connections.

Alison is correct. You're basically advocating the hell out of this and hoping to change someone's mind, but you know what? One person often can't change another's mind just by him or herself. But there are other people who can be brought in, who can be spoken to. There are case managers who can be involved in the case. There are other support systems and family members who can be involved in the case and you can work on them. You can say, this is a decision that is so monumental, it should be discussed and it should be discussed by a number of people, a network.

I think that's our best opportunity. That's the way I have changed people's minds. It's not just me the lawyer pressuring you, but it's me and sister and counselor and case manager, all saying not just thou shalt do this. That's from my unique perspective, not just the lawyer's. In that way, we have the best opportunity to persuade. At the end of the day, Matt, you're 100% correct. We don't have the law right now to say, guardian, go do what I say, unless we have the wherewithal to fight the guardian, and some state laws give us that opportunity. I have flat out asked people if they want to fight the guardian. The most important case I had was exactly that in nature: Do you actually still want this guardian making decisions for you?

No, I want to make my own decision.

From that, supported decision making was created.

MARC MAURER: One of the things that can happen is that it might be possible to let the guardian know that if the guardian doesn't lighten up some, there might be such a challenge. That's always part of the bargaining.

I want to mention a thing. We're going to get to an employment panel tomorrow. I am going to be on that panel and I'm going to talk about a sheltered workshop case we've had. And I hope that it's as important a case as I think it is. I have invited two of the people who are clients in that case to come, and they have now just joined us in the room. They will be at the reception tonight. So these two are Art and Joe, and I would like you to take the opportunity to meet them tonight. It is an honor to have them participate in the law symposium, and you'll hear from them tomorrow.

Are there other questions for these panel members?

>> Yes. Larry Berger. Two comments. First, you did a great job of finding all the good stuff in the comments to 1.14. But there is still whatever part of 1.14 about one of the things a lawyer could do is decide that the client needs a guardian. And I think, and I've confronted this myself on one occasion, that the lawyer who is representing the party can't be the person representing the person's petition to be the guardian. But I must say, the rule isn't particularly clear. That rule isn't particularly clear about that. So I think 1.14 has good stuff and it also has the other stuff in it.

And then my second comment is about Olmstead. First of all, there's not only step two but there's step three, which is when the person has gotten out of the institution and is now living in some other setting like a group home, which I don't know the statistics but I think in my state at least in New Jersey that that's where most people coming out of the developmental centers wind up.

Both in the developmental centers and in the group home, they are very vulnerable to manipulation by the direct support staff in those institutions. So that if it serves the interests of the provider to have the person remain more dependent than he needs to be, and yet the direct care person direct care person taking care of him every day is convinced of that, that's a difficult position.

JONATHAN MARTINIS: You're correct. Rule 1.14 does have good and bad. One of the ways we can address that is by everyone in this room emphasizing the good.

Everybody here remember Pert shampoo? Remember the tag line? I'll tell two friends and you tell two friends.

If something we have talked about today hit a nerve, about self-determination, supported decision making, tell a couple of lawyers. Then maybe the lawyers will focus on the good parts of 1.14. Maybe they'll focus on that ethical and moral obligation.

With regard to manipulation, you're right. I get that question all the time when I present. What about, how can you guarantee this person will not be unduly influenced? How can you guarantee this person will not be abused by a supporter? The answer is simple: I don't know. I guarantee you right now there is a person who does not have a guardian who is the subject of abuse or undue influence by a trusted supporter. That is a certainty.

I also guarantee you a person with a guardian is a victim of pretty horrific abuse right now.

There's a study that finds that women with intellectual disabilities who are disproportionately likely to be the subject of physical and sexual abuse who had increased self-determination, were given access to more control over their lives, were better able to recognize and avoid abuse. They were safer because they had more life control.

So if I'm given the choice between a possibly unsafe option and a proven and definitively unsafe option, every day twice on Sunday I'm going to pick the one that's correlated with self-determination because that's correlated with safety. And by the way, we should never make the determiner of the person's right to make choices that person's ability to make good choices. If that was the determiner, if the determiner was, might we be encouraged or convinced to make bad choices, I have to stop playing poker and you have to stop eating ice cream. That is not ultimately the decider. It is one of those rights that is part of every one of the Bill of Rights.

>> This is Rachel Langston from San Francisco. You've answered kind of part of my question but focusing on the communication aspect, when there is someone given a guardian or a family member, I've had a couple of situations in which a parent has contacted me on behalf of an adult child with an intellectual disability and I feel like in the couple of cases I'm thinking about, that parent has been a gatekeeper in an unhelpful way, either they're the one who is contacting me, even when I'm talking to the actual individual, their child, I feel like they're just this overbearing influence and it's difficult because I know they're well intentioned, they're trying to advocate for their child, and have been in that role for a long time. You know, I had parents who advocated on my behalf, so I get that. But I think they are often in the position where not only is it difficult to ascertain what the actual client's choice is because there is that heavy layer of influence, but it's also very difficult to advocate for them through and communicate that advocacy effectively to the parent who may not agree with the legal conclusion that you've reached or with the strategy that you're suggesting. And that's been the two cases that I've dealt with were that sort of case, where it's a real tug of war and I feel like communication was really sort of hampered. So I wondered if you could speak to that a little bit. Thank you.

ALISON LYNCH: So that's a really important point and definitely something that's come up in some of the cases that I've handled as well. And from my experience and perspective and that's all I can speak to today, what has worked for me in the past is having two very different conversations. One with the client and one with the parent. And saying, you know, coming from the same perspective. Look, my parents advocated for me. I got the special education that I needed. I got the large print when I was in first grade and was able to kind of expect that throughout grade school. Okay, great.

I understand that parents do a great job advocating but I also understand that they can go overboard. So with that knowledge, sitting down with the parent, you know, at the time this is starting to be an issue or if you think it's appropriate, even before it becomes an issue in some of these cases, if someone has a client and you see that the parent is active in some way. Having a conversation beforehand and saying, look, this is how I represent, this is my style, and what's really important to me is making sure that your son or daughter or family member is the person who is directing what I do. And I know how much time and effort you've put into helping them. It shows. It's very apparent. And you've incredibly enriched their lives for it. However, right now, that can't be your role because that's my role. I have to be the advocate now. And I have to advocate based on whatever it is my directive is and that can only come from the client.

And you know, doing this in kind of the nicest, friendliest way possible before it get as to tense or too much animosity can really diffuse some of these situations. Because if you have the conversation, then later if it seems like maybe there's a problem that's kind of arising, you can go back to the parent and say, you know, we talked about this thing where you aren't the one making the decisions in this case and I just have to reiterate it, because it feels like that might be happening a little bit.

And you know, some of this is coming from my background in psych and motivational interviewing and kind of getting at the core of what the problem really is, and I think a lot of that stuff can be really beneficial when you have conversations with people about what are your goals as an advocate, mom or dad? All right, that's great. We're on the same page. But right now, I have to be the one doing the advocacy and ultimately it has to be based on what this person is saying, not you.

And then having the conversation with the client, just to wrap it up really quickly, the most important party in all of this, saying, hey, you know, I know it might be confusing sometimes, your parents might be telling you one thing, I might be telling you something else. You just tell me what you want. You don't have to talk to your parents about this. You don't have to answer any questions that you don't want to. You can blame it on me and just say, my lawyer said I shouldn't talk about this right now. I've done that for a client and like, trust me, a 17-year-old being able to use that line is freeing. My special education kids are like, oh, that's so cool. Can I say that all the time? And I'm like, no, only on your case.

But saying, look, it makes me feel uncomfortable to talk about what I talked about with my lawyer, I really would rather not talk about it. And giving them that kind of permission. The parent might hate you but they're not your client. I know I have some parents that disliked that piece of advice but I feel like it's important, giving the client the ability to say, I don't have to tell you this. I have my own representation. This is my own case. I'll tell you what I want to tell you.

MARC MAURER: Jonathan?

JONATHAN MARTINIS: She's 100% right in the specific. I what tonight address the general because I think it's a perfect opportunity to discuss again why we need to incorporation decision making as young as possible.

What Alison discusses is the result of continuing expectation paternalism that has faced people with disabilities for thousands of years. As the child ages, the parent will see and expect it if we make that the norm. Instead of the parent speaking for the child, the parent will speak with the child.

It's also an opportunity to bring other people in and have a broader conversation if possible. I think the more voices that are talking, at least in the direction that you want them to talk, the better. But again, I say create the expectation young and we won't have to be having that type of argument at 17.

MARC MAURER: And I appreciate that from both of you, Alison and Jonathan. And yours is the last word for the first day of the symposium.

We now adjourn to the reception and we begin tomorrow morning at 8:30. Thank you very much.

(Applause.)