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Disability Law

Disabilities and the Law: The Evolution of Independence

BY DAVID FERLEGER

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Disabilities in Our Lives

Signing the Declaration of Independence on July 4, 1776, Stephen Hopkins referred to his cerebral palsy, saying “My hand trembles but my heart does not.” During the Constitutional Convention of 1787, Benjamin Franklin was carried into sessions in a sedan chair because he was almost immobilized by gouty arthritis. More than two centuries later, thousands of people attended the 1990 White House signing ceremony for the Americans With Disabilities Act (ADA), at which President George H. W. Bush declared, “Today we’re here to rejoice in and celebrate another ‘independence day,’ one that is long overdue.”

People with disabilities influence and inspire our lives. Thomas Edison and Ludwig van Beethoven were deaf. Steven Hawking has a neurological condition. John Milton became blind at the age of 43, and Claude Monet became blind in later life. President Franklin Roosevelt, musician Teddy Pendergrass, “Superman” Christopher Reeve, and violinist Itzhak Perlman have used wheelchairs. The ballet dancer Vaslav Nijinsky had bipolar disorder, as does Patty Duke, who played Helen Keller in “The Miracle Worker.” The actress Sarah Bernhardt had to have her leg amputated. Cher is dyslexic.

We are all extremely familiar with disabilities. We may have been born with a disability. If we are not disabled ourselves, we know people who are.

So-called temporarily able-bodied people may well lose their sight or speech or mobility. Baby boomers who are currently healthy will almost certainly become frail as they age. People with one challenge or limitation today often acquire another.

Currently, about 54 million people in the United States are disabled at present. This number accounts for about 19 percent of the U.S. population. Among families in America, 20,874,130 families—29 percent—have a family member with a disability.

Of the people with disabilities who are 15 years and older:

- 3.3 million use a wheelchair;
- 10.2 million use a mobility aid such as a cane, crutches, or a walker;
- 1.8 million are unable to see printed words or are blind;
- 1 million are deaf or unable to hear conversations;
- 2.5 million have difficulty having their speech understood by others; and
- 16.1 million have limitations in cognitive functioning or have a mental or emotional illness or developmental disability.

Snapshot numbers do not tell the whole story, of course. Someone 25 years old has a 44 percent likelihood of having at least one long-term disability that lasts three months or longer before the person reaches the age of 65. One out of two women and one out of three men will spend some time in a nursing home. The baby boomer generation, which makes up an increasing proportion of

the U.S. population, has 76 million members. In addition, in 2010, 13 percent of the United States population was over 65; by 2040, this percentage will rise to 20.4 percent. By 2050, there will be 88.5 million Americans over 65, more than doubling the 2008 figure. Most adults plan to keep working, even during so-called retirement.

People with disabilities live in relative social isolation. Compared to people without disabilities, disabled individuals are much less likely to work full- or part-time (35 percent versus 78 percent); less likely to socialize with close friends or relatives; less likely to go to church, synagogue, or mosque; and less likely to go out to eat. Physical isolation is also common in the lives of people with disabilities. Tens of thousands of residential institutions in the United States house people with disabilities. For example, in 2002 there were 69,136 nursing facilities and 28,448 facilities that serve people with developmental disabilities, mental health issues, or substance abuse. As of June 30, 2008, 42 states operated 2,614 residential settings that house people with intellectual or developmental disabilities. Currently, 1.8 million people live in nursing facilities. In 2008, at least 35,741 people lived in large state-operated institutions that cared for people with developmental disabilities.

Disabilities in History

The ancient Greeks called people with intellectual deficiencies “idiots” and intended the term to refer to their inferiority. Aristotle, who lived in the fourth century B.C., recommended the establishment of laws “to prevent the rearing of deformed children.” He claimed that “no deformed child shall live.” In ancient Rome, children who were blind, deaf, or mentally retarded were publicly persecuted and reported to have been thrown in the Tiber River by their parents. Some children born with disabilities were mutilated to increase their value as beggars.

In the Middle Ages, as leprosy began to disappear, leprosariums were converted to houses to be used by all sorts of people considered deviant: orphans, vagabonds, prostitutes, widows, and people with mental illness and intellectual disabilities. During this time, “idiot cages” became common in town centers and were used to keep people with disabilities “out of trouble.” These facilities may also have served as entertainment for townspeople. Some people with disabilities were shipped off to other countries. Sailors were paid to take these individuals away in what were called “ships of Fools,” which sailed from port to port. The sailors charged admission to view their cargo and eventually abandoned their passengers.

With the Age of Enlightenment, a more humane educational motive in services developed, with professionals observing that people with disabilities were able to grow and develop. The “moral treatment” movement was influenced by the Quakers in England and post-French Revolution reformers in France in the late 1700s and into the 1800s. Reformers in the United States included activists like Dorothea Dix and Clifford Beers, whose personal crusades were rewarded with attention from legislators.

The first schools for students who were deaf opened

in Europe in the mid-1700s and in the United States in 1817. A school for students who were blind opened in Boston in 1832. In the mid-1800s, so-called training schools for people with developmental disabilities were established. Sadly, rapidly increasing enrollment and, eventually, the eugenics movement and a perception that residents of these schools were dangerous, resulted in a shift from “training” to custodial care in overcrowded and understaffed institutions.

The turn-of-the-century institution was aptly described by Louis Brandeis. Years before his appointment to the U.S. Supreme Court, Brandeis once represented Alice N. Lincoln, a Boston philanthropist and noted crusader for the poor. In 1894, Brandeis appeared at public hearings, which were held to investigate conditions in the public poorhouses. Brandeis’ summation at one of these hearings emphasized the nature of segregation for those whom he described as “the outcasts of society”:

They call this a Home for Paupers. That place may be as clean today, or any day, as any place in Christendom; the food may be as good, the air may be perfect; you may have beds in woven-wire mattresses as good as any that can be found; the attendants and the discipline and work may all be there. But that place as it presented itself to us is as far from a home as one pole is from another. It is the very opposite of a home in every particular.

Documents of the City of Boston for the Year 1894, Vol. 6, p. 3632-3633 (Boston: Rockwell & Churchhill. City Printers, 1895). The “out of sight, out of mind” approach adopted by institutions was echoed in society at large in the late 1800s: laws were passed to keep people with cerebral palsy and other visible disabilities from even appearing in public. These laws were sometimes called the “ugly laws” or “unsightly beggar ordinances,” and the most famous was the City of Chicago Municipal Code, § 36034 (1911), which provided the following: “No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, or shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.”

The Chicago law was not repealed until 1974, and it took other communities decades to eliminate similar ordinances as well. The grim history also includes medical experimentation focused on people with disabilities and forced sterilization. Even today, people with disabilities—whether they are living in institutions or in the community—are sometimes abused or subjected to degrading use of physical restraints and seclusion.

Disability Rights in the United States

The disability rights movement has transformed the “social good” of services into a “rights model.” When we trace existing legal rights back to their origins in social

values, we find that it takes 15 to 20 years for this change to occur. Change has not occurred simply as a result of successful advocacy by people with disabilities. “Rights” today have often evolved from what had been found to be the most effective and humane professional practices and by those who were defendants in litigation. Often, consent orders in disability cases resulted in reforms to services for people with disabilities. Sometimes the need for those changes was first advanced by the state and local officials who were (or later became) defendants in the actions.

In the last 25 years, we have witnessed an explosion of federal legislative action designed to protect people with disabilities from facing discrimination in their everyday lives. In addition to the most visible statute, the Americans With Disabilities Act—legislation that covers employment, public accommodations, and state and local government—Congress has passed the Air Carrier Access Act, the Architectural Barriers Act, the Fair Housing Amendments, the Individuals with Disabilities Education Act, the Telecommunications Act, the Urban Mass Transportation Act of 1964, the Help America Vote Act, and the Rehabilitation Act. More than 100 regulations have been attached to federally assisted or conducted programs that promote accessibility for people with disabilities.

Although these laws have a modern feel, they have grown out of a long-standing recognition that there is positive social, political, and perhaps spiritual value in serving the needs of people with disabilities. The nondiscrimination rights we recognize today were first seen as merely good federal or state policy. For example, social welfare policy favoring community services for people confined in institutions developed into a right to community services in succeeding decades.

In addition, partly in response to criticism of the nation’s poor response to the disability-based problems of Civil War veterans, the United States began to address the issue of disability when soldiers returned from service during World War I. In 1916, the National Defense Act provided for soldiers to receive funds for instruction as a way to facilitate their return to civilian life; this was the first time the country recognized and responded legislatively to its obligation to persons injured in military service. In 1917, the Smith-Hughes Act established the federal-state program in vocational education and a year later, the Smith-Sears Veterans Rehabilitation Act expanded the role of the Federal Board of Vocational Education to provide services for vocational rehabilitation of veterans disabled during World War I; this was also called the Soldiers’ Rehabilitation Act.

These veteran-based laws were succeeded by civilian-based laws. In 1920, the Smith-Fess Act (also called the Civilian Rehabilitation Act) established rehabilitation programs for all Americans with disabilities. During the Great Depression, the 1935 Social Security Act was established as an income maintenance system for those unable to work and included medical and therapeutic services for children with physical disabilities as well as assistance to people who are blind.

After 1945, emerging disability rights movements were typically led by parents' groups and reform-minded professionals who promoted deinstitutionalization and community services for people with developmental disabilities; access to American sign language and cultural self-determination for people who are deaf; and self-directed, community-based living for people with physical disabilities. The organized movement for the visually handicapped lobbied for the right to use white canes and guide dogs in public places and for policies to advance the economic well-being of the blind.

The Challenge of Disability Rights Legislation

Enforcement of these laws ensuring rights to the disabled has been challenging for the courts and the parties before them. For every claim, there is a defense. For every rule, there is an exception. The "right to education" and the "right to community services" are informative exemplars.

First, in the United States, individuals with a wide range of disabilities are legally entitled to education and other support services under federal law. In 1975, the Education for All Handicapped Children Act (known since 1990 as the Individuals with Disabilities Education Act, or IDEA) became the legal basis for public education for all children, including those with severe and multiple disabilities. The IDEA requires an "individualized education program" for each child and establishes a right to "free appropriate public education" in the "least restrictive environment."

Defining the meaning of "appropriate" education and the meaning of the "least restrictive environment" has been fodder for a great deal of commentary and litigation. A major issue has been the extent to which children can be educated in an age-appropriate school setting alongside nondisabled peers. In school districts in rural areas, organizing sufficient resources without compelling excessive travel time is problematic. Other issues have been the parameters of other aspects, such as the following:

- summer educational programs to reduce or prevent skill regression;
- interventions that enable students to stay in school (providing catheterization for those unable to urinate voluntarily, for example);
- services and technology to assist with movement, positioning, speech, and augmentative forms of communication;
- education that is not limited by an assessment of educational potential; and
- provision of regular opportunities for interaction with nondisabled peers and inclusion in general education classrooms.

Another example of challenges in interpretation and enforcement is the Americans With Disabilities Act. The intricacies of enforcing the ADA's ban on employment discrimination are familiar to most readers: thousands of cases involve determination of whether a person is

disabled and, if so, what employment accommodation is required. Less familiar is the ADA's application to institutionalization.

Eleven years ago, the Supreme Court in *Olmstead v. L.C.*¹ held that unjustified institutionalization is discrimination that is forbidden by the Americans With Disabilities Act. In this case, the Court held that the ADA proscribes "[u]njustified isolation of the disabled."² A five-justice majority held that a failure to provide care for individuals with mental disabilities in the most integrated setting appropriate to their needs may be viewed as discrimination in violation of the ADA, unless the state or another public entity can demonstrate an inability to provide less restrictive care without "fundamentally altering" the nature of its programs.

The *Olmstead* decision was heralded as a potentially "revolutionary" advance for people with disabilities. Although other courts had previously found the same protections in the ADA, *Olmstead's* conclusion that Title II of the ADA forbids unjustified isolation of people with disabilities was a defining moment for the law.

Legal advocates and scholars are perhaps prone to overstate the impact of particular cases on the world generally, as well as on the law. That has been *Olmstead's* fortune. Although one might have expected the *Olmstead* decision to accelerate community placement for people with disabilities, this did not happen. In addition, the decision is fraught with ambiguities that have frustrated achievement of the right articulated by the Court: an end to unjustified isolation.

Since the *Olmstead* decision, the movement of residents from both public and private institutions has actually slowed down, according to an analysis marking the 10th anniversary of the ruling. *Olmstead* alone has proven insufficient to provide significant motivation for the increased attention to community integration that the decision mandates.

Apart from its lack of constitutional teeth, *Olmstead* suffers from several internal deficiencies that weaken the force of its integration mandate. These flaws include an unclear fundamental alteration defense, an ambiguous nonaccountable "working plan" option to demonstrate compliance, lack of guidance on standard of care, and lack of direction on the respective roles of the courts and legislatures.

The Fundamental Alteration Defense

The obligation of public entities to make reasonable modifications of their policies, practices, and procedures to avoid the discrimination of unjustified segregation is limited by the "fundamental alteration" defense found in federal regulations.³ Courts must consider whether "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with ... disabilities."⁴ Additional cost alone does not constitute a fundamental alteration, however. The difficulty is that there is no clear guidance in *Olmstead* on meaningful parameters

for the defense of fundamental alteration.

Clear and Nonaccountable Working Plan

Justice Ginsburg's plurality opinion in *Olmstead* gives states "leeway" to adopt "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated."⁵ Each element of this operational test—a "comprehensive, effectively working plan," a waiting list moving "at a reasonable pace," and a plan that is "not controlled" by a state's effort to keep institutions filled—raises difficult interpretive questions. It is a challenge to define these terms clearly.

One thing is certain. Any change to a complex system necessitates careful planning, which will typically include analysis; development of a mission, goals, and objectives; expected outcomes, tasks, and timelines; deadlines; identification of persons responsible for tasks; quality assurance and accountability mechanisms; and evaluation. When done well, a self-adjusting system will be in place, with sufficient feedback and flexibility to adapt to changing conditions. Absent unusual circumstances or prolonged violations of rights, a state should generally be given the first opportunity to come forward with a plan. An unimplemented or vague plan, however, is insufficient to satisfy parties' or courts' concerns that the court's involvement will someday come to an end.

Courts are certainly limited in their ability and resources needed to shepherd all the details of compliance,⁶ but courts are capable of ensuring compliance with the law—even in the most complex situations.⁷ A case in point is *United States v. State of Connecticut*, in which Senior U.S. District Judge Ellen Bree Burns found the state in contempt of a consent decree intended to reform Southbury Training School (STS), an institution for people with developmental disabilities.⁸ The court found deficiencies in such areas as medical care, psychiatric services, psychological programs, physical therapy, treatment of injuries, and protection from harm, concluding that "STS's systemic flaws have caused many residents to suffer grave harm, and, in several instances, death." The court appointed the author of this article as special master to review the care provided by the STS, to determine the changes needed, to "formulate specific methods to implement the required changes," and to help "effectuate those changes."⁹ In this position, I actively oversaw a detailed remedial plan and held hearings where necessary; after nine years, the state achieved compliance with the law at the institution and was purged of contempt.¹⁰ Such special mastership, especially under the 2008 Amendment to



Federal Rule of Civil Procedure 53, works well in securing compliance.

Standard of Care

The *Olmstead* Court stated the following in footnote 14 to the opinion: "We do not in this opinion hold that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.'" Justice Kennedy's concurrence is stated more strongly. He concluded that, given states' need to weigh their priorities, "[i]t follows that a State may not be forced to create a community-treatment program where none exists." Justice Kennedy did not explain how one distinguishes between "creation" and "expansion" of community programs, however. The multiplicity of opinions and the weak language cited above is another weakness in the decision. The language does not appear to support even the minimally adequate level of habilitation that the Supreme Court's 1982 *Youngberg v. Romeo* decision held is required.¹¹

Respective Roles of the Courts and Legislatures

Constrained perhaps by internal divisions, the Supreme Court was muted in its endorsement of vigorous efforts to move to a fully community-oriented system. *Olmstead* holds that institutional settings may be "terminated" but not for people "unable to handle or benefit" thereby. According to the ruling, institutions may be "phased out" so long as this does not place "patients in need of close care at risk."

This limited closure mandate appears calculated to appeal both to those who do not favor institutions and to those concerned that some residents may not be well served in the community. Obviously, no one would intentionally adopt a "phase out" effort or place even a single person into the community if the move would

predictably cause harm, but analysis of risk and benefit is a complex calculus in human services. Missing from the Court's discussion is the nature of the balance in this sensitive area between the legislative policy-setting role and the judicial role in the definition and enforcement of rights. Also missing is the question of what weight to give the constitutional liberty interests of the individual and his or her desires or those of parents or guardians. One wishes for clearer guidance from the Court on these issues.

The Future of Disability Rights

The two legislatively created rights discussed above (education and community integration) have been vitally important to administrators, government policy-makers, and the courts in defining and providing services to people with disabilities. The prohibition on employment discrimination enables employers to have the benefit of able workers who, in the past, would have been excluded from the workplace. One could cite examples of disability rights in other domains as well.

As in any such effort to address societal needs, legislation falls short of resolving all the complex elements of the issue. In the disabilities arena, where fundamental needs are at the forefront, there are two additional approaches that may assist in resolving the nuanced challenges posed by the legislation's language.

First, the Fourteenth Amendment of the Constitution may provide assistance on this issue. Prior to the enactment of the "right to education" IDEA and prior to the "community integration" concept in the ADA, the federal courts had enunciated two related constitutional rights on two occasions: (1) a constitutional right to education in 1972 and (2) a constitutional right to community services in the 1970s.

With the statutes in the forefront, constitutional analysis took a backseat to the law. It may be, however, that a comprehensive legal theory embodying both constitutional and statutory rights is more likely to serve private and public needs than a theory including just one or the other. This may be a time to circle back to those constitutional principles on which the rights of people with disabilities were recognized decades ago. Restoring the constitutional dimension to the conversation encourages reasoned discussion of both the opportunities and the deficits in the statutory solutions.¹²

Another avenue is one that neither Congress nor the courts have explored thus far. Universal design—also called "inclusive design"—refers to the design of services, products, and environments that all people can use, to the greatest extent possible, without the need for adaptation or specialized design. Early writers in the field cite the *Brown v. Board of Education* conclusion that "separate is not equal" as the "milestone that marks the beginning of an approach to design that respects all users."

The effort to address societal needs involves making things in the world more usable by as many people as possible at little or no extra cost, regardless of the person's level of ability or disability. We all know the famil-

iar examples in the barrier-free and accessibility context. However, the inclusive design concept refers to a broader issue than physical access. The concept encompasses every field in which disability rights has been asserted, including education, community integration, telecommunications, health care, and others. The benefits of universal design include elimination of discrimination, empowerment of individuals, increased fairness, and justice. It is essential, however, that the concept not be undermined by implementation without standards and by mandates without enforcement.

One example is mobility. The two-wheeled, self-balancing transportation device known as the Segway® is visible in many cities during commercial tours of historic sites; the devices are used by police in downtown Orlando, by shopping mall security guards, and for recreation by people who can afford these devices. For many people with disabilities, the Segway has become an essential everyday mode of mobility, which allows people with a wide variety of disabilities a means to "walk" alongside family and colleagues and to meet the world at eye level. Using the Segway has mitigated or eliminated painful movement for these users. Hundreds of veterans have benefited from the universal design inherent in the Segway thanks to donations and training by Segs4Vets, a national charity that donates the mobility device to American veterans who have been permanently disabled in Iraq and Afghanistan.

In addition to mobility, modern technology provides new domains in which the rights of people with disabilities must be protected. For example, work is under way to ensure that computer hardware, software, and the Internet are accessible to all. Federal law (§ 508 of the Rehabilitation Act) requires federal agencies to make their electronic and information technology accessible to people with disabilities.

Conclusion

The presence of disability in our communities is inescapable. As the population ages in the coming decades, the presence of people with disabilities and their participation in the nation's life will increase. The American legal community's response to disabilities has evolved from Louis Brandeis' compassionate concern expressed in his plea in 1864 to the statutory rights established by Congress in the last quarter century. State and local governments have played important roles both in defining rights locally and in implementing federal laws. The federal courts have both interpreted and enforced the rights of people with disabilities and have often been called upon to balance competing needs and interests in this field.

But the law's expanse consists of more than the statutes and the Constitution. It embodies our government and the nation's ideals. In 1977, Hubert Humphrey memorably reminded us of our duties to people with disabilities: "The moral test of government is how it treats those

Judicial Profile

ANDREA DOMASKIN

Hon. Donovan Frank U.S. District Judge, District of Minnesota

RECENTLY, A PACKAGE containing 24 thank you letters, handwritten and colored with markers, arrived unexpectedly in the St. Paul, Minn., chambers of Hon. Donovan Frank. “For a person with a disability, I thank you, Judge Frank, for opening your courts to people with disabilities. It is because of people like you that I can work and be productive,” wrote one member of a North Carolina class aimed at teaching people with developmental disabilities and their supporters to be advocates. The class had watched an online video of a speech given by Judge Frank. Neither the online speech nor the thank you notes were unique events for Judge Frank, who is 59 years old.

Judge Frank was recommended to the federal bench in the District of Minnesota by the late Sen. Paul Wellstone and nominated by President Bill Clinton in 1998. Judge Frank was the 31st federal judge selected for Minnesota, succeeding David Doty, who took senior status.

During three decades as a county prosecutor and a trial judge, Judge Frank has exhibited sensitivity to—and a keen understanding of—the barriers encountered by people with developmental disabilities, both in the community and in the court system. The federal courthouse in St. Paul has been one scene where his concern is evident. Judge Frank is acquainted with the 22 workers who maintain the building, most of whom have developmental disabilities. The workers were to be displaced during a three-year major renovation of the building—perhaps permanently. Judge Frank intervened with the General Services Administration to ensure that the workers would have employment during the renovation and that they could return to the courthouse when the building was reopened. All the workers returned, and they have since been honored with a national award for the quality of their work. Judge Frank went to the awards ceremony—the first time a tenant had attended one—and appeared in a video about the maintenance workers’ accomplishments.



Judge Frank regularly helps educate legal professionals about working with people with disabilities through continuing legal education programs and other activities. In June 2010, he was among the presenters at a Webcast Continuing Legal Education program on disability justice. About 185 attorneys registered for the program.

The judge brings this background, along with work in racial and gender diversity, to his position as incoming president of the Minnesota Chapter of the Federal Bar Association and to the helm of the FBA’s national Task Force on Diversity. As president of the local FBA chapter, Judge Frank’s goal is to create a Pro Se Bar Summit that would be co-sponsored by the FBA and the federal court under the leadership

of Chief Judge Michael Davis. The event would be designed to bring together state and federal legal aid organizations, pro bono programs, and lawyer referral programs in order to increase the availability of attorneys for pro se litigants in federal courts. Judge Frank said—

As part of the federal court's and the FBA's initiative, Becky Thorson, a partner at the Robins Kaplan Miller & Ciresi law firm in Minneapolis, has also prepared a CLE that focuses on encouraging and training members of the bar to represent individuals with disabilities. Thorson is working with the court and the FBA, along with Shamus O'Meara, Steve Rau, Colleen Wieck, and law students from the newly formed Disability Law Society at William Mitchell College of Law. This project is so important in providing lawyers to individuals with disabilities and, in so doing, giving them hope for their day in court and equal justice under the law.

Judge Frank wants to encourage participation in the Federal Bar Association by members of all racial and ethnic minority groups; women; people with developmental disabilities; and the lesbian, gay, bisexual, and transgender community. As part of the Pro Se Bar Summit, the FBA intends to network with minority bar associations.

The judge would like to see disability added to traditional notions of diversity. "When people think about diversity, they think about race and ethnicity," says Judge Frank. He believes that people with disabilities are the "forgotten minority."

The Same Hopes and Dreams

Judge Frank can trace his support for people with disabilities to his childhood in Spring Valley, a small farm town about 25 miles southeast of Rochester, Minn. His father's cousin, Dutch, had a developmental disability. Dutch went to church with Judge Frank's family and helped out at the family's television and appliance store. "I didn't realize it at the time, but this was really a message saying that they have the same hopes and dreams that we do," Judge Frank said. When Judge Frank was growing up, his parents instructed him not to use the word "retarded" to refer to someone with a developmental disability—a rule he still follows.

Later, Judge Frank became the first person in his extended family to attend college. He chose Luther College in Decorah, Iowa, a city near the border of Iowa and Minnesota that he had visited on a band trip. In college, he studied for a year at the University of Durham in England and graduated magna cum laude from Luther College in 1973. He went to Hamline University School of Law in St. Paul and graduated magna cum laude in 1977. Judge

Frank married his wife, Kathy, in 1973. They have five adult daughters.

After graduating from law school, he moved north to Minnesota's Iron Range and served as an assistant prosecutor for the St. Louis County Attorney's Office in Virginia, Minn. He initially worked on child neglect, abuse, and commitment cases. During the last five years there, he handled primarily civil cases and felony criminal cases. As an assistant attorney for St. Louis County, Judge Frank tried a case before a jury that involved the first felony child sexual abuse case in the state of Minnesota in which expert testimony was allowed to explain why young children do not report sexual abuse and why mothers often support the father or the boyfriend who is accused of the abuse. The expert was allowed to testify that the child's behavior was consistent with that of other child sexual abuse victims with whom the expert had worked. Judge Frank also handled the appeal of the case to the Minnesota Supreme Court. In *State v. Myers*, 359 N.W.2d 604 (Minn. 1984), the Minnesota Supreme Court unanimously affirmed the receipt of such testimony for the first time. The decision remains the law to this day. Judge Frank credits a courageous state trial judge, Mitchell A. Dubow, for the result.

Through his work, Judge Frank met a group of advocates who fostered his understanding of disabilities and, he said, challenged his notions of diversity. He joined the board of directors of a center for adults with developmental disabilities and the board of directors of a mental health center.

Judge Frank's tenure came shortly after the landmark Minnesota case of *Welsch v. Likins*, which resulted in the deinstitutionalization of many people with developmental disabilities. According to Colleen Wieck, now executive director of the Minnesota Governor's Council on Developmental Disabilities, the court's decision in this case suddenly made people who had been living in an institution become part of a community where they were now expected to go grocery shopping and to attend sporting events—a major adjustment for individuals who had been living in an institution where they had no choices. "Their lives were so radically different," she said, "and I think [Judge Frank] saw that and it inspired him to try to ensure that the rights of people with disabilities are protected." Judge Frank states, "I was essentially trained and educated by parents of disabled individuals—both children and adults."

In 1985, eight years after beginning his legal career, Judge Frank was appointed to the state district court bench. He was chief judge of Minnesota's Sixth Judicial District from 1991 to 1996.

Judge Frank began setting up outreach programs for local schools and communities. One day, he

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called the special education director in the school system in Virginia, Minn., and asked why no students with developmental disabilities came to the courthouse for programs as other students did. As a result, groups of students with disabilities started coming to the courthouse for programs offered to students.

A social worker then set up a meeting at the courthouse for adults with developmental disabilities. Judge Frank regularly recounts what happened during that meeting. One woman at the event, whose purpose was to show visitors a courtroom and explain how all citizens are protected by the Constitution, asked him about equal justice under the law. “Does that mean that I get the same rights as the wife of the President?” she asked, to which Judge Frank answered, “That’s exactly what it means.”

When the tour was over, three women asked to talk to the judge privately. All three had been sexually assaulted or harassed, and none had received protection from law enforcement. Judge Frank reports that he was able to “intervene in an appropriate way.” Among the framed personal photos in Judge Frank’s chambers is a snapshot of that tour’s participants.

Broader Human Dignity

Judge Frank’s interest in people who are vulnerable is not limited to issues involving disabilities. He is passionate about broadening human dignity, and this passion is reflected in his many activities.

Hon. Michael Davis, chief judge of the District of Minnesota, has worked with Judge Frank for more than 22 years and considers Judge Frank his best friend. Before coming to federal court, the two were state court judges together in different districts and worked on several statewide committees. The most important of these, Chief Judge Davis said, was a task force dealing with racial bias. “Judge Frank is one of the most intelligent, insightful, and compassionate individuals that I know,” Chief Judge Davis said. As a prosecutor, state court judge, and federal judge, “he has strived to make the justice system fair for all individuals coming before the court.”

Judge Frank is an active member of the Minnesota Chapter of the Federal Bar Association. For 12 years, he has served as host judge of the chapter’s Open Doors Program, an educational program designed to bring court-related issues to the everyday lives of young people. In addition to serving as chapter president, Judge Frank serves on the Markman Project Committee, has co-chaired the Long-Range Planning Committee, and has co-chaired the Diversity Committee.

Under Judge Frank’s leadership, the FBA Diversity Committee partnered with the Page Education Foundation, which was founded by Minnesota

Supreme Court Associate Justice Alan Page, a former Minnesota Vikings football player and member of the National Football League’s Hall of Fame. Judge Frank has sought to involve local FBA members as mentors in the Page Education Foundation, said Lora Friedemann, chair of the Intellectual Property Group at the Minneapolis firm of Fredrikson & Byron and the immediate past president of the Minnesota Chapter of the Federal Bar Association. The local Diversity Committee now provides two yearly scholarships to Page Scholars. Judge Frank was part of a team that traveled to Washington, D.C., to provide diversity training for the national leadership of the FBA.

Judge Frank has traveled to the federal women’s prison in Pekin, Ill., where women sentenced in Minnesota have to serve their sentences hundreds of miles from their children and families, said Steve Rau, a partner at the Minneapolis firm of Flynn, Gaskins & Bennett and also a past president of the Minnesota Chapter of the Federal Bar Association. Judge Frank was among those who, with the assistance of the FBA and Volunteers of America, developed a program to help these women’s children travel to see them each quarter, said Rau. “He has more energy than any human being I’ve ever met in my life,” Rau said. “It forever amazes me the things that the judge gets accomplished.”

In addition to his FBA work, Judge Frank serves on the Court Security Committee for the District of Minnesota. He is a liaison judge for the Bureau of Immigration and Citizenship Services. From 1986 to 1998, he served on the Minnesota Supreme Court Criminal Rules Committee; on the Minnesota Supreme Court Racial Bias Implementation Committee from 1993 to 1998; and on the Minnesota Task Force on Violence Against Women.

Judge Frank serves on the board of directors of Lawyers Concerned for Lawyers and the Minnesota Landmark Center, a 1902 building in St. Paul that once served as Minnesota’s federal courthouse and post office and is now an events center and home to arts organizations, galleries, and museums. He has been an active member of the Southern Minnesota Regional Legal Services Centennial Planning Committee. During the 2009–2010 academic year, Judge Frank served as an adjunct professor at William Mitchell College of Law in St. Paul, teaching courses on pretrial litigation.

Judge Frank has received myriad awards for his work, including the Federal Bar Association’s Elaine R. “Boots” Fisher Award in 2006, in recognition of his outstanding public service and dedication to diversity in the legal community; Luther College’s Distinguished Service Award in 2008; Hamline University School of Law’s Distinguished Alumnus Award in 2000; Minnesota Trial Judge of the Year

in 1996; and the Range Women's Advocates Annual Recognition Award in 1995 for his contributions to ending domestic violence.

Lawyers and judges who work with Judge Frank describe the person behind these committees and initiatives as genuine. Chief Judge Davis said his friend is "intense but engaging," and Lora Friedemann has described him as a patient, careful judge, who listens to both sides of an issue. She admires him for acts that go beyond his duties as a judge. For example, on one occasion, a pregnant woman who had applied for citizenship and had been accepted was unable to come to the courthouse for a naturalization ceremony, because she was hospitalized and unsure whether she would survive. Judge Frank went to her hospital room and performed a naturalization ceremony. Friedemann learned of Judge Frank's act when she spotted a photo in his chambers. "I think it speaks volumes for how he goes beyond the day-to-day requirements of being a judge," Friedemann said.

Shamus O'Meara, a partner at the law firm of Johnson & Condon in Minneapolis, represented a school district in a civil matter after a shooting at the school on the Red Lake Indian Reservation in Red Lake, Minn., had killed 10 in March 2005. Judge Frank presided over both the civil matter and the related criminal case that arose from the shooting. The cases were difficult and emotionally charged, O'Meara said.

One day, attorneys in the cases met in Judge Frank's chambers. Judge Frank had a television set on his desk, and he played for the group a video of an autistic teen-ager playing basketball. It was the end of the boy's last game, and he had been put in for the first time in his career. He shot three-pointer after three-pointer in a mesmerizing scene, O'Meara recalled.

After showing the video, Judge Frank shared his experiences with people with developmental disabilities and his passion for helping vulnerable people. He mentioned Minnesota's late senator, Paul Wellstone, who had recommended him for his judgeship. "What it did, was it not only put everyone at ease, but it also brought us all together in a very unique and meaningful way," O'Meara said. "To me, these aren't just words that the judge uses," O'Meara added. "This is his life."

Ongoing Support

Since joining the federal bench, Judge Frank has continued to work for equal justice under the law within his profession, in his community, and in his interactions with people with developmental disabilities. He hosted a presentation on disability justice issues at a meeting of the Minnesota FBA Chapter's Diversity Committee, then gave a presentation with O'Meara and Wieck on the topic at an FBA monthly meeting. This event led to the CLE on



Top photo—Judge Frank visits a job site in St. Paul, Minn.; Bottom photo—Judge Frank speaks with a self-advocate in St. Paul.



disability justice in June.

Judge Frank and Wieck met because O'Meara, whose son has autism, had arranged a meeting between Judge Frank and the Minnesota Governor's Council on Developmental Disabilities. O'Meara was chair of the council at the time. Judge Frank explained his experiences to the group. "Once we heard [Judge Frank's] speech, we knew we had to have him on videotape," said Wieck. The council recorded the speech, posted it on its Web site, and promoted it.

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The video (available at www.mnddc.org/extra/judge-frank.html) has inspired advocates of disability issues in North Carolina to write to him.

Judge Frank has presented employer awards at the Governor's Council on Developmental Disabilities, has given presentations dealing with the federal court at Minnesota Partners in Policymaking® sessions in 2009 and 2010, and has been asked to speak to a North Carolina Partners in Policymaking session. Along with Greg Brooker of the U.S. Attorney's Office in Minneapolis and Laurie Vasichek of the Equal Employment Opportunity Commission in Minneapolis, in 2010, Judge Frank spoke at a workshop on the 20th anniversary of the Americans With Disabilities Act.

Judge Frank has testified on disability issues at a Minnesota legislative hearing and has agreed to be filmed for a documentary produced by Twin Cities public television on the history of developmental disabilities. He will discuss the rights and responsibilities of people with developmental disabilities.

Judge Frank seeks to involve more attorneys in disability issues and to recruit pro bono attorneys to take on such cases. One of his primary concerns is that children and adults with developmental disabilities are abused, exploited, assaulted, and injured at a rate that is higher than that of any other group. As both a prosecutor and a judge, Judge Frank has used a variety of techniques to ensure that people with developmental disabilities are able to testify at trial, regardless of perceived competency issues. He urges everyone to see beyond the stereotypes and to show compassion to people with developmental disabilities.

Calling for more volunteer work among members of the bar, Judge Frank said that additional pro bono attorneys are needed, because they can change someone's life. He advises organizers to go into someone's law office and ask for volunteers and not leave until there are some. Pro se cases are also a concern for Judge Frank. All too often, he says, pro se cases that come in involve an issue that could have been resolved if an attorney had been involved at the beginning of the process.

Recognizing that the unemployment rate for individuals with disabilities is far above that of the overall workforce, the judge tries to play a part in stimulating jobs for such individuals. When he is out in the community and visits a retail store where he sees one or more people with a disability working, Judge Frank praises the store manager for inclusive employment practices. Similarly, he also praises law firms that hire people with developmental disabilities to do document imaging of their legal files or other tasks in the office.

Earlier this year, Judge Frank met with a group of adults with developmental disabilities at the federal

courthouse, meetings that were similar to those he held years ago. He asked the visitors what was most important to them and also asked everyone to tell him the definition of rights and equal justice under the law.

"I want to live on my own."

"I want to be respected."

"I want to be believed as a sexual assault victim."

The group of visitors invited Judge Frank to visit them at the center where they receive supported employment, and he accepted. When he arrived on a Tuesday morning in July, 27-year-old Jeremy Kelzenberg was waiting at the front door to greet the judge. "It's kind of neat to have him come out here and visit with us, to have someone that important come out," Kelzenberg said.

Before his visit to the courthouse, Kelzenberg had done research into Judge Frank's background on the Internet and read his results aloud from the witness stand in the judge's courtroom. He quizzed the judge about the details. "Does magna cum laude mean you belong to a fraternity?" Kelzenberg asked.

"He's a great judge," Kelzenberg said on the day that Judge Frank came to the center. "He sticks up for us and believes in us and is trying to help people like us with disabilities." When Judge Frank arrived at the center, he immediately greeted and hugged Rodney Kaufer, who had worn the judge's robe during the courthouse visit. "The judge, the judge!" Judge Frank said to Kaufer.

During the visit, about 20 active advocates with developmental disabilities sat around a conference table with Judge Frank and discussed a PowerPoint presentation of the work they had done during 2010 as well as their upcoming plans. They queried the judge's thoughts about local court cases in the news and the oil spill in the Gulf of Mexico. The group applauded when photos of the courthouse tour appeared in the slides. "He taught us that we have rights the same as anybody else," said Brian Jensen. "It was a very powerful thing, you know."

When the presentation was over, Judge Frank thanked the group, saying, "I thank you for showing me the way and reminding me of what my oath means and what those words above the U.S. Supreme Court in Washington, D.C., mean: 'Equal Justice Under the Law.' You make me a better person." **TFL**

Andrea Domaskin is a third-year law student at William Mitchell College of Law in St. Paul, Minn., and the 2010–2011 president of the law school's Disability Law Society.

TURRENTINE *continued from page 17*

and Brooklyn—and sat on the Ninth Circuit Court of Appeals and the U.S. Military Justice Court of Appeals. He is quite proud of four major cases he handled, in which his decision was reversed by the Ninth Circuit Court of Appeals but upheld by the U.S. Supreme Court: *United States v. Imperial Irrigation District*, 447 U.S. 352 (1980) (distribution of water in the Imperial Valley); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (constitutionality of extended border search); *Catholic Action of Hawai'i/Peace Ed. Project v. Brown*, 454 U.S. 139 (1981) (interpretation of the Atomic Energy Act); and *United States v. Ruiz*, 536 U.S. 622 (2002) (admissibility of evidence).

Off the bench, Judge Turrentine has been a lifelong avid hunter, fisherman, and world traveler. Throughout the years, he hunted for deer and elk in Utah and Wyoming; shot grouse in Montana and pheasant in South Dakota; and ducks, white wing doves, and quail in Mexico. He continued to enjoy salmon and halibut fishing in Alaska into his 90s. In addition to Europe, Asia, and Africa, his travels included two trips to Antarctica.

Judge Turrentine has a place in the hearts of his former law clerks and the many attorneys who have

appeared before him over the years. His law clerks, who are scattered throughout the United States, have honored him by setting up a fund in his name at the Gould School of Law at the University of Southern California. The first project was the funding and construction of the Hon. Howard B. Turrentine Video Center, located in the USC Law School library, which provides technology to assist law students in improving their courtroom skills. The fund also provides tuition support for students who hail from, or completed their undergraduate education in, San Diego.

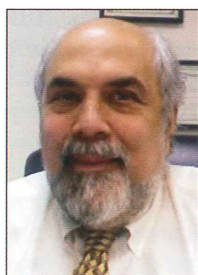
Defense attorneys in San Diego held a roast in 2009, chronicling the many trials and stories that demonstrated Judge Turrentine's sense of humor and warmth, and reflecting the attorneys' respect for him garnered, not only as a judge but also as a wonderful human being.

This is but a very brief history of a man, a member of the greatest generation, needing to be told of a career unequalled and a life that was well lived. Judge Turrentine will be greatly missed. **TFL**

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INDEPENDENCE *continued from page 31*

who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy, and the handicapped." **TFL**



David Ferleger received his J.D. degree from the University of Pennsylvania School of Law in 1972. He has a national litigation and consulting practice in disability law. He was special master for a federal court for nine years in a case involving a state institution for people with developmental disabilities and a court-appointed monitor in similar litigation. His Web site is www.ferleger.com and he can be reached at david@

ferleger.com. Benjamin Johnson, William Mitchell College of Law (J.D. candidate, 2011), provided research assistance for this article. For full citations, readers can send an e-mail to the author. © 2010 David Ferleger. All rights reserved.

Endnotes

¹527 U.S. 581 (1999).

²*Id.* at 597.

³28 C.F.R. § 35.130(b)(7).

⁴527 U.S. at 603–604, 615 (Kennedy, J. concurring).

⁵*Id.* at 605–606.

⁶See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding “We the People”*: *The Disability Rights Cases*, 104 COLUM. L. REV. 49, 58 (2004).

⁷See David Ferleger, *Special Master Rules: Federal Rule of Civil Procedure 53, The Role of Special Masters in the Judicial System*, 2004 Special Masters Conference: Transcript of Proceedings, 31 WILLIAM MITCHELL L. REV. 1193 (2005); David Ferleger, *Special Masters Under Rule 53: A Welcome Evolution*, in ALI-ABA, *THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER* (2007).

⁸931 F. Supp. 974 (D. Conn. 1996), appeal dismissed, 116 F.3d 466 (table), 1997 WL 321594 (1997), cert. den. sub nom., *Connecticut v. United States*, 522 U.S. 1045 (1998).

⁹931 F. Supp. at 985.

¹⁰*Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 299–300 (D. Conn. 2008) (describing the success of this judicial oversight in a parallel case involving the same institution).

¹¹*Youngberg v. Romeo*, 457 U.S. 307 (1982).

¹²David Ferleger, *The Constitutional Right to Community Services*, 26 GEORGIA STATE U. LA. REV. 763 (2010).

An abstract painting in shades of brown, tan, and gold, featuring thick, swirling brushstrokes that create a sense of movement and depth, resembling a storm or a turbulent sea.

The Americans with Disabilities Act and
Public Emergencies: Is There an “Exigent
Circumstances” Exception to the Act?

By Steven E. Rau and Gregory G. Brooker

In a striking repudiation of the U.S. Supreme Court, Congress enacted the ADA Amendments Act (ADAAA) in 2008. The explicit findings and purpose of the ADAAA were to guarantee that the original promise of the ADA was fulfilled and not thwarted because of the Supreme Court's rulings in *Sutton v. United Airlines Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184 (2002). The ADAAA represented a legislative rejection of judicially created restrictions of the intended protections provided by the ADA. The amendments created hope for individuals with disabilities and their advocates that the ADA would fulfill the original promise it offered to more than 53 million Americans with disabilities. This reinvigoration of the intent and purpose of the ADA will affect the law governing discrimination on the basis of a person's disability.

One line of cases that Congress did not statutorily overrule in the ADAAA relates to whether there is an "exigent circumstances" exception to the ADA itself. In *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), the Fifth Circuit held that Title II of the ADA "does not apply" in emergency situations in which police officers must quickly identify, assess, and react to potentially life-threatening situations. Congress, the Fifth Circuit noted, could not have intended the ADA to prevent discrimination against people with disabilities at the expense of public safety. *Id.* at 800. Similarly, in *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009), the Fourth Circuit held that exigent circumstances necessarily affect the "reasonableness" of the ADA accommodation requested. Thus, accommodations "that might be expected when time is of no matter become unreasonable to expect when time is of the essence," the court stated. *Id.* The Eleventh Circuit, in *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085–88 (11th Cir. 2007), also treated exigent circumstances as an issue that is relevant to the reasonableness of the ADA accommodation request.

The Eighth Circuit, which is currently considering whether to recognize an exigent circumstances exception to the ADA in a case involving a late-night public health emergency, may soon jump on this bandwagon. See *Loye v. County of Dakota*, 647 F. Supp. 2d 1081, 1088–90 (D. Minn. 2009), *appeal docketed*, No. 09-3277 (8th Cir. Sept. 9, 2009). The *Loye* case illustrates the practical problems of providing individuals with disabilities meaningful access to a public entity's programs, activities, or services under Title II of the ADA. These problems are exacerbated in this age of limited government resources and will continue to require creativity and imagination, especially in emergency situations.

Loye involved the dangerous situation of children playing with mercury that had been found in an abandoned building and the ensuing efforts to contain and decontaminate the area. *Loye*, 647 F. Supp. 2d at 1084. On Labor Day, Sept. 6, 2004, two children broke into an abandoned building near Rosemount Woods, a mobile home park, and found two bottles containing mercury in the building. At about 6 p.m., a neighbor saw the children playing with the mercury in the nearby park and called the police. Upon arriving at the scene, the police recognized the

substance as mercury and initiated decontamination procedures based on an emergency response plan developed by the county, together with 11 of the county's municipalities, more than a year before this incident. The plan was designed to enable the public entities to collectively plan for and respond to large-scale disasters in the community.

During the initial investigation of the incident, the police interviewed Vikki Marshall, a deaf woman whose son had been playing with the mercury. Afterward, in accordance with the emergency response plan, police officers began knocking on people's doors in the mobile home park to find and quarantine people who may have been exposed to the mercury. Some of the people who were quarantined were deaf like Marshall; they included Kevin Loye, Gina Gist, Bruce Einarson, Stacy Rogers, and David Stiles (hereinafter the referred to as the plaintiffs). *Id.* at 1084–1085. The decontamination process began around 11 p.m., more than four hours after the police officers' initial response to the mercury that had been reported. The decontamination process included taking people into a tent, having them remove all their clothes and jewelry, washing and brushing the individuals, and then giving them a Tyvek® suit. During the entire process, a sign language interpreter was not provided to any of the individuals who were deaf. Lipreading and reading handwritten notes were not effective because of the dim lighting in the decontamination tent. The individuals who were deaf obtained information about the process by interpreting various hand gestures and observing what people in the front of the line were doing. After decontamination processes ended at about 2 a.m., the individuals were taken by bus to a local motel. *Id.* at 1085.

Over the next few days and weeks, Dakota County conducted various meetings with the affected individuals. *Id.* at 1085–1086. A sign language interpreter was available at some of the meetings, but not all of them. In addition, a nurse was assigned to meet with various individual families, including those whose members were deaf. Whether an interpreter was present at each meeting for every individual was a disputed fact. By the end of September 2004, the families had returned to their homes, and the nurse's assistance ceased.

In September 2005, the plaintiffs filed charges with the Minnesota Department of Human Rights, asserting that their rights had been violated when Dakota County failed to provide interpreters during the decontamination process. The plaintiffs later filed an action against the county in federal court, asserting violations of Title II of the ADA; § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); and the Minnesota Human Rights Act, Minn. Stat. § 363A, Subd. 1. *Id.* at 1086.

Under Title II of the ADA, a public entity discriminates against a disabled individual if the person does not receive "meaningful access" to the public entity's programs, services, or activities. To provide "meaningful access," Title II of the ADA requires the public entity to take the "appropriate steps to ensure that communications" with deaf individuals are "as effective as communications

with others.” 28 C.F.R. § 35.160(a). Such steps include, but are not limited to, the use of interpreters, written materials, closed-caption decoders, and written materials. Under Title II, a public entity must give “primary consideration” to individuals who are disabled when providing services or activities. This requirement, however, does not mean that the public entity must supply what the individual requests. *Peterson v. Hastings Public Schools*, 31 F.3d 705, 708–9 (8th Cir. 1994). In *Loye*, the issue before the district court was whether Dakota County provided effective communication to the plaintiffs during the decontamination process—communication that was similar to that provided to others—and, if the county did not, whether the request for an interpreter was reasonable under the circumstances.

The court began by examining the facts surrounding the initial decontamination. Of particular interest to the court was the fact that the decontamination process started late in the evening—11 p.m.—on a holiday weekend, and the containment and decontamination of the mercury constituted an “extreme environmental and personal health emergency.” *Id.* at 1088. Given the situation, the court found that exigent circumstances existed such that Dakota County was not required to provide a sign language interpreter.

In arriving at this conclusion, the court in *Loye* stated that exigent circumstances may require that regulations be set aside, *id.* at 1089, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (finding exigent circumstances rendered warrantless entry into a home objectively reasonable under the Fourth Amendment); *United States v. Banks*, 540 U.S. 31, 37 (2003) (the same reasoning was applied for forcible entry on a “knock-and-announce” warrant). The court reasoned that an emergency responder must protect the public health and secure the area during an emergency, and any delay caused by the need to comply with the ADA could increase the risk to the responders and to the public. As such, it was not necessary for Dakota County to wait to begin decontamination procedures until an interpreter could be located and arrive at the scene.

The *Loye* court also determined that it was not logical to require Dakota County or any other member of the decontamination task force to keep an interpreter on staff “24 hours a day, 365 days a year, to guard against such a possibility” of needing one in an emergency. *Loye*, 647 F. Supp. 2d at 1089. Finally, the district court found that the responders were able to communicate effectively enough with the plaintiffs during this time period through hand gestures, pointing, and oral communications with family members who were not deaf.

The district court in *Loye* also examined whether Dakota County had provided “meaningful access” in making “reasonable modifications” by having an interpreter present at some of the follow-up meetings with the affected individuals. The court found that, under the precedent set by the Supreme Court, Dakota County was not required to have an interpreter at every meeting. *Id.* at 1090. Rather, it was a “reasonable modification” to allow the deaf residents to obtain the information presented at the meeting at a later time and to arrange for a private meeting some reasonable



time later to ask questions. In addition, the court noted that the plaintiffs were unable to identify specifically any information that they had not received or any harm they had experienced because of this procedure.

Because the plaintiffs were unable to provide any facts from which a reasonable jury could find that Dakota County had denied the plaintiffs the benefit of its services or discriminated against the plaintiffs, the court granted Dakota County’s motion for summary judgment. *Id.* at 1096. The plaintiffs appealed the decision to the Eighth Circuit, which, at the time this article was written, had heard oral arguments and taken the case under advisement.

The *Loye* case raises the following question: Under what circumstances do purported exigent circumstances excuse compliance with Title II of the ADA? The ADA and other similar laws prohibiting discrimination against individuals with disabilities do not contain any explicit exception for “exigent circumstances.” Nevertheless, courts seem willing to read such an exception into the statute. Therefore, the question becomes: when are conditions so changed that a public entity is excused from providing individuals with disabilities meaningful access to a public entity’s program, activities, or services?

Many of the decisions applying an exigent circumstances analysis to the ADA focus on the nature and scope of the emergency, and most involve incidents of police stopping a person who has a disability. See *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) (holding that the ADA did not require police to contact a mentally ill suspect’s family or mental health professionals during two-hour hostage standoff); *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008) (holding that the ADA did not require police to obtain an interpreter before arresting a deaf person involved in an assault); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085–86 (11th Cir. 2007) (holding that the ADA did not require a sign language interpreter

for a deaf driver who was stopped for suspicion of driving under the influence); *cf. Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006) (finding no exigent circumstances in the case of medical responders who made a decision to transport a disabled persons to the hospital without evaluating the person's refusal of medical assistance). Each case seems to depend on the specific facts of the emergency. This uncertainty is not good for public entities nor those covered under the ADA.

One factor to consider when exigent circumstances exist is how quickly the public entity must act when responding to the situation. Clearly, a traffic stop or detainment of an individual caught in the commission of a crime would require immediate action such that strict compliance with the ADA would not be possible. The cases on which the court relied in *Loye* involved situations in which decisions had to be made quickly. Yet, none of these cases dealt with a situation in which the public entity had no time to contact other agencies in order to provide the necessary services to comply with the ADA. Given that it took four hours for Dakota County to coordinate the decontamination process with numerous state and local agencies, it does not seem that time was of such essence for it to be permissible to allow Dakota County to completely ignore the ADA.

If such excused noncompliance is acceptable, how much time is enough before a situation moves from having exigent circumstances such that federal protections may be ignored? Under the court's reasoning in *Loye*, it may be that any situation that poses a risk to public safety or health may be sufficient to allow public entities to ignore the ADA, because public officials need to be able to move swiftly and quickly in order to resolve the risk. This exception is broad and has no statutory textual support in the ADA. In *Loye*, the county knew that some of the affected individuals were deaf. The police interviewed Ms. Marshall when they first arrived on the scene. Dakota County knew that some of its officials would need an interpreter to communicate adequately with the deaf residents. This was not a situation in which the public entity did not discover the need for reasonable accommodations to be made until the entity started providing the services, as is the case in a police stop. Given the amount of time Dakota County had to contact numerous agencies, it should have been reasonable to expect the county to attempt to call in an interpreter. Moreover, the county had written an emergency plan that was implemented the night of the mercury contamination. Shouldn't the county have anticipated in its plan the need in some cases to provide accommodations for persons with disabilities? Requiring the county to have a list of local sign language interpreters to call in emergencies does not appear to be unreasonable, given the four hours it took to set up the decontamination tents.

In these economic times, uncertainty about whether an exigent circumstances exception applies is not good for any entity—public or private. These cases, however, demonstrate the difficulty that courts encounter in requiring compliance with federal laws that do not provide an explicit, or even implicit, exception to compliance based

on exigent circumstances. Did Congress intend that it is always necessary to comply with the ADA by not providing such an exception or stating in its findings and purposes that compliance is always required? By enacting the ADAAA in 2008, Congress was overturning judicially created limitations of the ADA intentionally and allowing more people access to the protection provided by the ADA. Any argument that Congress acquiesced to various court decisions that determined that ADA compliance was not required because of exigent circumstances appears contrary to the purpose of the ADAAA.

The ADAAA broadened the definition of a "qualified disability," and this legislative amendment compounds the concern mentioned above. In times of smaller government budgets, public entities require—and deserve—clarity about which situations will allow a public entity to forgo compliance with the ADA. It could be a costly error for a city that believes exigent circumstances exist in responding to an emergency to have a court use 20-20 hindsight to award damages against the city. *See, e.g., Green*, 465 F.3d at 65 (finding no exigent circumstances exception to the ADA in the case of medical responders who made a decision to transport a disabled patient to the hospital without evaluating the person's refusal of medical assistance). As such, it is necessary for Congress or the Supreme Court to provide clarity on this issue for the benefit of all.

Whether there is an exigent circumstances exception to the ADA continues to be a focus of a hot debate, because Congress did not address the issue in the ADAAA. Perhaps a better approach to the issue is to consider the nature of the emergency situation in determining whether a request for an accommodation or a modification is reasonable under the statute. This approach is closer to the language of the statute than writing a judicially created exception for "exigent circumstances"—a broad concept better suited for constitutional cases than statutory ones. Focusing on the reasonableness of the request given the emergency at hand will also provide the needed clarity in the thorny cases involving public emergencies and the Americans with Disabilities Act. **TFL**



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