

BREAKING THE SOUND BARRIERS: HOW THE AMERICANS WITH DISABILITIES ACT AND TECHNOLOGY HAVE ENABLED DEAF LAWYERS TO SUCCEED

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In less enlightened times, Samuel Johnson once likened a woman's preaching at a Quaker meeting to a dog walking on its hind legs: "It is not done well; but you are surprised to find it done at all."¹ For much of America's history, many may have made the same assessment of a deaf lawyer.² Deaf lawyer Janine Kramer (Madera) came close to

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¹ RHONDA THOMAS TRIPP, *THE INTERNATIONAL THESAURUS OF QUOTATIONS* 718.10 (1970).

² I apologize if any nomenclature is not the preferred language for the subject matter of this Article. I am aware of the rationales for using "individuals who are deaf" and derivatives rather than "deaf persons" or "the deaf." Indeed, several individuals expressed discomfort towards the "label" of "deaf lawyer" or "disabled/handicapped lawyer." See, e.g., Michael A. Chatoff, *Judge Me By What I Can Do*, NAT'L L.J., Oct. 2, 1989, at 14 ("I am a lawyer. I am not a deaf lawyer. I dislike the term."); Dale C. Moss, *Not Disabled By His Handicap*, PA. LAWYER, Dec. 1989, at 10 (interviewing Harold Diamond: "I object to the term 'disabled.' I am handicapped, but I am not disabled by my handicap"); Panel Discussion, *The Plight of the Deaf*, 9 HUM. RTS. 18, 20 (1980-81) (quoting Robert Mather: "Just as many 'women lawyers' and 'black attorneys' prefer to be known by their profession rather than their sex or color, I prefer to think of myself as an attorney who happens to be deaf."); Jack Zemlicka, *Interview With Judge Richard S. Brown, Wisconsin Court of Appeals*, WIS. L.J., Mar. 3, 2008 ("I don't set out to be Rick Brown, the deaf judge. I set out to be Rick Brown, a judge who happens to be deaf.").

That said, I find writing "individuals who are deaf" and the like too wordy for an Article. Moreover, I found just as many individuals perfectly comfortable self-identifying as a "deaf lawyer" or something comparable. See, e.g., Sheila Conlon-Mentowski as told to Robert Brady, *I am a Deaf Lawyer*, COSMOPOLITAN, Apr. 1985, at 190-92; Roberta J. Cordano, *The Art of the Alchemist: A Conversation with a Law Professor*, 2 COLUM. J. GENDER & L. 150, 152 (1992) ("I am a Deaf woman attorney."); Susan Harris, *The Hearing Impaired Advocate*, 67 JUDICATURE 95, Aug. 1983 (discussing author's experiences); Alice McGill, Note, *Personal Experiences of a Deaf Law Student*, 1 HASTINGS WOMEN'S L.J. 117 (1989) [hereinafter McGill, *Personal Experiences*].

summarizing the sentiment when she once remarked of her practice, “[s]ome court hearings and depositions that I’m particularly proud of . . . I got it right and did well, but didn’t do anything that millions [of hearing lawyers] haven’t done before me.”³

When the Americans with Disabilities Act (“ADA”)⁴ was passed in 1990, the idea of a deaf person being a lawyer still seemed “far-fetched” to most of America.⁵ Although the number of deaf lawyers depends on the definition of “deaf” (Hard of hearing? Late-deafened?) and the definition of “lawyer” (Active practitioner? Member of a bar at some point?), in the course of researching this Article, I could only find two (three at the most) instances of deaf lawyers with active practices between the 1930s and 1970.⁶ By 1990, my best estimate is around twenty deaf lawyers existed.⁷

Having been involved in the deaf lawyer community for quite some time, reading dozens of articles on deaf lawyers, and corresponding with numerous deaf lawyers and law students, my best estimate is that there are currently about 200 persons who self-identify as “deaf” and who have obtained bar membership. If current law students or recent graduates seeking licensure are included, the number is 215 or 220. To put the number in some perspective, the American Bar Association had over 380,000 members in 2010.⁸

This Article discusses how the ADA and technology have enabled deaf lawyers to succeed. Today, we are (among other things) large-firm litigators, prosecutors, public interest advocates, transactional/tax lawyers, solo practitioners, government lawyers, public defenders, small

Similarly, for historical accuracy purposes, I have used some outdated terms (“deaf-mute” or “dwarf”) because that was the way I found them in the cited materials. *Cf.* *United States v. Russell*, 156 F.3d 687, 689 n.1 (6th Cir. 1998) (noting that “deaf-mute . . . is considered offensive” today).

³ Glenn Lockhart, *Represented: Lawyers Who Are Like Us*, SILENT NEWS, Mar. 2002, at 25.

⁴ 42 U.S.C. §§ 12101–12213 (1994).

⁵ MARLEE MATLIN & BETSY SHARKEY, *I’LL SCREAM LATER* 217 (2009). Ms. Matlin was about to embark on a television role in which she played a deaf prosecutor. *See infra* notes 218–20 and accompanying text.

⁶ *See infra* note 95 and accompanying text; *cf.* Steve Piacente, *Attorney Overcomes Disability*, POST & COURIER (S.C.), Dec. 27, 1992, at 1-B (noting that Michael Tecklenburg became the first deaf person to graduate from Columbia Law School in 1989, but that “[b]ack in the late 1960s [when he was diagnosed as deaf] . . . the prospect of becoming an attorney did not even seem a remote possibility for . . . Tecklenburg”).

⁷ A list of deaf attorneys as compiled by the now-defunct National Center for Law and Deafness in Washington D.C. circa 1988 is on file with the author. The list names thirteen deaf lawyers in the United States. From the research for this Article, I know several deaf lawyers were not on the list but should have been.

⁸ ABA COMM’N ON MENTAL AND PHYSICAL DISABILITY LAW, GOAL III REPORT, at 4 (2010), available at <http://new.abanet.org/disability/PublicDocuments/2010GoalIII.pdf>.

firm general practitioners, in-house counsel, professors, and judges. I will first provide a background on the necessity of proper accommodations for a deaf person to succeed in the legal profession. I will next give a pre-ADA history of deaf lawyers and discuss some of the barriers that they faced. I will then move on to how the ADA and technology has impacted the lives of deaf law students and lawyers and discuss what more can be done to ensure that the progress continues throughout the twenty-first century.

I. NECESSITY FOR PROPER ACCOMMODATIONS FOR DEAF LAWYERS

Prior to the ADA, even the Supreme Court's most progressive members impliedly agreed that intelligence or physical disability status bears a "relation to ability to perform or contribute to society."⁹ On July 26, 1990, President George H.W. Bush signed the ADA—which had already been approved by an overwhelming majority of Congress—into law. Senator Tom Harkin, one of the ADA's sponsors, termed the ADA the "Emancipation Proclamation" for people with disabilities in America.¹⁰ In the ADA's findings and purpose section, Congress stated, *inter alia*,

historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem

. . . .

. . . [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.¹¹

The chief benefit that the ADA has provided to deaf lawyers is the right to interpreting. With qualified interpreters, deaf persons generally

⁹ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion joined by Douglas, White, and Marshall, JJ.).

¹⁰ See 136 Cong. Rec. 17,369 (1990).

¹¹ 42 U.S.C. § 12101(a)(2), (a)(7) (1994).

have equal access to education as their hearing peers. As deaf lawyer Alexis Kashar remarked when she was provided an interpreter in class, "My whole world opened up with that interpreter Communication existed in a way I never knew existed. I could actually find why students were laughing, participate in debates, answer questions in class. It was unbelievable."¹²

Undoubtedly, there have been numerous examples of lawyers who retired from the profession or had to find new specialties due to declining hearing.¹³ As late as the mid-1980s, Richard Ricks and Theodore Burtzos, both of whom became deaf in their thirties due to Meniere's Disease, gave up their respective trial practices when they each concluded that no accommodations could allow them to effectively continue as advocates.¹⁴ Happily, both Mr. Burtzos and Mr. Ricks were able to resume their trial practices a few years later due to a combination of advanced legal protections (namely, the ADA), as well as sufficient technology.¹⁵

Likewise, there are stories of attorneys who were less effective, to put it charitably, at their jobs because they did not have proper accommodations. The following is a somewhat humorous example of how a lack of proper accommodations can impede the deaf attorney's effectiveness:

Probably the classic case that lawyers love to tell has to do with an old, very deaf attorney in Montpelier named John Center, who had a considerable practice in the

¹² Lydia Lum, *Deaf Child Defies Odds Growing Up: As an Attorney, She Helps the Disabled*, SUN-SENTINEL (Fla.), Jan. 1, 1994 (internal quotation marks omitted).

¹³ This includes Supreme Court justices. Justice Gabriel Duvall (then eighty-two years old) retired from the Court "in consequence of extreme deafness" in 1835. SENATOR PAUL SIMON, *ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES 175* (1992). Justice John H. Clark resigned from the Court at the relatively young age of sixty-five because of worsening deafness. LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOMES 556* (1991). Incidentally, Justice David Brewer remained on the Court for several years despite being "so deaf that he cannot hear." See *id.* at 430.

¹⁴ See Allie Shah, *Computer Puts Deaf Prosecutor Back in Court*, CHI. TRIB., Feb. 2, 1995, at 4. Burtzos recalls that he "was devastated" when he became deaf and "didn't know what to do. [His] life as a trial lawyer had completely vanished." *Id.*; see also Elsa Walsh, *Struggle Against Silence: Young Lawyer Quits Cases as Deafness Worsens*, WASH. POST, Nov. 29, 1986, at B1 ("Even with his hearing aids turned to full volume [Ricks] could hear only some speech and nothing on the telephone. After a particularly severe sentencing, a client lashed out at Ricks, yelling that he had received a prison term instead of probation because Ricks could not hear what was going on in the courtroom.").

¹⁵ See *infra* notes 213-14 and accompanying text. Mr. Burtzos later became a judge on the Cook County Circuit Court.

Supreme Court, but was not very diligent in tending to it. He had this particular case on the docket that had been continued by agreement of the parties for several terms, never being reached for argument. Eventually another term came around. Chief Justice Powers presided over the court and called upon Mr. Center to explain about that case. Mr. Center simply rose and said, 'We have continued it by stipulation, Your Honor.' Whereupon the Chief Justice, very angry at the many delays that had occurred, said, 'Mr. Center, you cannot continue to make a fool out of this court.' Mr. Center, of course, not having heard the remark at all, simply answered, 'Your Honor, I thought we could by stipulation.'¹⁶

But even if the deaf lawyer tried to ask the judge to repeat himself or slow down because he was talking too fast for the deaf lawyer to lipread, many judges – who are trying to move cases along – do not react well to such requests.¹⁷ Interpreting obviates these types of situations.

Although some extraordinary individuals succeeded in the legal profession prior to the ADA, it cannot be doubted that the ADA, coupled with technology, has enabled deaf persons to thrive in the legal profession for the past twenty years. As one deaf lawyer (who preferred not to be identified) wrote, "[m]ost people prefer to do things exactly the same way they've been doing them in the past – an attitude which tends to harm disabled [and/or] deaf attorneys who can participate fully with some simple courtesy." The ADA goes a long way in changing such sentiments.

II. TYPES OF ACCOMMODATIONS USED

There may be something to the sentiment of ABC News Journalist John Hockenberry (himself a paraplegic) opining that "you realize the obstacles are just guys standing there, telling you that it's impossible. And you know it's not."¹⁸ But the hard truth is that without interpreting,

¹⁶ See Virginia C. Downs, *Yankee Justice: The Lighter Side of Vermont Law*, 30 VT. B.J. & L. DIG. 17, 19 (Spring 2004).

¹⁷ Janice Arenofsky, *Success Stories: Her Day in Court*, 17 EEO BiMONTHLY 34 (Dec. 31, 1996) (recounting the experience of Jamie McAlister, a deaf lawyer, who noted that a judge would sometimes "get into a huff" when she requested that he slow down so she could understand him).

¹⁸ JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 332 (1993).

it is extraordinarily difficult for deaf lawyers (or deaf professionals in general) to succeed.

A. *Minimal Accommodations*

Prior to the enactment of the ADA and the invention of sufficient technology, many deaf lawyers went through law school and practiced with very minimal accommodations. For example, a deaf student might resort to sitting in the front row while attempting to read the professor's lips or utilizing other students' class notes (either on a voluntary or paid basis).¹⁹ I hope that it is self-evident to the reader that for a deaf person to simply sit in the front of a class and attempt to read the professor's lips is of extremely limited utility from a learning standpoint. While some deaf persons are skilled lipreaders, the task is still difficult even under the best of circumstances. Because so many words look alike on the lips, even the best lipreaders can only capture thirty to sixty percent of what is being said by the speaker, and the rest of the spoken message is filled in through guesswork.²⁰ This assessment of the utility of lipreading assumes optimal circumstances, such as the professor speaking fairly clearly and facing the deaf student directly, the deaf student is not tired or ill, and has good vision. Additionally, discussion within the class must be non-existent.²¹ Given that many law school

¹⁹ See, e.g., R.C. SMITH, A CASE ABOUT AMY 99 (1996) (discussing Michael Chatoff); BONNIE POITRIAS TUCKER, THE FEEL OF SILENCE 123 (1995) [hereinafter Tucker, SILENCE] (discussing the author's own experiences in law school); Grant Pick, *A Silence Broken*, STUDENT LAW., Sept. 1977, at 47, 48 (discussing Lowell Myers' experiences in law school); Doreen Pollack, *Susan Harris in Moot Court*, ALEXANDER GRAHAM BELL ASS'N DEAF NEWSOUNDS, Oct. 1982, at 4 (discussing Susan Harris); Vickie Walter, *Members of the Bar: Deaf Lawyers Beating the Odds in their Profession*, GALLAUDET TODAY, Spring 1989, at 9 (discussing Leonard Hall).

²⁰ See, e.g., SHAPIRO, *supra* note 18, at 92 ("[O]nly 30 percent of speech can be read from lip movements."); McGill, *Personal Experiences*, *supra* note 2, at 121 (estimating fifty-percent comprehension of words in ideal lipreading conditions); Nora Coyne, *Lawyer Lipreads Witnesses*, READING EAGLE, May 23, 1982 (explaining that Harold Diamond estimates, at best, he can only catch "six or seven words in a 10-word sentence"); Edward Dolnick, *Deafness as Culture*, ATLANTIC MONTHLY, Sept. 1993, at 39 (estimating fifty percent comprehension of words under peak lipreading conditions); Michael Schwartz, *Serving Hearing-Impaired Clients*, 18 BARRISTER 45, 46 (1991-92) (estimating that even the best lipreaders only obtain thirty percent of information). These estimates are not inconsistent. Even if one picks up seven words out of a ten-word sentence, the "missed" words could be critical to understanding the sentence, and thus the whole sentence is misunderstood.

²¹ To give perspective on how difficult it is to achieve these "optimal" conditions, consider the experiment of deaf Thomas M. Cooley Law School student John Machiorlatti. For one of his classes, Mr. Machiorlatti "used a stopwatch to track the amount of time in a class where the professor was talking [versus] the amount of time where students were speaking. Not surprisingly, about 55 percent of the class was spent in student discussion." David Cohen & Richard Bernstein, *Determining Proper Accommodations for Deaf Law*

professors teach through the Socratic method, lipreading and notetaking is an especially poor way for a deaf person to learn much in law school.²²

Although class notes provide some benefit, they do not come close to providing missing information lost through lipreading. Such notes are almost always taken by fellow students in the class, who may or may not substantively understand the professors' points. Moreover, even the most skilled notetaker can only write a handful of pages of notes from an hour-long class when a word-to-word transcription of the same class would result in a sixty- or seventy-page document.²³

Some deaf lawyers utilized similar "accommodations" in court appearances. For example, Harold Diamond's practice required him to make several court appearances each week, and he was "allowed to position himself [in court] where he wishe[d] so he [could] easily read lips."²⁴ Scott Harrison employed a similar strategy as an assistant public defender in the Florida county courts early in his career,²⁵ as did Charles

Students, DISABILITIES PROJECT NEWSLETTER (Comm. on Justice Initiatives & Equal Access Initiative Disabilities Project/State Bar of Mich., Mich.), Mar. 2007, available at http://www.michbar.org/programs/disabilitynews/disabilities_news_10.cfm.

²² See, e.g., Tucker, SILENCE, *supra* note 19, at 123 ("I couldn't comprehend a word that was said [during Socratic discussion in classes. T]he discussion [was] so fast and furious that most of the time I couldn't even figure out who was speaking."); Sheryl Nance, *Deaf Columbia Graduate Set to Face Bar Exam, Career*, 201 N.Y. L.J. 2 (June 2, 1989) (Michael Tecklenburg remembering that it was difficult "to keep up with the fast-paced Socratic-style dialogue" in law school); Lynne Weaver, *Daily Log of Independent Fieldwork*, reprinted in *LAW STORIES: LAW, MEANING, AND VIOLENCE* 195 (Gary Bellow & Martha Minow, ed. 1996) (Harvard Law School student Lynne Weaver recalling that "the popular Socratic teaching method makes it impossible for me to follow everything that is going on in a law school classroom"); E-mail from Brandy Ligouri Tomlinson to author (Aug. 14, 2010) (on file with author) ("I could not rely on lip reading due to the [S]ocratic method used in law school. I would sit in class completely clueless and not able to follow along.").

²³ Professor Tucker was astute enough to recognize that five or six pages of class notes "could not reflect every aspect of lengthy class discussions." Tucker, SILENCE, *supra* note 19, at 124. "To fill in the gaps, [she] spent several hours a day reading legal treatises, hornbooks, law review articles and additional legal cases to better understand the concepts being explored." *Id.*; see also *id.* at 131-32, 140. Due to these efforts, Professor Tucker graduated within the top five percent of her class in 1980 and was editor-in-chief of the Colorado University Law Review. *Id.* at 155, 159.

²⁴ Moss, *Not Disabled*, *supra* note 2, at 10; see also Coyne, *supra* note 20 (quoting Mr. Diamond, who reported that he has "an unlimited license to move anywhere in the courtroom").

²⁵ Jan Pudlow, *Lawyer Does Not Let Hearing Impairment Hold Him Back*, FLA. B. NEWS, Apr. 1, 2001, at 25 ("[I]t looked like [Mr. Harrison] was watching a tennis match. His head whipped back and forth from prosecutor to witness, so he could read their lips."); see also *id.* (noting that Mr. Harrison was permitted "to sit at the table closest to the jury box usually reserved for the prosecutor"). When Mr. Harrison was promoted to defend felonies in Florida circuit court, he was provided with more sophisticated accommodations. *Id.*

“Mac” Gibson in his civil litigation practice in South Carolina.²⁶ One nineteenth century deaf lawyer had his law partner write down important parts of court proceedings while they were trying cases.²⁷ Richard Brown, who is now Chief Judge of the Wisconsin Court of Appeals, became deaf five years after he was elected to the bench. He recalls that he relied primarily on lipreading and residual hearing from his cochlear implant to follow courtroom proceedings in early years.²⁸

For persons with mild or moderate hearing impairments, an assistive listening device such as an FM or infrared auditory system was often sufficient.²⁹ They may have still needed notetakers and may have also faced the same difficulties as lipreaders in terms of classroom discussion because only the voice of the speaker using the microphone, often the professor, is heard on the system. Nonetheless, such assistive listening devices are useless to people who have severe or profound hearing loss.³⁰

B. Sign Language Interpreters

For deaf persons who knew sign language, sign language interpreters proved to be an excellent accommodation. There are two forms of sign language that can be used by deaf law students and lawyers: American Sign Language (“ASL”) and Signed English. For present purposes, it will suffice to say that the basic difference between ASL and English is that the former is a conceptual language.³¹ The literal translation for “I have been to Chicago” into ASL would be “touch finish Chicago.”³² The literal ASL translation for “prosecutor” could be any of

²⁶ See Bill Thompson, *Hearing Loss No Handicap to Lawyer*, CHARLESTON EVENING POST (S.C.), Aug. 16, 1988 (describing experiences of Mac Gibson).

²⁷ See *infra* note 62 and accompanying text.

²⁸ See Zemlicka, *supra* note 2; see also *infra* notes 200, 216–17 and accompanying text (discussing Judge Brown’s later use of interpreters).

²⁹ See, e.g., Bonnie P. Tucker, *Accommodating Hearing-Impaired Law Students and Faculty Members*, 41 J. LEGAL EDUC. 355, 355–56 (1991) [hereinafter Tucker, *Students and Faculty*] (noting point); see also Walter, *supra* note 19, at 9 (discussing Debora van der Weijde’s (Luther’s) experiences in law school).

³⁰ See, e.g., *Ball v. AMC Ent., Inc.*, 246 F. Supp. 2d 17, 23 n.17 (D.D.C. 2002) (recognizing point).

³¹ The differences between ASL and Signed English are more extensively described elsewhere. See, e.g., Dolnick, *supra* note 20, at 40, 46–52; Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 868–79 (2003); Jo Anne Simon, *The Use of Interpreters for the Deaf and Legal Community’s Obligation to Comply With the A.D.A.*, 8 J.L. & HEALTH 155, 162–64 (1993–94); Tucker, *Students and Faculty*, *supra* note 29, at 358.

³² LaVigne & Vernon, *supra* note 31, at 870; see also Tucker, *Students and Faculty*, *supra* note 29, at 358 (similar examples). Of course, virtually all languages have their own syntax and word order. The French phrase for “how are you’ (*Comment allez-vous?*)” would

“‘blame-person,’ ‘government lawyer,’ ‘complaining lawyer,’ ‘other lawyer,’ or ‘against lawyer.’”³³ English, on the other hand, is a language that conveys meaning through specific word choice.

Signed English is essentially a pidgin-like combination of both signs and English.³⁴ Not every English word is signed, but the literal translation of Signed English is closer to English than ASL. And different signs will be used for the same English word when context so warrants (i.e., “satisfactory” or “sanction” will be signed for the English word “fine” depending on the context of the word’s meaning).³⁵

There is debate within the deaf community whether ASL is appropriate for sophisticated legal terminology for deaf lawyers or law students. Some deaf students and lawyers have used ASL and believe it is sufficiently clear for legal work.³⁶ Others disagree, noting that ASL is of limited utility for deaf lawyers and law students because ASL cannot pick up crucial nuances of certain legal terms, or because many legal terms simply do not have a corresponding sign language equivalent.³⁷

literally be translated into English as “how go you?” See LaVigne & Vernon, *supra* note 31, at 870 (making point).

³³ See LaVigne & Vernon, *supra* note 31, at 875.

³⁴ Simon, *supra* note 31, at 162.

³⁵ See *id.*

³⁶ See, e.g., E-mail from Debra Patkin to author (Aug. 23, 2010) (on file with author) (“[W]hen I had ASL interpreters at UCLA [Law School], I was able to understand legal concepts quickly (the vocabulary, not so quickly, but it was much more important that to understand what the law meant than what a particular term was used).”).

³⁷ See, e.g., Larry J. Goldberg, *The Law: From Shield to Sword for Deaf People*, 9 HUM. RTS. 23, 25 (1980-81) (“Legal terms themselves pose problems in interpretation [to sign language]. For example, consider the phrase *you may appeal*. Since there is no sign for the word *appeal*, it will require an interpreter to use a combination of signs, such as *you are not satisfied with decision, ask for another trial*. It requires nine signs to explain this concept.”); see also LaVigne & Vernon, *supra* note 31, at 861-62, 869-70, 874-79 (discussing the difficulties of translating legal terms into ASL); Mike McKee, *Signs of Change*, RECORDER, Apr. 24, 2000, at 6 (quoting Janine Kramer (Madera) as preferring Signed English to ASL: “ASL is a very conceptual language . . . And I want to know the English, the actual word being said.”). Professor Tucker also noted that “[w]hen you use American Sign Language, you have huge gaps in your vocabulary, and you can’t go into the law with that disadvantage.” *Id.*; see also Simon, *supra* note 31, at 185 n.150 (1993-94) (citing now-Syracuse Law School Professor Michael Schwartz: “Mr. Schwartz believes it is imperative that he receive an English interpretation due to the complexities and technicalities of legal terminology, and because English is his first language, not ASL. He would be laboring under a deficit if he had to rely solely on an ASL interpretation.”); Weaver, *supra* note 22, at 171-72 (describing difficulties of using sign language to convey legal terminology to deaf clients in school clinic); *infra* note 219 (providing additional discussion regarding the differences between ASL and English).

Several deaf law students have expressed frustration when interpreters were not familiar with terms used in the law context.³⁸

Of course, sign language interpreters are only helpful if the deaf lawyer or student actually knows sign language. At least one law school was sued in part because it insisted on providing sign language interpreters as an accommodation for deaf students, when the students' knowledge of sign language was limited and other accommodations would have been more appropriate.³⁹ Additionally, for deaf law students that utilized sign language interpreters—and oral interpreters, for that matter—an accompanying notetaker was essential. Whenever the deaf person turns her eyes away from the interpreter to write down or type notes, she inevitably misses what is being said at that moment.⁴⁰

³⁸ See Lisa Davis, *Missed Interpretation*, S.F. WKLY. NEWS, Mar. 13, 2002, at 3, available at <http://www.sfweekly.com/2002-03-13/news/missed-interpretation/1>. In the article, Davis reports:

Often, [Emily] Alexander says, the [University of California's] interpreters were not well enough versed in legal subjects to properly translate the material discussed in her classes. "The interpreters were not familiar with the case names and some of the words," she says. "I would have to come up with a crib sheet and give it to the interpreters. I was putting a lot of time into not only my own classwork, but into [educating the interpreters]."

Id. Another student, Kirstin Wolf (Kurlander)

also suffered from a problem that had plagued Emily Alexander: The university's interpreters often did not understand legal vocabulary well enough to effectively interpret lectures. For instance, they might confuse "proximate cause" (something that sets in motion events that result in an unfortunate end, such as an injury), with "probable cause" (a reasonable ground to believe in the existence of certain circumstances). Similarly, they might confuse all-but-unrelated concepts such as "common law" and "constitutional law."

Id. at 4; see also Arenofsky, *supra* note 17, at 34 ("The hardest part of [using Signed English interpreters in law school for Jamie McAlister] was creating signs for legal terminology, since [signed English] provided no specialized vocabulary."); Jonathan Shapiro, *Deaf Hastings Student Overcomes Obstacles*, THE RECORDER, Mar. 24, 1989, at 9 ("There are no signs for certain legal terms, like *res ipsa loquitur* . . .").

³⁹ See Davis, *supra* note 38, at 2 ("Many of those complaints center on what students have seen as a problem in getting anything other than traditional sign language interpreting services in the classroom."); see *id.* at 4 (recounting how Kirstin Wolf (Kurlander) requested CART interpreting (discussed *infra* notes 45–49 and accompanying text) because she became deaf later in life and was not fluent in sign language, but was given sign language interpreters anyway). For additional discussion of this lawsuit, see *infra* notes 229–32 and accompanying text.

⁴⁰ Davis, *supra* note 38, at 3 ("[Emily] Alexander recalls meeting with staff members in [the University of California's] Disabled Students Program before she began school and requesting ASL interpreters for her classes. Staff members mentioned that she also should have someone taking notes for her, but explained that she would have to secure such a person in each class herself. (ASL is a visual language, making it difficult to take notes

C. Oral Interpreters

In the case of lipreading, “[a]n oral interpreter simply mouths the speaker’s words without making any sound; the hearing impaired person reads the lips of the interpreter – who is usually only two or three words behind the speaker.”⁴¹ The benefit oral interpreters have over lipreading is that they are directly facing the deaf person, whereas the actual speaker may be beyond the deaf person’s sightlines. This helps to create an optimal lipreading situation.

Oral interpreters gained popularity in the 1980s and early 1990s among deaf students and lawyers who did not know sign language.⁴² Certification for oral interpreting requires training and passage of an exam conducted by the Registry of Interpreters for the Deaf.⁴³ Oral interpreters have been used often by deaf lawyers in practice when the deaf lawyer had a family member or office assistant “mouth” the words for the deaf attorney to lipread.⁴⁴

simultaneously.”); *see also* McGill, *Personal Experiences*, *supra* note 2, at 124–25 (Ms. McGill making similar point).

⁴¹ Tucker, *Students and Faculty*, *supra* note 29, at 356–57.

⁴² *See, e.g.*, Associated Press, *Florida Has Its First Deaf Lawyer*, SARASOTA-HERALD-TRIB., Nov. 22, 1984 (describing Karen Jones’s experiences in law school); Deborah L. Jacobs, News Release, *Law School’s First Deaf Student Conquers Academic Challenges*, 16 THE OBSERVER (Columbia Law Alumni Magazine), no. 4, 1988, at 6–7 (describing experiences of Michael Tecklenburg); News Release, *Stenocaptioning Delivers Lectures to Deaf Students*, STANFORD NEWS SERV., Apr. 6, 1992, available at <http://news.stanford.edu/pr/92/920406Arc2304.html> [hereinafter *Stenocaptioning Delivers Lectures*] (Theodore “Ted” Chen recalling that his oral interpreters in undergraduate study were “better than sitting in class and not understanding anything at all . . . but it was still imperfect and very tiring for me. My word recognition rate would go down drastically after a short time”).

⁴³ *See* REGISTRY OF INTERPRETERS FOR THE DEAF, <http://www.rid.org/education/testing/index.cfm/AID/88> (last visited Jan. 15, 2011).

⁴⁴ Early deaf lawyers used oral interpreters in courtroom proceedings. *See* Tucker, *SILENCE*, *supra* note 19, at 177; *infra* notes 65–66, 132 and accompanying text. Hardly any deaf lawyer uses such interpreting in court anymore. *But see infra* note 263 (oral interpreters are often used informally by deaf lawyers at the office for understanding telephone calls). Sometimes if the deaf lawyer has enough residual hearing through hearing aids or cochlear implants to follow short and simple conversations on the phone, he will have the “interpreter” (usually a secretary or assistant) listen in via speakerphone and the deaf lawyer will ask the assistant to repeat what was said when the lawyer cannot make out the speaker’s message, or otherwise just tell the deaf lawyer what the speaker says. *See infra* note 263; *see also, e.g.*, Arenofsky, *supra* note 17 (Jamie McAlister describing similar system); Pudlow, *supra* note 25, at 25 (“Because he has to use the telephone to communicate with his clients, police officers, and witnesses, [Scott Harrison] puts his phone on the speaker while his assistant, Vee Grant, sits across the desk and whispers what the person on the other end is saying. ‘If I get lost, I’ll just cover the speaker, and Vee will tell me what they are saying.’ Harrison explains. ‘We’ve been working together for a couple of years, and we’ve got it down to a fine art.’”); *infra* notes 121, 132, 168, 263 and accompanying text.

D. Computer Assisted Real-Time Interpreting

The final and most recent traditional form of accommodation for deaf lawyers and law students is Computer Assisted Real-Time (“CART”) interpreting. CART interpreting is essentially “captioning,” similar to real-time captioning used on “live” television broadcasts such as newscasts, debates, or sporting events. A stenographer (or “court reporter” or “captioner”) steno-types every word that is said in the room, and the “translation” is read by the deaf lawyer or student on a laptop computer screen. CART interpreting is not to be confused with simple typing.⁴⁵

CART interpreting has effectively rendered oral interpreters obsolete—at least in formal settings.⁴⁶ Lawyers and students who are not fluent in sign language have largely embraced CART interpreting and have sung its praises.⁴⁷ Further, unlike other forms of interpreting, CART computers allow for the display of twenty-four lines (or more) of text, which allows the deaf person to take short mental breaks or take notes from the screen without missing information, which is nearly impossible with oral or sign interpreters.⁴⁸ Given that demographics of deaf education have been favoring cochlear implants, mainstreaming, and lipreading over sign language for the past decade or so with no change in sight,⁴⁹ I predict that CART (or at least the next generation

⁴⁵ Now-retired Professor Bonnie Tucker recalls that she tried “typists” (i.e., secretaries who attempted to transcribe a taped lecture or discussion on paper) but found them impractical. See Tucker, SILENCE, *supra* note 19, at 123–24. A conventional typing keyboard is not the same as a stenography machine. Even a skilled typist took four times as long as the actual lecture (i.e., four hours for every hour of class discussion). See also *id.* at 124. Tucker abandoned typists as an accommodation after a few weeks after she learned the amount of work required for the tasks. *Id.*

⁴⁶ Like any courtroom stenography, CART’s accuracy rate is in the high nineties percentage-wise. Even if oral interpreters can give that type of translation, it is much easier to read text than to read lips by a wide margin. See *supra* notes 20–22 and accompanying text.

⁴⁷ See *infra* notes 211–17, 222–28 and accompanying text.

⁴⁸ See Weaver, *supra* note 22, at 195 (making point); *Stenocaptioning Delivers Lectures*, *supra* note 42 (same). Furthermore, some studies have shown that deaf individuals retain information better when they view the information through captions, rather than in sign language. See Julie Heldman, Note, *Television and the Hearing Impaired*, 34 FED. COMM. L.J. 93, 150, n.300 (1982) (citing studies).

⁴⁹ See, e.g., Josh Swiller, *I Think I Hear You*, WASHINGTONIAN, Sept. 2010, at 42, 43, 47, available at <http://www.washingtonian.com/articles/people/16737.html> (noting increasing popularity of cochlear implants and mainstreaming); Lou Ann Walker, *Losing the Language of Silence*, N.Y. MAG., Jan. 21, 2008, available at <http://nymag.com/guides/mindbody/2008/42822/> (quoting administrators at schools for the deaf observing that more and more deaf children are receiving cochlear implants and not learning sign language).

voice-to-text technology) will become the prevalent choice of interpreting for future deaf law students or lawyers.

III. EXPERIENCES OF DEAF LAWYERS PRIOR TO THE ADA'S PASSAGE

In my research, I found several articles identifying an individual as the first deaf lawyer.⁵⁰ These articles, however, were referencing individuals from the twentieth century. While those lawyers indeed deserve recognition, the history of deaf lawyers in America goes back a bit further.

A. *The Pioneers (Late Nineteenth and Early Twentieth Century)*

The first deaf lawyer in the United States appears to be Joseph G. Parkinson.⁵¹ Mr. Parkinson became deaf at age nine due to scarlet fever.⁵² He entered schools for the deaf, where he was put in advanced classes because, in his own words, he was "deaf but not a deaf-mute."⁵³ He moved to Washington, D.C., to enroll in Gallaudet University (then known as the Columbia Institution for Instruction of the Deaf and Dumb), and obtained a job at the Patent Office after graduation.⁵⁴

Mr. Parkinson was described as "a lad of uncommon cleverness," and impressed his superiors at the Patent Office.⁵⁵ He was the subject of a very interesting anecdote that exemplifies some of the "attitudinal"

⁵⁰ See, e.g., Letter of Howard Rosenblum, *The Whole Story*, 19 *STUDENT LAW* 5, 47 (1990-91) (criticizing earlier article in *Student Lawyer* that identified Harold Diamond as the "sole [deaf] lawyer in active practice" as inaccurate and listing several other deaf lawyers practicing at the time). A typical example was found in *Shah*, which identified Mr. Burtzos as the "first deaf attorney" to try a case in Illinois and argue in the Illinois Appellate and Supreme Court. At least one deaf lawyer, and perhaps others, predated Mr. Burtzos on all three counts. *Shah*, *supra* note 14, at 4. And in an interview in 2005, Lowell Myers stated that he was the only deaf lawyer in Illinois throughout his career. See DVD: Interview with Lowell Myers, 20th Century Chicago Stories: Deaf Lives and Experiences (2005) (on file at Gallaudet University Library) [hereinafter Myers Interview, Chicago Stories]. Again, this claim is not accurate.

⁵¹ See GUILBERT C. BRADDOCK, *NOTABLE DEAF PERSONS* 155-57 (1975). Braddock reviewed "news notices" from the late nineteenth century in concluding that Mr. Parkinson was the first deaf lawyer in the United States. *Id.* While there were other deaf lawyers licensed during Parkinson's lifetime whom were not mentioned in Braddock's book, I found nothing to contradict Braddock's conclusion that Mr. Parkinson was the first to be licensed. Braddock also credits Englishman John William Lowe as being the first deaf person licensed to practice law worldwide, being called to the bar of England in 1829. See *id.* at 97; see also W.J. Lowe, *A Deaf Mute Barrister*, in *AMERICAN ANNALS OF THE DEAF AND DUMB* 36 (Edward A. Fay ed., 1877) (discussing Mr. Lowe's life and career).

⁵² BRADDOCK, *supra* note 51, at 155.

⁵³ *Id.*

⁵⁴ *Id.* at 155-56.

⁵⁵ *Id.* at 156.

barriers encountered by deaf lawyers even today. As former U.S. Senator William M. Stewart of Nevada recounted to the *Saturday Evening Post* (reprinted in *The Silent Worker*) after his retirement from a long Senate career:

While I was in the Senate, I paid several visits to the Deaf and Dumb Asylum, and found there a boy of great brightness. I secured for him a clerkship in the Patent Office. On a visit to Washington later, I went to the Patent Office to see the boy. I talked with the Commissioner and learned that he was one of the most efficient clerks in the bureau, and that he deserved promotion.

I went to the Secretary of the Interior and asked for his advancement. While I was pleading his cause Andrew Johnson was sitting behind me. I did not know he was there until he spoke up. He said:

“Being deaf and dumb is no reason for promotion. God Almighty knows how to mark men.”

I lost my temper and came very near to losing my senses. I sprang at Johnson, intending to make an impression on his flesh, if no impression could be made upon his sense of right and wrong. He jumped behind the Secretary, and four or five clerks rushed up and got between us. He went out of the room with as little delay as possible.⁵⁶

President Johnson’s unenlightened outlook notwithstanding, Mr. Parkinson eventually earned promotions in the Patent Office and became licensed to practice law no later than 1883.⁵⁷ He moved to Cincinnati and formed a law practice with his brother, Robert H. Parkinson.⁵⁸ Their practice proved quite successful. Both were counsel in several patent cases, including a few Supreme Court cases.⁵⁹ The brothers later opened

⁵⁶ See *St. Louis*, SILENT WORKER, Apr. 1908, at 126. While impossible to confirm, it is highly likely that the “boy” to whom Senator Stewart was referring was Joseph Parkinson.

⁵⁷ BRADDOCK, *supra* note 51, at 156.

⁵⁸ See *id.*; see also *The Deaf in Business*, SILENT WORKER, Dec. 1900, at 55, available at [http://dspace.wrlc.org/view/ImgViewer?img=7&url=http://dspace.wrlc.org/doc/manif est/2041/32679](http://dspace.wrlc.org/view/ImgViewer?img=7&url=http://dspace.wrlc.org/doc/manifest/2041/32679) (discussing Mr. Parkinson’s career).

⁵⁹ See, e.g., *Consol. Roller Mill Co. v. Walker*, 138 U.S. 124 (1891); *McCormick v. Graham’s Adm’r*, 129 U.S. 1 (1889). Some of Gallaudet University’s graduates may be intrigued to know that Mr. Parkinson and his brother defended a company (unsuccessfully) in a patent suit brought by Alexander Graham Bell for infringing Bell’s telephone. See *Am. Bell Tel. Co. v. W. Tel. Constr. Co.*, 58 F. 410 (C.C.N.D. Ill. 1893). This

up another office in Chicago and Joseph Parkinson told the *Washington Post* in an 1891 interview “that his income ‘was way up in the thousands.’”⁶⁰

As far as accommodations are concerned, Mr. Parkinson foreshadowed other deaf lawyers by having family members function as interpreters. Having not become deaf until age nine, Mr. Parkinson did retain some of his speech, which reportedly was “not very difficult to follow.”⁶¹ Nonetheless, according to one account, when Mr. Parkinson appeared in court and wished to make a point, he would write down his arguments on a piece of paper and his law partner/brother would deliver the argument orally to the judge or jury.⁶² I presume that Robert Parkinson likewise wrote down important points in the court proceedings on paper for his brother to read.

While Joseph Parkinson may be the most prominent of the pioneering deaf lawyers, he was hardly alone. According to the *Columbus Dispatch* (reprinted in *The Silent Worker*), a deaf lawyer named N.B. Lutes argued a case before the Ohio Supreme Court in 1893.⁶³ Mr.

was not the only time that Bell and Gallaudet graduates clashed, as Bell and Gallaudet (both the person and the school) strenuously disagreed on the proper method of deaf education—lipreading and spoken language (Bell) versus sign language (Gallaudet). See *infra* notes 104–09 and accompanying text.

⁶⁰ BRADDOCK, *supra* note 51, at 156; see also *The Work of Gallaudet College*, SILENT WORKER, June 1898, at 147, available at <http://dspace.wrlc.org/view/ImageViewer?img=3&url=http://dspace.wrlc.org/doc/manifest/2041/32301> (noting that Parkinson “became eminent enough in patent law to be admitted to practice in the Supreme Court of the United States, and to be retained by the great firm of the McCormick Reaper Co., to take charge of its patent business”).

⁶¹ BRADDOCK, *supra* note 51, at 156.

⁶² See *About the Deaf*, SILENT WORKER, Jan. 1893, at 9, available at <http://dspace.wrlc.org/view/ImageViewer?img=9&url=http://dspace.wrlc.org/doc/manifest/2041/30794>. Braddock reports that some questioned whether Parkinson’s successful practice was due more to him or to his brother. See BRADDOCK, *supra* note 51, at 156–57. Braddock surmises (quite plausibly) that Joseph Parkinson was the legal genius behind the practice and did more of the day-to-day office preparation, whereas his brother dealt with the outside world. See *id.* To Joseph Parkinson’s credit, he continued his practice for seven years after his partnership with his brother was dissolved. See *id.* at 157. We can contrast his experience with the story of two deaf brothers who set up a law practice in Canada, and employed their hearing sister as their office assistant. See *Two Famous Deaf-Mute Lawyers*, SILENT WORKER, Apr. 1920, at 192, available at <http://dspace.wrlc.org/view/ImageViewer?img=24&url=http://dspace.wrlc.org/doc/manifest/2041/37988>. When the sister passed away, the brothers’ law practice ended almost immediately. See *id.*

⁶³ See *About the Deaf*, SILENT WORKER, Feb. 1893, at 9, available at <http://dspace.wrlc.org/view/ImageViewer?img=9&url=http://dspace.wrlc.org/doc/manifest/2041/30795> (“An almost unprecedented sight was witnessed in the Supreme Court this morning. It was an attorney . . . who could not hear a sound.”). The case in question appears to have been *Barbour v. Nat’l Exchange Bank*, 33 N.E. 542 (Ohio 1893). Sadly for Mr. Lutes (and his client), the *Barbour* court ruled against him. See *Barbour*, 33 N.E. at 545.

Lutes, who lost his hearing after he had become a lawyer, took lipreading lessons to communicate.⁶⁴ Like Mr. Parkinson at the same time, and others decades later, Mr. Lutes utilized family members (his wife and daughters) as interpreters in the course of his business.⁶⁵ He “became so proficient [in lipreading] that with the aid of his wife who listens to all that is said in court and repeats it to him, he has been able to keep up his practice.”⁶⁶

Having a family member willing to assist in the office was not a prerequisite for success for deaf lawyer pioneers. For example, Roger O’Kelley became deaf as a child and was “practically mute” as an adult, being able to “speak only to utter brief exclamations.”⁶⁷ He communicated with the hearing world through writing notes on pads, and eventually earned a degree from Shaw University.⁶⁸ In 1908, he was licensed by the North Carolina Supreme Court.⁶⁹ In 1912, he earned a Bachelor of Laws degree from Yale University.⁷⁰ He eventually returned to Raleigh, North Carolina, and established a “lucrative” practice among the local African American community performing legal services relating to domestic relations, real estate, corporations, and abstracts of title.⁷¹

If succeeding as a lawyer while being deaf and living in a segregated state was not impressive enough, consider that Mr. O’Kelley was also blind in one eye from a football injury.⁷² Interestingly, it was the eye injury, not his deafness, that worried Mr. O’Kelley’s friends that he

⁶⁴ See *About the Deaf* (Feb. 1893), *supra* note 63.

⁶⁵ See *All Sorts*, SILENT WORKER, Feb. 1902, at 93, available at <http://dspace.wrlc.org/view/ImgViewer?img=13&url=http://dspace.wrlc.org/doc/manifest/2041/33179>.

⁶⁶ See *About the Deaf* (Feb. 1893), *supra* note 63. Mr. Lutes’ wife served as his interpreter at the *Barbour* argument. *Id.* Although the reported decisions from the Ohio Supreme Court of that era do not specify which specific attorney conducted the argument, Mr. Lutes’ law firm is counsel of record in several reported decisions. I presume that Mr. Lutes argued at least some of those decisions, using either his wife or daughters as oral interpreters.

⁶⁷ See Joseph Lacy Sewell, *The Only Negro Deaf-Mute Lawyer in the United States*, SILENT WORKER, Mar. 1927, at 169, available at <http://dspace.wrlc.org/view/ImgViewer?img=11&url=http://dspace.wrlc.org/doc/manifest/2041/40015>.

⁶⁸ See *id.* at 169–70.

⁶⁹ *Id.* at 169, 172.

⁷⁰ *Id.*

⁷¹ *Id.* at 171. *The Silent Worker* reported that Mr. O’Kelley was one of sixty-four licensed attorneys in Raleigh. See *With Our Exchanges*, SILENT WORKER, Nov. 1908, at 33, available at <http://dspace.wrlc.org/view/ImgViewer?img=17&url=http://dspace.wrlc.org/doc/manifest/2041/34737>.

⁷² See *Deaf Mute Made Lawyer*, SILENT WORKER, July 1909, at 195, available at <http://dspace.wrlc.org/view/ImgViewer?img=19&url=http://dspace.wrlc.org/doc/manifest/2041/34997>.

would not be able to practice law.⁷³ O'Kelley remarked that he had "one good eye left and would make it anyhow."⁷⁴ He apparently did.

Another pioneering deaf lawyer was Theodore Grady, who became deaf as a young child and learned sign language at a school for the deaf in Berkley, California.⁷⁵ He later enrolled at the University of California and did remarkably well at a mainstreamed school, even by today's standards (let alone in that era), being elected to student government and being involved in many extracurricular activities (including the glee club).⁷⁶ Upon graduating, he was elected Deputy City and County Tax Collector for San Francisco and held that office for several years.⁷⁷

Eventually, Mr. Grady found himself drawn to the study of law, reasoning "that the chances of an intelligent deaf man in the practise of [law] were about as good as any enjoyed by more fortunate hearing men."⁷⁸ In 1895, he joined the law office of Garber, Boalt, Bishop and Wheeler as a law clerk.⁷⁹ Two years later, he applied for admission to the California Bar, and appears to have set precedent for being the first deaf person to request an accommodation for a bar exam. At the time, the custom was to give the examination questions orally. Mr. Grady requested that the questions be given in written format.⁸⁰ His request was granted, and he passed the examination.⁸¹

I could not find anything regarding the substantive law that Mr. Grady practiced, but he was an active practitioner.⁸² At least one clue about his responsibilities comes from Guilbert C. Braddock, who reports that Grady submitted a paper on deaf lawyers to the Paris International Congress of the Deaf in 1900, and highlighted that "[o]ffice work is far the most important branch of law practice. . . . Litigation does not always occupy the greater portion of a lawyer's time. Many of our successful practitioners never go into the courts at all."⁸³ Given Grady's assertion

⁷³ *Id.* There have been a few lawyers who have been both legally deaf and blind. I hope that someone writes an article discussing the issues faced by these lawyers.

⁷⁴ *Id.*

⁷⁵ See *California's Deaf Lawyer*, SILENT WORKER, Feb. 1902, at 83, available at <http://dspace.wrlc.org/view/ImgViewer?img=3&url=http://dspace.wrlc.org/doc/manifest/2041/33179>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* The firm was described as "the best and largest law firm west of Chicago." *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *California*, SILENT WORKER, Oct. 1903, at 10, available at <http://dspace.wrlc.org/view/ImgViewer?url=http://dspace.wrlc.org/doc/manifest/2041/33642> (reporting that Grady "has about ten cases at present").

⁸³ See BRADDOCK, *supra* note 51, at 156 (omissions in original) (quoting Grady's 1900 paper).

(which was undoubtedly as true then as it is today) in the 1900 paper, and given that I could not locate a reported decision in which he made an appearance, it is most likely that he primarily – if not exclusively – performed legal preparation at his firm’s office.

Mr. Grady claimed one advantage to his deafness over his hearing colleagues. By communicating with the firm’s clients by passing notes, he could “get at the gist of the matter sooner by writing than by speech. Clients will tell the truth if a statement is in black and white, but not always otherwise.”⁸⁴

Other deaf lawyers of that era followed similar paths as Mr. Grady. For example, Paul Coann became deaf during childhood but continued in regular schools and did not learn sign language even though he was not a proficient lipreader.⁸⁵ He eventually was admitted to practice law, but did not try any cases. Rather, he joined an Albion, New York, law office and “did much office work and proved himself skillful in arguments and clinching facts.”⁸⁶ Similarly, William Egan was a deaf-mute who was admitted to the practice of law and joined a law firm that specialized in prosecuting patents, pensions, land, and war claims against the government.⁸⁷

Yet quite a few deaf lawyers of that era maintained practices that included appearances before tribunals. A deaf lawyer identified as B.F. Round graduated from Gallaudet and reportedly had “been successful in prosecuting many pension claims for old soldiers.”⁸⁸ Alva Jeffords was a deaf-mute who specialized in probate law in Missouri.⁸⁹ His probate practice was apparently successful enough to keep him constantly busy, as he often traveled away on cases for weeks at a time.⁹⁰ Moreover, foreshadowing many deaf lawyers in the twentieth century, Mr. Jeffords

⁸⁴ *Id.* Roger O’Kelley made the same observation in his practice. See Sewell, *supra* note 67, at 170.

⁸⁵ See *What a Deaf Man May Do*, SILENT WORKER, Feb. 1911, at 96.

⁸⁶ See *id.*; see also *A Number of Newspapers*, SILENT WORKER, Dec. 1897, at 50, available at <http://dspace.wrlc.org/view/ImageView?url=http://dspace.wrlc.org/doc/manifest/2041/32014> (noting that Mr. Coann did real estate work).

⁸⁷ See *All Sorts*, SILENT WORKER, Nov. 1899, at 45, available at <http://dspace.wrlc.org/view/ImageView?url=http://dspace.wrlc.org/doc/manifest/2041/32643>.

⁸⁸ See *A Deaf Pension Attorney*, SILENT WORKER, Jan. 1904, at 62, available at <http://dspace.wrlc.org/view/ImageView?url=http://dspace.wrlc.org/doc/manifest/2041/33736>. *The Silent Worker* further reported that Mr. Round “has secured a favorable reversion of decisions in cases of long standing which experienced attorneys in that line of business had failed to obtain.” *Id.* I was not able to confirm the existence of such cases, but I fully acknowledge that such administrative decisions from that era most likely were never entered into today’s electronic legal databases.

⁸⁹ See *St. Louis*, SILENT WORKER, Apr. 1911, at 126, available at <http://dspace.wrlc.org/view/ImageView?url=http://dspace.wrlc.org/doc/manifest/2041/35650>.

⁹⁰ *Id.*

was widely sought after for legal services by other deaf people because he could communicate with them.⁹¹

And then there were people such as Henry White, a deaf-mute admitted to practice law in Arizona, but never actually did practice.⁹² Instead, Mr. White taught deaf children and wrote a book entitled *Law Points for Everybody* that reportedly sold more than 60,000 copies in New England alone.⁹³

The above discussion is not intended to be an exhaustive list of early deaf lawyers; I found other instances of deaf lawyers being identified. Unfortunately, not much was said about them, so I cannot comment on anything beyond their existence.⁹⁴

B. The Pre-ADA Modern Era

1. The 1930s to 1970: The Dark Ages

While affording the greatest respect to these pioneers, any beachhead they established as trailblazers for future deaf attorneys was largely lost by the 1930s. I was not able to account for the existence of any deaf lawyers in the United States after Mr. O'Kelley in 1927 (who was probably near retirement age by then) until Harold Diamond and

⁹¹ *Id.* There have been many deaf lawyers who set up practices devoted to deaf clients. See, e.g., *The Chicago Bar Foundation's Spotlight Series: Midwest Center on Law and the Deaf* (CBA Record, Chicago, IL), Apr. 2002 (describing how Howard Rosenblum left a law firm job to establish a public interest organization for deaf legal rights); *infra* note 133 and accompanying text (Lowell Myers). For additional discussion of representation of deaf clients, see Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143 (2011); Howard A. Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1061 (2011); Schwartz, *supra* note 20.

⁹² See *A Deaf Mute Attorney*, SILENT WORKER, July 1912, at 194, available at <http://dspace.wrlc.org/view/ImgViewer?url=http://dspace.wrlc.org/doc/manifest/2041/35990>.

⁹³ *Id.* Many deaf lawyers have since contributed to legal scholarship by authoring works on deaf or disability legal rights. See, e.g., LOWELL MEYERS, *THE LAW AND THE DEAF* (1964); BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *LEGAL RIGHTS FOR PERSONS WITH DISABILITIES* (1992). Law review articles authored by deaf lawyers are too numerous to list here.

⁹⁴ See, e.g., BRADDOCK, *supra* note 51, at 155 (same regarding deaf lawyers Sterrett Gittings of Baltimore and W.S. Smith of Oregon); JACK R. GANNON, *DEAF HERITAGE: A NARRATIVE HISTORY OF DEAF AMERICA* 402 (Jane Butler & Laura-Jean Gilbert eds., 1981) (same regarding deaf lawyer William S. Abrams); *The Deaf in Business*, SILENT WORKER, Dec. 1900, at 55, available at <http://dspace.wrlc.org/view/ImgViewer?url=http://dspace.wrlc.org/doc/manifest/2041/32914> (noting the existence of deaf lawyer Gold Fogle, without much substantive discussion about him).

Lowell Myers in the mid-1950s. And even Mr. Diamond and Mr. Myers appear to be the only practicing deaf attorneys until the 1970s.⁹⁵

a. *Theories for the Dearth*

I have several theories for the dearth of deaf attorneys in this period. First, the nature of the legal profession changed drastically in the early twentieth century. Although many law schools existed in the latter nineteenth century, a formal law degree was not a requisite for obtaining a law license in that era. An aspiring lawyer could perform an apprenticeship under the tutelage of an experienced lawyer, and then take a bar examination for a license. This appears to be the path that most (if not all) of the deaf lawyer pioneers undertook.⁹⁶ One-on-one instruction with a “master” was a far more conducive learning environment for deaf students than a classroom with hearing peers.

By the early twentieth century, however, the American Bar Association and American Association of Law Schools had wielded their influence to establish minimum standards for obtaining a law license nationwide—including completion of a three-year graduate program.⁹⁷ Most jurisdictions eventually adopted such requirements for licensure.

Whatever benefits these changes brought to the legal profession and society in general, it is hard to view them as anything other than detrimental for aspiring deaf lawyers. For one thing, there was nothing to prevent an unenlightened law school admissions committee from summarily rejecting any deaf person seeking admission to law school. As late as 1968, deans at Brooklyn Law School advised student Michael Chatoff to drop out and find another profession when he became deaf following surgery to correct a neurological condition.⁹⁸ Moreover, disability advocates suspected that law schools were requiring

⁹⁵ One exception may be John D. Randolph, who obtained a degree from the Georgetown University Law Center in 1960. GANNON, *supra* note 94, at 402. It is unclear whether Randolph ever got licensed as a lawyer, but he did work in the U.S. Patent and Trademark Office as an examiner and appeared before the Board of Patent Appeals sixty times and had a perfect record. See 1.17 GALLAUDET ALUMNI NEWSLETTER, Nov. 1, 1982.

⁹⁶ See, e.g., *All Sorts*, *supra* note 87, at 45 (noting that William Egan was admitted to the practice of law under the tutelage of W.W. Foote). While Roger O’Kelley earned a law degree from Yale, he was already licensed in North Carolina before he matriculated at Yale. See *supra* note 69–70 and accompanying text.

⁹⁷ See generally KAUFMAN & COLLIER, *LAW IN AMERICA: AN ILLUSTRATED HISTORY* 63–66 (2001); James P. White, *Legal Education in an Era of Change: Law School Autonomy*, 1987 DUKE L.J. 292 (1987).

⁹⁸ See SMITH, *supra* note 19, at 98; see also *id.* at 100–01 (similar skepticism from officials at N.Y.U. Law School when Chatoff applied to obtain an LLM degree).

applicants with disabilities to provide higher board scores and grades than non-disabled peers to prove their worthiness of admission.⁹⁹

Even if a deaf applicant had been admitted to a law school, there was no obligation on the part of the school to provide any accommodations.¹⁰⁰ Surely the prospect of paying for not only tuition, board, and books, but also for interpreters (a considerable expense) discouraged deaf students from considering law school.¹⁰¹ And even if the deaf student could pay for interpreting out of his or her own pocket (as some did in the 1970s), interpreting for the deaf did not materialize as a formal profession until the mid-to-late 1960s.¹⁰²

Furthermore, many prospective deaf students were undoubtedly discouraged from entering the legal profession as well as many other professions because the communication methods for conducting business and being informed of general matters were becoming increasingly inaccessible. The telephone was the most obvious example of technology that provided great benefits for society in general, but had a devastating impact on the employment prospects for deaf persons. It is one of history's great ironies that Alexander Graham Bell, who had a deaf mother, a deaf wife, and spent much of his career as a teacher for the deaf, invented the machine that "cut deaf people off more from the world, depriving them not only of communication but of jobs and a full place in the hearing community."¹⁰³ Whereas lawyers in the late nineteenth century conducted business by face-to-face meetings, U.S.

⁹⁹ See Dale C. Moss, *Overcoming the Barriers: The Plight of Handicapped Lawyers*, PA. LAW., Dec. 1989, at 7 (citing Laura Cooper, chair of American Bar Association's Disabled Lawyers' Committee).

¹⁰⁰ Of course, the same barriers applied to the greater disability community as well. As former Catholic Law School Dean Voorhees (who did extensive work in the greater lawyers with disabilities community) observed, until 1973, "few individuals with severe disabilities attempted to obtain a law school education. No admissions committee would give them encouragement, and there was scarcely need for any form of discrimination to keep them out." See Theodore Voorhees, *Handicapped Lawyers and the Private Sector*, 68 A.B.A. J. 1594, 1596 (1982).

¹⁰¹ See, e.g., Shapiro *supra* note 38, at 9 (Sheila Conlon-Mentowski noting that "the high cost of educating deaf students" probably prevented some from attending law school).

¹⁰² See GANNON, *supra* note 94, at 327-28. Prior to that time, interpreting for the deaf was generally conducted by family members. *Id.* While it was certainly possible that some wealthy families could have hired private interpreters or teachers for their deaf children (such as Helen Keller's family did with Anne Sullivan Macy), it does not appear that any of these deaf persons entered law school.

¹⁰³ SHAPIRO, *supra* note 18, at 90. Professor Tucker minces no words in her autobiography recounting how frustrating it was to deal with the telephone both professionally and personally. See Tucker, SILENCE, *supra* note 19, at 74-75, 95-96, 102-03, 145-46, 166-68, 170-71, 172. Even as late as 1991, then-Harvard Law Student Lynne Weaver said that "phones are a major concern" for an aspiring deaf lawyer. See Weaver, *supra* note 22, at 175.

mail, and telegraph, businesses in the early twentieth century had increasingly employed telephonic communication.

I would be remiss if I did not acknowledge another theory as to why there were no deaf lawyers during this era. Historically, the two most popular methods of educating deaf children were oralism (i.e., speaking and lipreading) and sign language. The former was championed by (among others) Alexander Graham Bell, and the latter was championed by (again, among others) Edward Miner Gallaudet, the first president of what is now Gallaudet University.¹⁰⁴ In 1880, the International Congress of Educators of the Deaf decreed that oralism, rather than sign language, should be adopted as the accepted teaching method for deaf children.¹⁰⁵ Henceforth through approximately the 1960s, schools for the deaf nationwide shunned sign language and favored oralism.

Oralism fit within the conformist spirit of the era.¹⁰⁶ However, it was an exceptionally difficult skill to master—especially for children who were born deaf or became deaf before they learned how to speak.¹⁰⁷ Many simply could not do it, even though the skills of speaking and

¹⁰⁴ To explore the debates between Bell and Gallaudet in greater detail, see RICHARD WINEFELD, *NEVER THE TWAIN SHALL MEET: BELL, GALLAUDET, AND THE COMMUNICATIONS DEBATE* (1987). Both Bell and Gallaudet made compelling arguments for their respective philosophies and much of their debates resonate even to this day. To Bell's proponents, he was a visionary who advocated for what today is understood as "mainstreaming." See, e.g., SHAPIRO, *supra* note 18, at 96 (similar observation). At worst, he was ahead of his time. Later technological advances such as hearing aids, the cochlear implant, CART interpreting, and others made oralism and mainstreaming much easier and vindicated Bell's philosophies. See, e.g., Walker, *supra* note 49 (noting increase of deaf children who were successfully mainstreaming). To Bell's detractors, he effectively engaged in genocide and sought to eradicate deaf culture from the human race. See, e.g., SMITH, *supra* note 19, at 134-35. As of the time of this writing, an internet search of "Alexander Graham Bell" or "A.G. Bell," and "Nazi" or "Hitler" will lead to numerous hits on pro-sign language blogs and websites expressing disdain for Bell and oralism. Cf. Dolnick, *supra* note 20, at 43 (noting that when *60 Minutes* did a feature in 1993 on cochlear implants on deaf child Caitlin Parton—who currently is applying to law school—sign language activists protested implants as "child abuse," "genocide," and "Zyklon B").

¹⁰⁵ SHAPIRO, *supra* note 18, at 91.

¹⁰⁶ *Id.* at 90. Shapiro explains that the

Victorian era was unsparing toward minority culture. The Welsh language was banned from schools in Wales; English was made the administrative language of the Indian subcontinent. Even the usage of gestures when speaking English was considered improper since . . . gesturing was something that Italians did, and Jews, and Frenchmen: it reflected the poverty of their cultures and the immaturity of their personalities. Sign language became a code word with strong racial overtones.

Id. (internal quotation marks omitted).

¹⁰⁷ One commentator likened oralism to "learning to speak Japanese from within a soundproof glass booth." Dolnick, *supra* note 20, at 39.

lipreading bore no correlation to intelligence.¹⁰⁸ The result was that, despite some success stories, many deaf children in the late nineteenth and the first half of the twentieth centuries grew up with undeveloped or underdeveloped language skills.¹⁰⁹

If sign language had been more accepted among deaf educators throughout the twentieth century, might there have been more deaf lawyers during that time? I do not believe so. Counterfactual history is inherently uncertain, but such individuals surely would have run into the same obstacles described earlier in this section. If anything, a signing deaf applicant who did not speak would have encountered even more skepticism and difficulties at law schools during this period.

Finally, there was the problem of low expectations. It was hard to shake attitudinal barriers that deaf persons could not become lawyers.¹¹⁰ For example, Janine Kramer (Madera), remembers that “adults patronized her in grade school [i.e., the 1980s] when she professed her desire for a legal career. ‘They kind of laughed . . . and patted me on the head.’”¹¹¹ Ms. Madera graduated from Boalt and spent several years at the Los Angeles office of Latham & Watkins before joining the L.A. County District Attorney’s Office. But she was hardly alone in encountering skepticism about entering the legal profession.¹¹²

¹⁰⁸ See SHAPIRO, *supra* note 18, at 91–92.

¹⁰⁹ See *id.* at 92 (noting that a 1972 study by Gallaudet University researchers revealed that the average eighteen-year-old deaf high school graduate read at a fourth grade level).

¹¹⁰ The greater disability lawyer community faced (and still faces) the same issue. See, e.g., Carrie Griffin Basas, *The New Boys: Women With Disabilities and the Legal Profession*, 25 BERKELEY J. GENDER L. & JUST. 32, 55 n.95 (2010) (citing additional authorities).

¹¹¹ McKee, *supra* note 37, at 6.

¹¹² Many deaf lawyers recall being discouraged by others from entering the legal profession (or even higher education altogether), or at least doing trial work. See, e.g., Jenna Greene, *Breaking Barriers*, NAT’L L.J., Jan. 10, 2011, at 19, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202477463994> (“When Gregory Hlibok [head of the Federal Communications Commission’s Disability Rights Office] was 9 years old, he wanted to be a lawyer—until adults told him to consider another field, since it was ‘not possible’ for him to litigate in a courtroom as a deaf person.”); McKee, *supra* note 37, at 6 (Judge Brown recalling that he was told “by a high-ranking member of the American Bar Association that he wasn’t qualified to be a trial judge, despite his two decades on the appellate bench. ‘His bias was front and center . . . He believed deaf people couldn’t ever be trial judges.”); Panel Discussion, *supra* note 2, at 21 (Robert Mather recounting that “[s]ome of [his] friends thought it was unrealistic for me to want to become a lawyer”); Pudlow, *supra* note 25, at 25 (Scott Harrison recounting “I got it from all quarters. The [Florida State Law School] administration told me that I couldn’t be a trial attorney. I had several professors with the same attitude. And even my buddies laughed when I told them I wanted to do trial work.”); Associated Press, *Deaf Law Grad Plans to Become Advocate for Disabled*, FLA. B. NEWS, May 15, 1984, (Karen Jones recalling: “When I decided to go to law school, many of my friends said, ‘You can’t do it, it’s going to be too hard.’ . . . [Jones] was told no judge would let her into a courtroom; even if she were able . . . , how could she use her credentials?”); Conlon-Mentowski, *supra* note 2, at 190

On the flip side, a self-perpetuating cycle of defeatism existed within the deaf community. As Judge Brown explained, “[d]eaf people . . . have felt for so many years that because the doors to the legal profession were closed to them, why should they bother going into the law?”¹¹³ It was difficult to shake such perspectives as long as few deaf people were willing to break them.

b. Harold Diamond and Lowell Myers

I had long believed that the first deaf attorney in the “modern” era was Lowell Myers.¹¹⁴ However, in the course of researching this Article, I now believe that the title should go to Harold Diamond, who became a lawyer in 1955 – one year before Myers.

Mr. Diamond became deaf at age fourteen due to a near-fatal auto accident.¹¹⁵ Contrary to advice from doctors that he transfer to a residential school for the deaf, he remained in normal schools, “keeping his deafness a secret.”¹¹⁶ Like Theodore Grady, he did remarkably well in a mainstreamed school considering the era, becoming high school class president and valedictorian before earning a scholarship to the University of Pennsylvania.¹¹⁷ After teaching accounting for a few years, he returned to Penn to earn a law degree.¹¹⁸ He worked for the Securities and Exchange Commission, and a “large Philadelphia [law] firm” before forming his own general practice firm.¹¹⁹

His accommodations in court (at least through the 1980s) were minimal, consisting solely of asking for special seating so he could lipread.¹²⁰ Like many other deaf lawyers, he used his secretary as an oral

(“The sister superior who ran the high school I attended had a conference with my father shortly before I was to graduate. She advised him to forget about sending me to college.”); Coyne, *supra* note 20 (Harold Diamond recalling that his “parents pleaded with [him] not to become a lawyer . . . They didn’t think [he] would make it.”); *see also infra* notes 125–26, 128 & 174 (providing additional examples).

¹¹³ See McKee, *supra* note 37, at 6.

¹¹⁴ See, e.g., GANNON, *supra* note 94, at 402, 439 (listing Myers as the first of the twentieth century deaf lawyers).

¹¹⁵ See Moss, *Not Disabled*, *supra* note 2, at 10.

¹¹⁶ See *id.*

¹¹⁷ See *id.* He obtained his undergraduate degree in three years. See Coyne, *supra* note 20.

¹¹⁸ See Moss, *Not Disabled*, *supra* note 2, at 10. If the reader is wondering, Diamond says that he never mentioned that he was deaf when he applied to Penn Law School. See Ian Blynn, *Deaf Lawyer Proves Adept at “Listening,”* JEWISH EXPONENT, Mar. 19, 1982, at 31 (“They never asked and I never told them.”). Compare *infra* notes 242–43 and accompanying text (discussing whether deaf law students should disclose disability on job applications). Diamond obtained his law degree in two years. See Coyne, *supra* note 20.

¹¹⁹ See Moss, *Not Disabled*, *supra* note 2, at 10.

¹²⁰ See Blynn, *supra* note 118, at 31, 81 (describing Diamond’s trial techniques).

interpreter for telephone calls.¹²¹ Hearing aids were helpful for him to discern sounds, but not nearly good enough to understand sounds such as speech.¹²² He credited his success in trial partially to his deafness—he believes that the ability to move around more freely in court to position himself for lipreading earns him extra attention from the jury.¹²³ He also says that because he is deaf, he puts far more emphasis into trial preparation than his adversaries and can “quote testimony fully and accurately from memory [in a manner] that unnerves witnesses and wins cases.”¹²⁴

Like many other deaf lawyers, Mr. Diamond encountered skeptics. He recalls a criminal case when a trial judge questioned “whether a deaf lawyer could be competent to carry on a trial.”¹²⁵ Diamond recalls what transpired next:

I told the judge, “Let’s go through the case and if you think I’m not competent, I’ll never try another one.” We went through the trial, and when we got to the summation, the D.A. summed up for an hour. I talked for 20 minutes. While the jury was out, the judge called counsel to the bench. He was really angry. He told the D.A., “If you knew the case as well as Mr. Diamond, you could’ve summed up in 20 minutes, too.”¹²⁶

Lowell Myers’ hearing began to deteriorate when he was a teenager and he was deaf by the time he was an adult.¹²⁷ He became a CPA and tax investigator for the state of Illinois and took night classes at John Marshall Law School.¹²⁸ He graduated second in his law school class in 1956, and became a tax attorney for Sears, Roebuck & Company.¹²⁹

¹²¹ See Moss, *Not Disabled*, *supra* note 2, at 10.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Blynn, *supra* note 118, at 81.

¹²⁶ *Id.* Diamond later said that he never forgave the judge for questioning his competency. See Coyne, *supra* note 20.

¹²⁷ See Pick, *supra* note 19, at 48.

¹²⁸ *Id.* As happened to numerous other deaf persons applying to law school, see *supra* note 112, Myers encountered skepticism from the John Marshall Law School administration regarding his application. See, e.g., Jody Brott Lampert, *The Attorney Who is Deaf But Seldom Defeated*, CHI. TRIB. MAG., Jan. 8, 1978 (reporting that an assistant dean told Myers, “You’ll never make it”); Interview with Lowell Myers, ‘Dummy’ Lawyer Lowell Myers Takes Aim at Rights for the Deaf, PEOPLE, June 4, 1979, at 84 (“[Y]ou are almost certain to flunk out.”) (hereinafter Myers Interview, PEOPLE). In an interview shortly before his death, Myers recounted that the John Marshall administration was afraid that the school would look bad taking a deaf person’s money for tuition when the person almost certainly would not be

Earning an impressive salary of \$92,000 in the 1970s from his corporate job, he was able to set up a side practice servicing deaf clients.¹³⁰ Like Mr. Diamond, Mr. Myers prided himself on extensive pre-trial preparation.¹³¹ And like Mr. Lutes before him, Mr. Myers used family members (usually his sister) as oral interpreters for telephone calls and court business.¹³² And like Alva Jeffords before him, many deaf individuals throughout the state sought out his legal services because no one else could communicate with them.¹³³

However, for all his advocacy on behalf of the deaf community (which was indeed extensive by any measure), Myers' legacy is somewhat complicated by the fact that he discouraged other aspiring deaf students to become lawyers. Professor Tucker recounts when she was considering applying to law schools in the mid 1970s:

Could a deaf person make it through law school?
Apprehensively, I penned a letter to the only deaf
lawyer I had heard of, a man who had become deaf as
an adult and practiced law for a corporation in Chicago.
I knew of this lawyer because he had represented a deaf

able to find work as a lawyer upon graduation. See Myers Interview, Chicago Stories, *supra* note 50.

Ironically, Myers himself later engaged in the same "naysaying" to deaf persons considering applying to law school that he complained about when directed at him. See *infra* note 134 and accompanying text.

¹²⁹ See Pick, *supra* note 19, at 48.

¹³⁰ *Id.* at 47. According to Myers' daughter, all lawyers signed an agreement upon employment promising to work exclusively for Sears. See E-mail from Lynda Myers, to author (Sept. 28, 2010) (on file with author). Myers refused to sign the agreement, contending that deaf people needed his services because he was the only lawyer who could communicate with them. *Id.* Sears agreed to make an exception for Myers for that reason. *Id.* Myers spent twenty-five years working for Sears and retired on good terms. *Id.*

¹³¹ See Pick, *supra* note 19, at 49 ("Myers describes his trial technique as relying heavily on research and pre-trial preparation of witnesses. 'I do five times what I should do. . . I put my witnesses through it much worse than my opponent will.'"); see also Lampert, *supra* note 128 (Myers estimates that his opponent typically will "work 8 hours [in trial preparation]. I work 12."). Myers' tenacity is exemplified by his bringing several lawsuits pro se. See, e.g., *Leader v. Cullerton*, 343 N.E.2d 897 (Ill. 1976) (challenging constitutionality of a state tax with other pro se plaintiffs); *Chicago v. Myers*, 227 N.E.2d 760 (Ill. 1967) (challenging a parking ticket); *Myers v. Daley*, No. 86-0321, 1988 Ill. App. Ct. LEXIS 324 (Ill. App. Ct. 1988) (action to order state's attorney to advise Myers on status of investigation of crime in which Myers was the victim).

¹³² See Pick, *supra* note 19, at 48. Myers initially hired an assistant to interpret at trials, but fired the assistant when he kept on answering the judge's inquiries directly, rather than consult with Myers. Lampert, *supra* note 128. His sister took over, and remained with Myers' practice throughout his career. *Id.*

¹³³ See Myers Interview, PEOPLE, *supra* note 128, at 84.

man in a well-known case that was reported in a book and movie called *Dummy*.

"What do you think?" I asked him. "Should I go to law school?"

"No." His response was emphatic. "It's near impossible to get in, and if you *do* get in, being deaf you'll *never* make it through," he wrote. "And if by some luck you *squeak* through," he continued, "you'll *never* get a job. No one will hire a deaf lawyer."

That was all it took to make me determined to apply to law school.¹³⁴

Myers passed away in 2006, and as far as I know, never expressed regret for discouraging deaf persons from entering the legal profession. Lynda Myers, Lowell's daughter, theorizes that her father was an extraordinarily brilliant man (a member of Mensa) who succeeded in an era with minimal accommodations and genuinely thought that becoming a lawyer was too difficult for other deaf persons.¹³⁵ However, she also stated that her father spoke at numerous deaf gatherings and with individuals about his experiences through the early 1980s and onward, and inspired several deaf individuals to apply to law school.¹³⁶

¹³⁴ Tucker, *SILENCE*, *supra* note 19, at 121. Professor Tucker says today that she bears no ill will towards Myers for that "advice" and understands where he was coming from when he expressed his opinion to her in the mid-1970s. See E-mail from Bonnie Tucker, to author (Oct. 4, 2010) (on file with author). It is worth noting that if Tucker talked to Robert Mather, who was near completion of law school around that time, she would have received very different advice: "I would say go to law school. It's tough, but don't give up. If you don't understand something, you have to keep asking, keep going after it. You have to have [the] guts to take a course in trial practice. You shouldn't be afraid of being embarrassed." Donna Chitwood, *Lawyer*, 7 *GALLAUDET TODAY* 4 (Summer 1977) (quoting Robert Mather).

¹³⁵ See E-mail from Lynda Myers, *supra* note 130. Ms. Myers' theory is bolstered by the fact that her father spent much of his side practice representing deaf clients who were (for lack of a better term) "low functioning" because of poor communication skills. See Myers Interview, *PEOPLE*, *supra* note 128, at 84 (describing "typical" cases in which deaf clients needed Myers to extricate themselves from contracts they signed despite having absolutely no idea what they were doing); see also Lampert, *supra* note 128, at 34 (generally same). Perhaps he had indeed become jaded and concluded that the deaf community could not produce another lawyer other than himself.

¹³⁶ See E-mail from Lynda Myers, *supra* note 130. One such person was Howard Rosenblum, who is currently the CEO of the National Association for the Deaf. Rosenblum remembers that Myers "came to speak at a temple for the deaf . . . I sat there and watched Mr. Myers present about his experiences as a deaf lawyer and it really hit me at that time that deaf people can be lawyers. So Mr. Myers was my inspiration." E-mail from Howard Rosenblum, to author (Oct. 12, 2010) (on file with author).

2. The Rehabilitation Act of 1973: Starting Over

Encouraged by the legislative successes of other minority groups, disability activists as well as their family members focused throughout the 1960s and early 1970s on seeking greater legal protections that would ensure their acceptance into greater society.¹³⁷ A decade of lobbying finally paid off when President Nixon signed the Vocational Rehabilitation Act of 1973 (“Rehab Act”).¹³⁸ The primary effect of the Rehab Act was to appropriate \$1.55 billion in federal aid for disability services.¹³⁹ But the most significant provision of the Rehab Act was Section 504, which read in relevant part:

No otherwise qualified [handicapped] individual . . . in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁴⁰

a. Law Schools

In the immediate years after passage of the Rehab Act, there was an enthusiastic push among the deaf community to enroll deaf students into law school. According to Gannon, the now-defunct National Center of Law and the Deaf “encouraged a number of deaf students to enter law school. By 1980 there were 20 deaf students in law schools around the country.”¹⁴¹ This was quite an impressive jump given that only one law school—the University of Wisconsin—ever formally adopted disability as a criterion for affirmative action in admissions through 1989.¹⁴²

¹³⁷ See SHAPIRO, *supra* note 18, at 64.

¹³⁸ 29 U.S.C. §§ 790-96 (1982).

¹³⁹ See SHAPIRO, *supra* note 18, at 65.

¹⁴⁰ 29 U.S.C. § 794. Section 504 may have been a historical accident. The legislative history surrounding the inclusion of Section 504 is sparse, if not non-existent. In later interviews, congressional aides could not even remember who had suggested adding the civil rights provision to the Rehab Act. See SHAPIRO, *supra* note 18, at 65.

¹⁴¹ See GANNON, *supra* note 94, at 398. This trend was generally followed by the greater disability community as well. See, e.g., Voorhees, *supra* note 100, at 1596 (“In the decade of the ‘70s, the bars to law school admission were knocked down [for students with disabilities].”).

¹⁴² See Moss, *Overcoming the Barriers*, *supra* note 99, at 7. By no means do I mean to suggest that everything was dandy for deaf students regarding admissions committees. Deaf lawyer Jeff Rosen, who later became general counsel for the National Council on Disability, reported “[t]wo hundred and fifty law schools rejected him before one agreed to

Of course, getting admitted to law school was one thing. Getting through law school was quite another. What Gannon does not mention is that few of those twenty (or more) deaf law students in 1980 actually graduated.

Common sense suggests that lack of accommodations was a major culprit.¹⁴³ Up until the enactment of the ADA, “accommodation after admission [to law school was] still very much ad hoc.”¹⁴⁴ While it is true that some extraordinary deaf individuals made it through law school with minimal accommodations, the task was extremely difficult. Many deaf students became discouraged and withdrew from law school out of frustration of not being able to understand what was said in class.¹⁴⁵

A large part of the problem was the text of the Rehab Act. Although prohibiting “discrimination” against people with disabilities, the Rehab Act did not contain a mandate that the recipient of federal funding make reasonable accommodations for the student or employee with a disability. As such, “[f]ew schools and businesses interpreted these laws to mean they needed to hire costly interpreters for deaf students or

accept a deaf [student].” See *Putting the Handicapped to Work*, WASH. POST, Jan. 21, 1990, at B8.

¹⁴³ See, e.g., *Glimpse from the Past: Law Schools Admit More Deaf/Hearing Impaired Students*, NAD BROADCASTER, Sept. 1996, at 19 (listing eight deaf persons enrolled in law schools in 1977, and noting that only three actually graduated). Granted, a few deaf persons who entered law school and did not graduate did indeed have interpreters, but instead left law school for personal reasons. See E-mail from Sheila Conlon-Mentowski, to author (Sept. 2, 2010) (on file with author) (recounting circumstances of several deaf individuals who did not complete law school during that era).

¹⁴⁴ Moss, *Overcoming the Barriers*, *supra* note 99, at 7; accord Marianne Wesson, *Book Review*, 46 J. LEGAL EDUC. 627, 628 (1996) (reviewing BONNIE POITRAS TUCKER, *THE FEEL OF SILENCE* (1995)) (“In the pre-ADA period . . . accommodations [for deaf students] were favors, not rights.”). McGill, *Personal Experiences*, *supra* note 2, at 125 (Ms. McGill opining the following: “Deafness means a limiting of choices. I may be admitted into any university, yet I am limited to attending those schools willing to provide interpreting services”).

¹⁴⁵ There is no point in identifying specific individuals here. But deaf students dropped out of law school even after the ADA was enacted due to ineffective accommodations. See, e.g., Cohen & Bernstein, *supra* note 21 (John Machiorlatti repeated his first year because he felt it was a waste without interpreting); Davis, *supra* note 38, at 3 (“Finally, in 1997, a frustrated [Emily] Alexander gave up on the idea of becoming a lawyer and dropped out of Boalt. ‘People I entered school with were graduating and getting jobs,’ she recalls. ‘I had a year of credits still left. I felt like no matter how hard I worked, I would never catch up to the other people. I was so burnt out. I felt like I didn’t belong at that school.’”); E-mail from Brandy Ligouri Tomlinson, to author (Aug. 14, 2010) (on file with author) (“I took final exams knowing I was going to fail because of the lack of accommodation and I did. [The school administration] kicked me out after my first term . . . Without the proper tools, such as CART, it is extremely difficult to do well in law school.”); see also Davis, *supra* note 38, at 4 (Kirstin Wolf (Kurlander) recalling that she also considered dropping out of law school because of inadequate accommodations).

employees.”¹⁴⁶ Rather, schools interpreted the Rehab Act as only meaning that they could not refuse admission to an applicant because of a disability. Once admitted, the deaf student was on his or her own.

Some post-Rehab Act, pre-ADA deaf law students paid for interpreters in law school out of their own pocket—a situation that would be unthinkable today.¹⁴⁷ Others made do with minimal accommodations, such as sitting in the front row while attempting to read the professor’s lips or borrowing friends’ class notes.¹⁴⁸ At least one used family members as interpreters during extracurricular activities.¹⁴⁹

¹⁴⁶ SHAPIRO, *supra* note 18, at 84–85.

¹⁴⁷ See, e.g., Tim Wells, *Moving Mountains: Disabled Lawyers at the Top of Their Trade*, WASH. LAW. Sept–Oct. 1995, at 33 (“[Robert] Mather attended law school at DePaul University. Because the section 504 regulations had not yet been implemented, he had to pay for interpreters himself.”). Mr. Mather clarified in an interview with me that he actually split the cost of interpreters with the state rehabilitation department, but only because his rehab counselor was very sympathetic to his plight and fought for funding. But for the efforts of his counselor, Mather is convinced he would have had to pay the entire bill for his interpreter. See also Voorhees, *supra* note 100, at 1595 (“While at law school she had . . . not only board and tuition expenses, but the additional expense of an interpreter who attended every class with her for three years.”). Dean Voorhees did not identify the deaf woman, but Sheila Conlon-Mentowski fits the description. However, Ms. Conlon-Mentowski informed me in an e-mail that she did not pay for her law school interpreter; so the identity of the woman Dean Voorhees was describing remains a mystery. E-mail from Sheila Conlon-Mentowski, to author (Aug. 25, 2010) (on file with author).

Other law students with disabilities in that era were in the same boat. For example, blind law students had to hire readers out of their own pocket to perform legal research for papers and class assignments. See, e.g., Moss, *Overcoming the Barriers*, *supra* note 99, at 7; Susan Vaughn, *Against All Odds*, 13 BARRISTER 19, 20 (1986) (blind lawyer Robert Sweetman recounting how he paid readers in law school from his own pocket when state rehabilitation funding was inadequate for readers’ services).

¹⁴⁸ See *supra* notes 19–23 and accompanying text.

¹⁴⁹ Susan Harris used her mother as an oral interpreter during a moot court competition. See Pollack, *supra* note 19, at 5. To Ms. Harris’ credit, she advanced to a competition at the National level. *Id.* at 4–5. Ms. Harris discusses her experience in more detail in Harris, *supra* note 2.

Even after the ADA was enacted, many schools have been resistant to providing interpreting accommodations for extracurricular activities such as law journals, moot courts, or clinics. See, e.g., Davis, *supra* note 38, at 3 (noting that Boalt refused to provide for interpreters for law journals even though school’s brochures proclaimed that “[s]tudent programs are a vital part of a Boalt education. Eleven student-edited law journals provide significant educational opportunities in legal research, writing and editing,” and also noting that Emily Alexander dropped out of a school-sponsored homeless clinic when she could not participate in exercises without interpreting and Boalt refused to provide her with one).

I can sympathize. While Georgetown Law provided CART interpreting for my classes, Georgetown refused to do so for activities related to my participation on the Georgetown Immigration Law Journal. Adhering to the “pick your battles” philosophy, I made the best of the situation, approaching journal editors individually after journal meetings and asking them to repeat the “essential” points that were discussed at the

In 1977, the Federal Department of Health, Education, and Welfare (the predecessor to today's Department of Health and Human Services) finally issued implementing regulations declaring that federal funding recipients should make "modifications" to educational programs and provide deaf students with "auxiliary aids" such as interpreters when necessary.¹⁵⁰ This was a very positive step in the right direction. As one deaf lawyer put it, "[t]o me and all the Deaf folks in town, it was *obvious* that providing an interpreter for . . . classes was the minimum obligation the school had under the 'reasonable accommodation' requirement of the law."¹⁵¹

Unfortunately, the regulations were either ambiguous or, in some instances, conflicting as to whether the educational institution or the state vocational rehabilitation department was responsible for providing for interpreting needs of deaf students.¹⁵² The result was extensive finger-pointing between schools and state vocational rehabilitation departments that ended up in litigation.¹⁵³ This confusion undoubtedly delayed interpreting for deaf law students even further after the regulations were issued.

For example, some law students paid for interpreting out of their own pockets and sued their state vocational rehabilitation department

meetings. But it is only a matter of time before courts definitively rule that law schools have to provide interpreting for extracurricular activities. *Cf. Working the Difficult Issues: A Round Table Discussion*, 15 AM. U. J. GENDER SOC. POL'Y & L. 899, 922, 924 (2006-07) (opining that if law school is offering academic credit for extracurricular activity, then full accommodations for the activity must be provided for students with disabilities). One student has initiated an ADA complaint on this basis, but declined to be identified for fear of retaliation. I note that some schools have provided interpreters for extracurricular activities for law students. *See, e.g.,* Shapiro, *supra* note 38, at 9 (noting that Hastings Law School gave Alice McGill interpreters during informal study groups with classmates); E-mail from Debra Patkin, to author (Aug. 23, 2010) (on file with author) (recalling that UCLA Law School provided for interpreting to essentially everything at school, including moot court, law journals, guest speakers, gym classes, job fairs, and a school-sponsored 5K race).

¹⁵⁰ See 45 C.F.R. § 84.44 (1978). The next round of regulations (promulgated by the U.S. Department of Education) used the term "reasonable accommodation," which had been gaining favor in courts interpreting the regulation. *See* 34 C.F.R. § 104.12(a) (1985); *see also* Alexander v. Choate, 469 U.S. 287, 300 (1985) (recounting Court's own development of "reasonable accommodation" concept).

¹⁵¹ Cordano, *supra* note 2, at 152.

¹⁵² *See* Jeffery H. Orleans & Mary Anne Smith, *Who Should Provide Interpreters Under Section 504 of the Rehabilitation Act?*, 9 J.C. & U.L., 177, 179-83 (1982-83) (discussing how regulations were unclear as to which precise entity actually paid for interpreting).

¹⁵³ *See, e.g.,* Schornstein v. N.J. Div. of Vocational Rehab., 519 F. Supp. 773, 776, 779 (D.N.J. 1981) (rejecting state rehabilitation department's contention that college, rather than department, was responsible for providing funding for interpreter for deaf student); Jones v. Ill. Dept. of Rehab. Servs., 504 F. Supp. 1244, 1256-57 (N.D. Ill. 1981) (essentially identical).

for reimbursement.¹⁵⁴ Others sued their law schools for the failure to provide accommodations and then had to sue again when the accommodations that were provided were inadequate.¹⁵⁵ At a minimum, these situations had to have been a huge distraction for the deaf students.

Admittedly, some situations worked out well for the deaf law student as far as funding was concerned. Some law students were able to obtain state vocational rehabilitation funding to pay for interpreters, or had the law school assume the costs.¹⁵⁶ One law student was able to secure state rehabilitation funding to hire notetakers for classes.¹⁵⁷ Another secured a federal grant to pay for notetakers in class her first two years of law school, but lost the grant for her 3L year after the Reagan Administration took office and engaged in extensive budget cuts.¹⁵⁸ Others found themselves in situations in which the state rehabilitation department and the law school shared the costs for interpreting and other accommodations.¹⁵⁹

Such disparate situations may have created other inequities. Certain law schools gained a reputation for being “good” about providing accommodations among deaf students. Eventually, those law schools became the choice of several qualified deaf applicants, and the schools found themselves having to provide interpreters for several students at

¹⁵⁴ See, e.g., *Ind. Dep’t of Human Res. v. Firth*, 590 N.E.2d 154 (Ind. Ct. App. 1992) (affirming trial court’s decision that deaf student at Notre Dame Law School was eligible for vocational rehabilitation funding to pay for sign language interpreter).

¹⁵⁵ See Lisa Green Markoff, *One Disabled Student’s Lawsuit Sheds Light on Issue of Access*, NAT’L L.J., Dec. 4, 1989, at 4 (recounting how deaf law student Karen Prince filed a complaint against Rutgers Law School for initially refusing to provide interpreters and notetakers, and after Rutgers relented, she sued again when the notes she received were illegible or lacking detail). Ms. Prince won an injunction from a federal court ordering Rutgers to provide transcripts of class proceedings promptly to Ms. Prince. See Laura F. Rothstein, *Disability Issues in Legal Education: A Symposium (Introduction)*, 41 J. LEGAL EDUC. 301, 312 (1991). However, the victory proved Pyrrhic, as the semester was almost over by the time the court issued the injunction. See Tucker, *Students and Faculty*, *supra* note 29, at 357.

¹⁵⁶ See, e.g., E-mail from Conlon-Mentowski, *supra* note 143 (attesting that she was provided with an interpreter at Georgetown Law and shared the interpreter with another deaf student); E-mails from Michael Schwartz, to author (Aug. 13, 2010 & Feb. 21, 2011) (on file with author) (attesting that N.Y.U. Law School paid for interpreters, notetakers, and access to Xerox machines when Professor Schwartz was a student).

¹⁵⁷ See Tucker, *SILENCE*, *supra* note 19, at 124.

¹⁵⁸ See E-mail from Susan Harris, to author (Sept. 30, 2010) (on file with author).

¹⁵⁹ See, e.g., Shapiro, *supra* note 38, at 1, 9 (noting that state rehabilitation department paid for half of \$30,000 costs for interpreters and notetakers for deaf law student Alice McGill, and “Hastings must scramble for the rest”). At least part of the reason why the interpreting bills were so high is that McGill used interpreters for her study groups, as well as class time. *Id.*

once.¹⁶⁰ Although impossible to prove, one cannot help but wonder whether some admissions committees turned away qualified deaf applicants because they were leery of having to provide yet another deaf student with expensive accommodations. The ADA effectively alleviated such overburdening issues by making clear that every law school had an obligation to provide interpreting. Hence, deaf students today no longer need to flock to a certain school because of its reputation for being “good on accommodations” when they know full well that they can get appropriate accommodations at virtually any other decently funded law school.

b. Workforce

Whatever “rights,” if any, the Rehab Act granted to deaf students attending law schools, they did not extend to the private sector in employment. Private law firms, of course, did not accept federal funding and were not bound by any requirements of the Rehab Act. If the newly minted deaf lawyer did not graduate from law school *summa cum laude* and serve as an editor to the school’s law journal (such as Professor Tucker or Susan Harris), or from a Top 5 law school (such as Michael Tecklenburg), then applying to law firms was an exercise in futility during the Rehab Act era.¹⁶¹

Bob Mather remembers applying for law firm jobs after graduating from DePaul Law in 1977: “An interpreter was needed to facilitate

¹⁶⁰ This is basically what happened to the University of California. See *infra* notes 229–32 and accompanying text.

¹⁶¹ Professor Tucker remembers: “It was imperative that I graduate in the top 10 percent. For any lawyer, finding a good job was hard. As a deaf lawyer I was going to find it even harder. I needed all the pluses I could get.” Tucker, SILENCE, *supra* note 19, at 132. Jeff Rosen recalls that “150 employers rejected him until he found [a] job with the Equal Employment Opportunity Commission.” *Putting the Handicapped to Work*, *supra* note 142. Howard Rosenblum remembers:

I was never offered a job with any law firm in the field I wanted, which was Intellectual Property Law. Whether I brought an interpreter or not, no firm called me back for a second interview or hired me. I could not even get a law clerk job with any of the Intellectual Property law firms when I was in law school.

E-mail from Howard Rosenblum, to author (Oct. 12, 2010) (on file with author). Alice McGill, fresh out of Hastings Law School, says “[r]egardless of the number of applications, resumes and interviews, I could not land a job” before securing a part-time position with the California Center for Law and the Deaf. E-mail from Alice McGill, to author (Sept. 9, 2010) (on file with author). Professor Schwartz informs that he applied to approximately 135 law firms in Manhattan and indicated on his cover letter that he was deaf. He received 135 rejections. E-mail from Michael Schwartz to author (Feb. 21, 2011) (on file with author). In fairness, some deaf lawyers during the Rehab Act era did have the superb credentials to gain employment at firms, yet made a personal decision to work elsewhere.

communication . . . and in the private firms no one was even ready to talk about that."¹⁶² Dean Voorhees' observation on employment prospects for the greater disability lawyer community was fully applicable to deaf lawyers:

In the decade of the '70s, the bars to law school admission were knocked down. Job placement, however, has been entirely another matter. Sympathetic federal and state governments stretched out helping hands wherever possible, but the private sector has made considerably less effort to provide employment.

. . . .
 . . . [I]t has become increasingly evident that jobs with law firms in the private sector will be attained only with great difficulty—and for few students at best.¹⁶³

He theorized for the reasons behind the resistance of firms to hire more lawyers with disabilities:

Some law firms are convinced that the handicapped will prove incompatible with the other lawyers who have entered their employ. The partners may believe that to hire them will constitute a retreat from their established policy of hiring only the best qualified graduates they can find. They may be apprehensive that clients will react unfavorably to the appearance of a handicapped associate in an office in which they are accustomed to meeting young lawyers who are sharp, physically fit, and constantly on their toes.¹⁶⁴

Indeed, law firms did not bother denying their reluctance to hire lawyers with disabilities. The hiring partner from Los Angeles office of Gibson, Dunn & Crutcher went on record as saying: "I'm not sure what the response of our firm would be in hiring a blind lawyer, but we'd certainly have to look at the costs To compensate for lost efficiency,

¹⁶² Wells, *supra* note 147, at 33.

¹⁶³ Voorhees, *supra* note 100, at 1596; accord Vaughn, *supra* note 147, at 20 ("[D]isabled [law] students just couldn't seem to secure interviews for associate positions [at private firms]—let alone job offers."); Moss, *Overcoming the Barriers*, *supra* note 99, at 6 (citing several instances of law students with disabilities graduating from Ivy League law schools and/or at the top of their classes, yet being unable to obtain offers from law firms).

¹⁶⁴ Voorhees, *supra* note 100, at 1596; accord Moss, *Overcoming the Barriers*, *supra* note 99, at 6 ("[T]he tendency continues strong among employers, especially law firms, to equate disability with inability.").

we would probably adjust [the blind lawyer's] compensation."¹⁶⁵ The hiring partner for New York's Cravath, Swaine & Moore said that they would not want to put an applicant with a disability "into situations they can't handle."¹⁶⁶ And "[o]ne Philadelphia firm turned down a Harvard Law grad with the callous explanation that it didn't want to be confused with a freak show. The student was a dwarf."¹⁶⁷

To the extent that deaf lawyers did find positions in law firms, they proceeded with minimal accommodations. Professor Tucker remembers that when she interviewed for a job at a large Denver firm, she just requested her own secretary, whom she would train to be an oral interpreter for phone calls and large meetings.¹⁶⁸ Michael Tecklenburg likewise used very few accommodations at his law firm.¹⁶⁹

Like any demographic, their experiences were mixed at firms. Professor Tucker achieved partnership at her firm before leaving for a successful career in academia.¹⁷⁰ Ms. Harris remembers that some

¹⁶⁵ See Lis Wiehl, *Case For The Disabled: Alienated Lawyers Make a Plea to Bar Bias and Upgrade Offices*, CHI. TRIB., Jan. 29, 1989, at 7 (quoting Kenneth Anderson) (internal quotation marks omitted); accord Moss, *Overcoming the Barriers*, supra note 99 at 8, 10 ("Hiring partners voice fears of 'lost efficiency' from [lawyers with disabilities] who may not work long hours, although increased susceptibility to fatigue is a factor in very few disabilities.").

¹⁶⁶ See Wiehl, supra note 165 (quoting Evan Chesler); accord Vaughn, supra note 147, at 19 ("[D]isabled attorneys have been turned down for high-paying jobs by well meaning-employers who decided the work would be too stressful").

¹⁶⁷ Moss, *Overcoming the Barriers*, supra note 99, at 12. The lawyer in question was University of Washington School of Law Professor Paul Miller. See Wiehl, supra note 165 (quoting Professor Miller and recounting "sideshow freak act" quote). Professor Miller recounted that "firms often showed bias against dwarfs. '[He] did as well as most of [his] classmates in law school, but [he] had to make literally hundreds of job inquiries.'" *Id.* While I was drafting this Article, I asked Professor Miller if he would identify the Philadelphia firm that "didn't want to be confused with a freak show." He declined, saying that he had never revealed the name of the firm in his career and saw no reason to do so now.

Sadly, Professor Miller died of cancer while this Article was being edited. In addition to gaining acclaim in the academic community, Professor Miller served as a commissioner of the Equal Employment Opportunity Commission during the Clinton Administration, and served a year as a special assistant to the President for the Obama Administration in charge of managing presidential appointments for the U.S. Department of Justice, U.S. Department of Education, and many of the Independent Regulatory Agencies within the federal government. See Maureen O'Hagan, *Obituaries: Paul Miller Was a Giant Among Peers*, SEATTLE TIMES, Oct. 21, 2010, available at http://seattletimes.nwsourc.com/html/obituaries/2013226198_millerobit22m.html?syndication=rss. His passing was truly a loss to both the disability community and the nation at large.

¹⁶⁸ See Tucker, SILENCE, supra note 19, at 155.

¹⁶⁹ See Nance, supra note 22, at 2; Steve Piacente, *Henry Tecklenburg Inspired Deaf Son to Public Service*, POST & COURIER (S.C.), Aug. 1, 1993, at 19A.

¹⁷⁰ Tucker, SILENCE, supra note 19, at 177-78, 184-85.

people at her firm were very helpful and accommodating, but others were not.¹⁷¹

The other deaf lawyers who received their law degrees or became deaf during the Rehab Act era found employment in the government, at public interest organizations, or set up shop for themselves. A 1989 article dedicated to deaf lawyers said that there were “only about 15” deaf lawyers in the country, and profiled eleven of them.¹⁷² Of those eleven, eight worked for the federal or a state government.¹⁷³ All lawyers interviewed expressed satisfaction with their careers, and one of them (Debra Luther) today is an Administrative Law Judge for the Interior Board of Indian Appeals.¹⁷⁴

State and local bar associations did not make things easier for deaf lawyers. Neither had a good history of accommodating deaf lawyers, refusing requests to hire interpreters for lectures or workshops, or even requests for preferential seating in the front row so the deaf lawyer could try lipreading.¹⁷⁵ To its credit, the American Bar Association appears to

¹⁷¹ See E-mail from Susan Harris, *supra* note 158. Ms. Harris’ firm had a large labor department that only represented employers. She says that some (but not all) lawyers at her firm “had the attitude that they could do whatever they wanted and say whatever they wanted as they were the best in defending clients who engaged in the same behavior.” *Id.* She also remembers that “at least one of [her] employee reviews was full of talk about ‘the handicap,’ in ways that weren’t relevant to the quality of [her] work.” *Id.*

¹⁷² See Walter, *supra* note 19, at 7-10. In reality, the number was probably a little higher at that time. See *supra* note 7.

¹⁷³ See Walter, *supra* note 19, at 7-10. The others were “a court-appointed defense attorney, primarily representing poor people,” an attorney for the National Captioning Institute, and a director for a deaf advocacy organization. See *id.* Again, this was entirely commensurate with the greater disabled lawyer community during this era. See, e.g., Moss, *Overcoming the Barriers*, *supra* note 99, at 8 (“Most disabled attorneys end up going into the public sector, where easier acceptance and access accompany smaller salaries, or into private, usually solo, practice in small or medium-sized towns. Very few ever work in a major big-city firm . . .”); Vaughn, *supra* note 147, at 20 (“The private sector is slowly opening up to disabled attorneys. But still, an inordinate number of these individuals accept positions with the state and federal governments.”); Wiehl, *supra* note 165, at 7 (“Because few disabled lawyers have been hired by big firms, most have government jobs or small practices. . . . depend[ing] on clients no other lawyers would take.”).

¹⁷⁴ Of course, this should not suggest that everything went smoothly for deaf lawyers with the government. For example, Professor Tucker paid for her own interpreters when she served as a judicial law clerk on the U.S. Court of Appeals for the Tenth Circuit. See Tucker, SILENCE, *supra* note 19, at 160. Ms. Conlon-Mentowski did likewise during a summer clerkship with the Massachusetts Attorney General’s Office. See E-mail from Conlon-Mentowski, *supra* note 143. Professor Tucker also says that after achieving partnership at her law firm and teaching a few years at Arizona State Law School, she applied to become a judge in the Arizona appellate courts. However, she was effectively told by the responsible political people: “A deaf person couldn’t possibly be qualified to be an appellate judge.” Tucker, SILENCE, *supra* note 19, at 184.

¹⁷⁵ See, e.g., Mary Johnstone, *Representing the People*, GALLAUDET TODAY, Spring 1988, at 28 (Professor Schwartz recounting how a New York City bar association refused to provide

have been ahead of the curve, providing interpreters for deaf lawyers even before the ADA was enacted.¹⁷⁶

c. Increased Visibility

In addition to actual progress at law schools and employers, the Rehab Act era produced at least two instances of extensive media attention in cases in which a deaf lawyer was counsel of record: Lowell Myers representing Donald Lang, and Michael Chatoff representing Amy Rowley.

Lang was either born deaf or became deaf as an infant. His family was too poor to provide for special education such as speech rehabilitation or sign language instruction, and he grew up without any language other than some homemade signs between himself and his mother. Lang's mother passed away when he was a young adult and Lang was left on his own. He obtained a job at a loading dock and gained a reputation as a hard worker and an affable fellow even though he could not communicate with anyone other than through the most rudimentary signs. Some of his co-workers acquainted Lang with the practice of hiring hookers for sex. On November 12, 1965, prostitute Earline Brown was found dead and Lang was one of the last persons seen with her. Lang was indicted for Brown's murder.¹⁷⁷

Myers was appointed as his attorney a few weeks later.¹⁷⁸ Because Lang did not know any recognized form of sign language, he could not communicate with court officials nor Myers.¹⁷⁹ As such, he was deemed

interpreters for association events); Moss, *Overcoming the Barriers*, *supra* note 99, at 12 ("Hearing-impaired attorneys find their requests for up-front seating at professional gatherings are routinely ignored."). Even today, some deaf lawyers resent mandatory Continuing Legal Education programs that are not accessible. *See, e.g.*, E-mail from Alice McGill, *supra* note 161 ("There are a number of providers who refused to provide accommodations for MCLE classes so I started frequenting the ones who do provide interpreters (and who incidentally are usually more expensive). In recent years, the [California] State Bar has offered Online CLE but only a few that were captioned. I checked the online CLE today—there are now 28 that are captioned out of 550 seminars. . . . [P]rogress is slow."). Another deaf lawyer who did not wish to be identified for this Article expressed similar frustration regarding the CLE programs in his own state.

¹⁷⁶ *See* Johnstone, *supra* note 175, at 28. Professor Schwartz adds that the ABA at first denied deaf lawyers (namely, himself) interpreting, but reversed course after he appealed the initial denial to the ABA's House of Delegates and succeeded in getting the ABA to adopt its policy to provide interpreting for deaf members. E-mail from Michael Schwartz, *supra* note 161.

¹⁷⁷ *See* People *ex rel.* Myers v. Briggs, 263 N.E.2d 109, 110 (Ill. 1970).

¹⁷⁸ *Id.*

¹⁷⁹ *See* Lowell J. Myers, *Personal Viewpoint: The Strange Case of Donald Lang*, 64 A.B.A. J. 1198 (1978) ("The case against Donald was circumstantial, but the unsolvable problem was that we simply could not communicate with one another. He could not tell me what

incompetent to stand trial and held in a mental institution.¹⁸⁰ As the years passed, attempts to teach Lang formal sign language proved futile and it appeared that he would never acquire the necessary communication skills to be deemed competent to stand trial.¹⁸¹ Myers eventually filed a petition for a writ of habeas corpus, arguing that the state could not detain Lang indefinitely. He should either stand trial or be released.¹⁸² The trial and appellate courts denied the writ, but the Supreme Court of Illinois agreed with Myers that Lang could not be kept in custody indefinitely without trial.¹⁸³

Upon remand, Myers discovered that much of the physical evidence obtained by the police for Brown's murder five years earlier spoiled due to mishandling. Because the state had no proof to make a case against Lang, he was released. Unfortunately, five months later, the same situation recurred. Lang was seen with prostitute Ernestine Williams in a hotel and Williams was later found dead in the hotel room the next morning.¹⁸⁴ Lang was again charged with murder. Myers defended him in trial, arguing that other men had committed the murder.¹⁸⁵ However, the jury disagreed and convicted Lang. After Myers ensured that Lang was sent to a prison where he could receive sign language training, he withdrew from the case to concentrate on his regular work.¹⁸⁶ While Lang's conviction was overturned on appeal because of his inability to communicate,¹⁸⁷ he was again deemed incompetent for trial and has been in mental hospitals ever since.¹⁸⁸

Lang and Myers' story became the subject of a book and a 1979 made-for-television movie called *Dummy*, starring Paul Sorvino (as Myers) and LeVar Burton (as Lang).¹⁸⁹ The movie was reasonably

happened, could not testify in his own defense, and could not understand the witnesses. I was not sure that he even understood what the case was about.").

¹⁸⁰ See *Briggs*, 263 N.E.2d at 111.

¹⁸¹ *Id.* at 111-12.

¹⁸² See *id.* at 112 ("Petitioner further argues that a deaf-mute cannot be imprisoned for life because he is merely accused of a criminal offense, without ever being given a trial, and without ever being convicted.").

¹⁸³ *Id.* at 113.

¹⁸⁴ See *People v. Lang*, 325 N.E.2d 305, 306 (Ill. App. Ct. 1975).

¹⁸⁵ See *Pick*, *supra* note 19, at 50.

¹⁸⁶ *Id.*

¹⁸⁷ See *Lang*, 325 N.E.2d at 310-11; *cf.* *Powell v. Alabama*, 287 U.S. 45, 72 (1932) (dicta nearly presaging the *Lang* case and result).

¹⁸⁸ Jamie Mickelson, Note, "Unspeakable Justice": *The Oswaldo Martinez Case and the Failure of the Legal System to Adequately Provide for Incompetent Defendants*, 48 WM. & MARY L. REV. 2075, 2085 (2007).

¹⁸⁹ The movie was nominated for an Emmy for Outstanding Drama or Comedy Special. It lost to a film called *Friendly Fire*. See *Emmy Awards*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/event/ev0000223/1979> (last visited Jan. 16, 2011).

accurate in chronicling some of the challenges that Myers faced in practice, including using his sister as an oral interpreter for telephone calls and oral argument before the Illinois Supreme Court (Myers was allowed to leave the podium and approach the justices directly for lipreading).¹⁹⁰

The other celebrated case in the Rehab Act era was *Board of Education v. Rowley*.¹⁹¹ A deaf eight-year-old girl named Amy Rowley wanted a sign language interpreter for her mainstreamed public school classroom, but the school district, not wanting to pay the costs of an interpreter, asserted that an interpreter was unnecessary because Amy was an above-average student and passing her classes without any accommodations.¹⁹² Michael Chatoff was employed at the time by West Publishing and was a family friend of the Rowleys. He brought suit on the family's behalf under the Education of All Handicapped Children's Act (today the Individuals with Disabilities in Education Act).¹⁹³ The trial court agreed that merely because Amy was progressing in class did not mean that she did not need an interpreter, and the Second Circuit affirmed on appeal.¹⁹⁴ Chatoff argued the case both at the trial and appellate levels, using a combination of lipreading and notetaking.¹⁹⁵ The school board petitioned for certiorari to the U.S. Supreme Court, and the Court granted the petition.

Knowing that it was one thing to try to lipread three judges on the Court of Appeals, but quite another to lipread nine justices on the Supreme Court, Chatoff filed a motion requesting leave to use a CART

¹⁹⁰ Myers said in 2005 that he believed the movie was well-done and accurate as a general matter. See Myers Interview, Chicago Stories, *supra* note 50. However, when I asked his daughter about the argument she said that the scene was probably dramatic license on the part of the television producers. She said that her father "didn't like to make it obvious that he was deaf in court" and most likely stayed at the podium and used his sister as an oral interpreter for the argument. E-mail from Lynda Myers, *supra* note 130.

¹⁹¹ 458 U.S. 176 (1982).

¹⁹² *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 529-33 (S.D.N.Y. 1980). Incidentally, the trial judge in the *Rowley* case (Judge Broderick) later became the first federal trial judge (as far as I know) to hire a deaf law clerk when he hired Michael (later Professor) Schwartz. See SMITH, *supra* note 19 at 214. Professor Schwartz recalls that during his clerkship, Judge Broderick "provided me with sign language interpreters 20 hours a week and scheduled chamber meetings and side conferences with lawyers during the time interpreters were on hand." Email from Michael Schwartz, *supra* note 161.

¹⁹³ See Jim Mann, *The High Court Hears a Deaf Lawyer*, 4 AM. LAW. 55 (1982). The *Rowley* case was turned into an excellent book called *A Case About Amy*. See generally SMITH, *supra* note 19.

¹⁹⁴ See *Rowley v. Bd. of Educ.*, 632 F.2d 945 (2d Cir. 1980).

¹⁹⁵ See Jim Mann, *Deaf Lawyer Wants to Make Case His Way*, PHILA. INQUIRER, Feb. 3, 1982. Chatoff estimates that even with notetaking and lipreading, he only followed about fifty percent of the proceedings at the trial and appellate levels. *Id.*

interpreter at his own expense.¹⁹⁶ According to internal Court memoranda, there were attempts to encourage Chatoff to let another attorney perform the oral argument.¹⁹⁷ While debate over whether it is better to have the lawyer who has been with the case from the beginning or an experienced Supreme Court practitioner deliver the oral argument at the Court happens in every case—particularly when the case has far-reaching implications—such efforts to get Chatoff to give up the argument were likely intensified by his deafness. Chatoff said that even if the Court had denied the motion for leave to use CART, he still would have tried to argue the case himself, “find the best note taker [he could] and pray for the best.”¹⁹⁸ The Court granted Chatoff’s motion.

Although the CART system that Chatoff used was state-of-the-art at the time, it was not sophisticated enough for the hectic back-and-forth pace that accompanies Supreme Court argument. Supporters who attended the oral argument say that the delay was about four seconds long between a justice’s question and the time that Chatoff read it.¹⁹⁹ But other deaf lawyers who used CART interpreting around that time said that the delay was significantly longer than that.²⁰⁰

¹⁹⁶ The Supreme Court has long forbidden any form of transcription of its proceedings beyond manual notetaking by the public. Indeed, when I was a law student, my property professor recommended that we attend the oral argument at the Supreme Court of an upcoming property case that had potential far-reaching consequences. I contacted the Court to see if they would allow me to bring in a CART interpreter. The Court responded “no.” I am pleased to report that the Court has recently since softened its stance and will permit deaf spectators to bring CART interpreters. See Letter from Pamela Talkin, Marshal of the Court, to K. Todd Houston, Exec. Dir. of the Alexander Graham Bell Ass’n for the Deaf and Hard of Hearing (Mar. 23, 2004) (on file with author). The Court still will not pay for the interpreting, but progress is progress.

¹⁹⁷ Mann, *The High Court Hears*, *supra* note 193, at 55 (quoting Jan. 25, 1982 memo from Clerk of the Court Alexander Stevas to Chief Justice Warren Burger: “Efforts to persuade [Chatoff] to have other counsel argue the case have not been fruitful.”).

¹⁹⁸ Mann, *supra* note 195.

¹⁹⁹ SMITH, *supra* note 19, at 146.

²⁰⁰ Judge Brown, who utilized CART interpreting in the 1990s after the program became proficient, recalls early versions of CART interpreting: “it was very challenging because in 1983 the computer-assisted real-time machines had just been invented. It took seven seconds for the computer to translate a court reporter’s key stroke to English—seven seconds per word.” Zemlicka, *supra* note 2; accord Vaughn, *supra* note 147, at 54 (noting that as of 1986, “[n]o system yet exists which can translate the spoken word of lectures, meetings, trials, and conference into print” in a practical, workable manner). Judge Brown remembers that in early days of CART interpreting, the interpreting was so cumbersome that he would only request (via a hand signal) interpreting when he could not follow an argument by lipreading. See E-mail from Richard Brown, to author (Sept. 1, 2010) (on file with author). He also remembers that it took several generations of upgrades before the CART program got efficient enough for interpreting purposes. *Id.* Judge Brown also notes that on occasion, his fellow panel judges will “lean in” and try to read the CART screen

Whether the delay was four or seven seconds, the justices were uncharacteristically hesitant to challenge Chatoff at the *Rowley* argument. Only two justices (O'Connor and Stevens) asked Chatoff any questions at all. The American Lawyer reported that the justices “understandably seemed reluctant to interrupt Chatoff too often.”²⁰¹ As Ms. Harris lamented when she read that account, “[o]ne wonders how any advocate, much less a deaf advocate, can effectively present a case if a court, hampered by lowered expectations and fear, does not want him to argue and is reluctant to challenge him?”²⁰²

Making matters worse was when the lawyer from the U.S. Solicitor General's Office got up for his argument supporting Rowley, not only did the previously quiet justices immediately pepper him with questions,²⁰³ but also the lawyer was unprepared and was unable to supply answers about the factual record—issues that Chatoff surely knew by heart.²⁰⁴ The result was a six to three decision holding that Amy Rowley was not entitled to an interpreter under the law as long as she was passing her classes satisfactorily.²⁰⁵

While the result was disappointing, the community took much heart that a deaf lawyer prosecuted the case all the way to the Supreme Court.

during an argument when the case involves complex scientific jargon that is unfamiliar to the judges. *Id.*

A fair depiction of CART interpreting from the 1980s can be seen in the 1987 (several years after Chatoff used CART interpreting at the Supreme Court) movie *Suspect*, starring Cher and Liam Neeson. Cher (in character) defends Neeson (in character) from murder charges. Neeson is a deaf man who does not know sign language. The trial features CART interpreting so Neeson can follow. The significant delays and limited utility of CART technology at that time were apparent from the film. Indeed, CART was only used for Neeson's direct and cross-examinations. The rest of the trial, Neeson presumably has no idea what was being said. See *SUSPECT* (Tristar Pictures 1987).

²⁰¹ Mann, *The High Court Hears*, *supra* note 193, at 56 (emphasis added).

²⁰² Harris, *supra* note 2, at 97. Even today, one deaf lawyer who did not wish to be identified argued a case in a federal court of appeals recently and noted that some judges did not ask him any questions, but posed numerous questions to his co-counsel and opposing counsel. The deaf lawyer wonders whether the judges were uncomfortable challenging or engaging a deaf lawyer. Ultimately, the court ruled in favor of the deaf lawyer's client.

²⁰³ SMITH, *supra* note 19, at 147.

²⁰⁴ Mann, *The High Court Hears*, *supra* note 193, at 56.

²⁰⁵ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209–10 (1982). Happily for disability advocates, the *Rowley* decision was not particularly well-received by the lower courts charged to implement the decision. One study reported that in the eight years following the decision, lower courts “retreated dramatically from *Rowley*, distinguishing it when they could, and minimizing it and finding other sources of guidance when they could not.” Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 352–53 (1990) (discussing cases involving disabled children's accommodations and placements in school and various courts' efforts to deal with *Rowley*).

After the Court granted Chatoff's request to use the CART interpreter, the case drew significant nationwide attention.²⁰⁶ In the book *Great Deaf Americans*, the authors devoted a chapter to Chatoff.²⁰⁷ They remarked, "Chatoff's example of courage will not be forgotten. Even in losing, he made a giant stride for the deaf."²⁰⁸

Between the media coverage of the *Lang* and *Rowley* cases, the idea of a deaf person functioning as a lawyer (at least one who represented deaf clients) may still have been far-fetched to most of the country, but it was no longer unfathomable.²⁰⁹

IV. AFTER THE ADA

There were several ways in which the ADA was a significant improvement over the Rehab Act. For purposes of this Article, the most important aspects is that the ADA explicitly covered employers, public accommodations (including schools), and public services (i.e., courts), and explicitly required covered entities to affirmatively provide "reasonable accommodations" to persons with disabilities.²¹⁰

²⁰⁶ Chatoff's biographical file at the Gallaudet University Library is nearly an inch thick and comprises mostly of articles related to the *Rowley* case. There were articles from perhaps fifty different newspapers nationwide recounting how a "deaf lawyer" argued a case before the Supreme Court.

²⁰⁷ See ROBERT PANARA & JOHN PANARA, *GREAT DEAF AMERICANS* 129-31 (1983).

²⁰⁸ *Id.* at 131.

²⁰⁹ Indeed, two years after *Dummy* aired, the television show *Barney Miller* featured a deaf lawyer representing a deaf prostitute. According to a synopsis of the episode,

Detective Dietrich (Steve Landesberg) arrests an attractive deaf prostitute ([Phyllis] Frelich), which leads to several communication gags, such as "Do you want me to mime her her rights?" Officer Levitt (Ron Carey) has a deaf sister and knows sign language, so he serves as interpreter. The prostitute is booked and in the process charms Dietrich. Her deaf lawyer ([Seymour] Bernstein) arrives to arrange bail, followed by her deaf pimp ([Peter] Wechsberg). As she leaves the precinct, she reminds Dietrich that they have a date the next night, prompting Levitt to again offer his services as interpreter. The deaf actors [Frelich, Bernstein, Wechsberg] all use ASL, and the deaf attorney character uses Manual English as well. Although the audience can understand most sign sequences through Levitt's interpreting, there are a few signed dialogues between the lawyer and Levitt that keep the hearing audience in the dark. Other than this communication problem, the deaf actors bring credibility to the episode.

JOHN S. SCHUCHMAN, *HOLLYWOOD SPEAKS: DEAFNESS AND THE FILM ENTERTAINMENT INDUSTRY* 144 n.59 (1999). The episode was very well-received by the deaf community. See, e.g., Paul Andcrook, *The Barney Miller Episode: Fantastic!*, *THE DEAF AM.*, Mar. 1981, at 17-18.

²¹⁰ See 42 U.S.C. §§ 12112, 12132, 12182(a) (1994).

A. Fortuitous Timing for Deaf Lawyers

The enactment of the ADA could not have come any sooner for deaf lawyers. Indeed, in some ways, the timing was perfect. One of the great boons for deaf lawyers and law students was that the ADA took effect roughly about the same time that CART interpreting had improved to the point of being usable for deaf lawyers and law students. As discussed earlier, CART interpreting in the 1980s was limited by a significant lag time between the “stenotyping” of the words and the appearance of the words on the screen.²¹¹ This was the reason why CART interpreting was not embraced by deaf lawyers in the 1980s. As explained by Ms. Harris, “[t]ime lag is every barrister’s enemy. Critical objections cannot be made; uncomfortable silence ensues; the lawyer’s competency is called into question, regardless of preparation; the case is lost.”²¹²

However, by 1990, the programming advanced to the point where there was only a one to two second delay—more than sufficient for use in classrooms and courtrooms. The benefits of CART interpreting were immediately seized upon by deaf lawyers and law students. Richard Ricks, who had all but given up on his career as a trial lawyer when he became deaf five years earlier, resumed his criminal defense practice after the D.C. Superior Court implemented CART interpreting so Ricks could follow proceedings.²¹³ Theodore Burtzos (later Judge Burtzos), who transferred from the Cook County State’s Attorney’s Office trial department to its appellate division after becoming deaf in the mid-1980s, did likewise around the same time.²¹⁴ Lynne Weaver used CART interpreting in a clinic her 3L year at Harvard Law School to represent a client at an administrative hearing for an employment discrimination dispute.²¹⁵ As part of a state exchange program between trial and appellate judges, Judge Brown presided over a trial using CART interpreting.²¹⁶ According to Judge Brown, the extra second or two it took him to read the CART screen gave him time to formulate thoughtful

²¹¹ See *supra* notes 199–200 and accompanying text.

²¹² Harris, *supra* note 2, at 96.

²¹³ See Sandra Torrey, *In D.C. Court, A Career Reborn*, WASH. POST., Jan 30, 1991, at D1–D2 (also noting that “Ricks literally bounced with excitement” at the trial and quoting him as saying “I feel great . . . Now I know I can work again.”).

²¹⁴ Shah, *supra* note 14, at 4 (Mr. Burtzos remarked about CART interpreting after the trial: “This is a godsend!”).

²¹⁵ Weaver, *supra* note 22, at 186–87 (“As far as the interpretation went, it was wonderful. . . . One terrific feeling was that of not being at a disadvantage because of my hearing impairment because of this technology”).

²¹⁶ See McKee, *supra* note 37, at 6.

responses to objections, and he was well-received by the trial attorneys.²¹⁷

As far as publicity is concerned, there was no shortage of press attention focused on the deaf and disability communities in the aftermath of the ADA's passage. But deaf lawyers received even an additional boost when NBC aired a program in 1991 entitled *Reasonable Doubts* featuring Oscar-winner Marlee Matlin as a deaf prosecutor and perennial star Mark Harmon as her investigator and sign language interpreter.²¹⁸ Although the show was critically acclaimed and won praise from deaf lawyers for presenting a "very reasonable depiction of a deaf person functioning in a professional role,"²¹⁹ it lasted only two seasons.

Still, unlike previous media depictions, *Reasonable Doubts* showed deaf lawyers using interpreters on the job and not limited to representing deaf clients. Professor Schwartz recalls that "the show was groundbreaking—it helped people to wake up to the idea of Deaf people as professionals. That was a time and a day that I could point to and say on this day people's attitudes and perceptions began to change."²²⁰

²¹⁷ *Id.* Delaware Superior Court Judge Norman Barron likewise used real-time interpreting to preside over trials after he became completely deaf in the mid- to late-1990s. See Barry Strassler, *Delaware's Hearing Impaired Judge*, SILENT NEWS, June 1998, at 30. One defense attorney who appeared before Judge Barron quipped "I don't know what the big deal is about [Judge Barron becoming deaf; he] never listened to defense attorneys before, so what's the difference?" *Id.*

²¹⁸ See MATLIN & SHARKEY, *supra* note 5, at 213–20. To prepare for the role, Matlin consulted extensively with Professor Schwartz, who at the time was working as the Assistant District Attorney in the Manhattan District Attorney's Office in the Appeals Bureau, but was well-familiar with trial practice. *Id.* at 214–15.

²¹⁹ Arenofsky, *supra* note 17 (quoting Jamie McAlister). Matlin remembers that some deaf fans complained when her character was using signed English, rather than ASL, in the courtroom. MATLIN & SHARKEY, *supra* note 5, at 217. Matlin responded that she wanted the show to be realistic, and that signed English was more appropriate than ASL in a courtroom setting. See *id.*; see also *supra* notes 36–38 and accompanying text. One caveat about the show's believability is that Harmon's signing on the show was often substandard. MATLIN & SHARKEY, *supra* note 5, at 230 (acknowledging that "[s]igning never came easy to Mark"). At times, the communication between the characters was only slightly more believable than young Jeff's fully comprehending Lassie's barking. There were instances where Harmon's character would give one or two signs, and the audience was expected to believe that Matlin's character understood several sentences.

²²⁰ See MATLIN & SHARKEY, *supra* note 5, at 216–17. The media acceptance of deaf lawyers continued. Years later, Matlin again played a deaf lawyer in a guest role on the television program *My Name is Earl*. And in 2005, *Saturday Night Live* did a skit called "The Deaf Judge," which, quite frankly, was not that funny. See *Saturday Night Live Transcripts*, <http://snltranscripts.jt.org/04/04ndeaf.phtml> (last visited Jan. 16, 2011).

B. For Deaf Law Students

Thanks to the success of deaf lawyers in the Rehab Act era, and increased publicity, law schools largely dropped any previous biases or prejudices against admitting deaf students by the time the ADA was enacted. So long as the student had the necessary record, she was admitted to law school.

But getting the record necessary for admission to law school was still an issue for some aspiring deaf law students. Many students, for example, took a preparation course for the Law School Admissions Test (“LSAT”) in hopes of increasing their chances of being admitted to law school. A company called Testmasters that provided preparation classes for the LSAT refused to provide interpreters for deaf students who wished to take the classes. In 2004, a deaf student complained to the Department of Justice about Testmasters’ refusal to provide interpreting access to its classes. Shortly thereafter, Testmasters agreed to provide proper accommodations for deaf students.²²¹

Once in law school, deaf students—especially the ones who did not know much sign language—eagerly embraced CART interpreting. It appears that Stanford Law was the first to provide CART interpreting to a deaf law student in 1991.²²² Several other law schools followed suit in the following years, including Georgetown Law when I enrolled in 1993.

It is difficult to put into words just how much of an impact CART interpreting had for those that used it. Mr. Chen said of having CART interpreting at Stanford Law: “For the first time, I am actually learning something from classes . . . I wonder at times how much better my

²²¹ See Consent Order *United States v. Robin Singh Ed. Servs., Inc.*, No. CV-06-3466 ABC (C.D. Cal. June 21, 2006), available at <http://www.ada.gov/testmaster.htm>. Testmasters based its refusal to provide interpreters because the cost of the interpreter would exceed the student’s tuition—a situation Testmasters’ CEO deemed “patently unfair” and “unethical attempts at extortion.” See E-mail from Robin Singh to Drago Renteria (Aug. 25, 2004) (on file with author). Testmasters was wise to settle, as courts have routinely rejected substantively identical “this is so unfair” defenses from defendants that refuse to provide interpreters because the costs are higher than the service payment from the individual deaf customer. See, e.g., *Mayberry v. Von Walter*, 843 F. Supp. 1160, 1162–63, 1166–67 (E.D. Mich. 1994) (rejecting doctor’s contention that bearing costs for an interpreter for a deaf patient was “outrageous”). The solution is for the public accommodation to raise prices slightly for all customers so that interpreting costs can be absorbed easily. See Tucker, SILENCE, *supra* note 19, at 195–96; accord *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994) (reasonable accommodation mandate “contemplates some financial burden resulting from accommodation”).

²²² See *Stenocaptioning Delivers Lectures*, *supra* note 42 (discussing accommodations for Ted Chen).

undergraduate grades would have been.”²²³ Mr. Machiorlatti expressed similar sentiments. He repeated his first year at Cooley Law School after concluding it was largely a waste of time sitting in class without any accommodations and requested CART interpreting the second time around.²²⁴ After his first semester with CART interpreting, he received a Certificate of Merit for the highest grade in his criminal law class.²²⁵

Even setting aside the direct benefits of being able to understand the classroom discussion, CART interpreting provided residual benefits for the deaf student as well. For example, deaf students often either never participated in classroom discussion²²⁶ or were never called upon by the professors, presumably from discomfort or misplaced pity.²²⁷ When I received CART interpreting, my own professors called upon me as often as any other student. Likewise, I also asked questions in class when I thought it necessary. I would like to think that my classroom participation left a favorable impression upon my professors and classmates because I could “think on my feet” and make convincing points—both widely assumed to be requisites of a good lawyer.²²⁸

²²³ *Id.*; see also *supra* notes 213-17 and accompanying text. This author completely agrees with Mr. Chen’s sentiments. My grades at Georgetown Law (with CART interpreting) were significantly higher than they were at Dartmouth College (without CART interpreting). Another deaf student at Stanford called CART interpreting “the greatest thing since sliced bread.” *Id.* (quoting John Interrante, a deaf doctoral student studying computer science: “[A sign language] interpreter might be able to tell me about 70 or 80 percent of what’s said, but she or he can’t do a perfect job Spoken language has many more words than sign language has signs Stenocaptioning feels like a quantum improvement in comparison, because it lets me understand between 95 and 100 percent of what’s said.”); accord Weaver, *supra* note 22, at 179, 195 (remarking that CART interpreting “sound[ed] absolutely perfect for [Weaver]” and deeply regretting that she did not have it for her law school classes).

²²⁴ Cohen & Bernstein, *supra* note 21.

²²⁵ *Id.*; accord E-mail from Brandy Ligouri Tomlinson, *supra* note 22 (on file with author) (“I [returned to] law school in 2007 with CART and my GPA went from an ‘F’ to a ‘B.’ Huge difference.”).

²²⁶ See *supra* note 22.

²²⁷ McGill, *Personal Experiences*, *supra* note 2, at 127; E-mail from Howard Rosenblum, *supra* note 161 (on file with author) (Rosenblum remembering that professors declined to call on him his first year, but called on him repeatedly thereafter when law school dean told faculty to treat Rosenblum like any other student). Again, this is not particular to the deaf community. See, e.g., Basas, *supra* note 110, at 34 (Professor Basas remembering that professors were reluctant to call upon her in class); Lunch Address, *Assisting Law Students with Disabilities in the 21st Century*, 15 AM. U. J. GENDER SOC. POL’Y & L. 847, 857 (2006-07) (observing that law professors are hesitant to call upon blind students in Socratic discussion).

²²⁸ I remember at the end of one Family Law class, the professor announced that for a group project, we would break into teams of four and negotiate a “mock” separation agreement between “spouses.” If we could not find our own partners, the professor would assign us to teams. Before I could even start to find a team, I was approached by three

One drawback (at least from the perspective of the schools) to CART was that it was expensive. For law schools that had several deaf students, multiple requests for CART interpreting resulted in significant interpreting expenses. For example, the University of California (“UC”) school system (both for undergraduate and graduate schools) became a popular destination for deaf students because of a perceived progressive attitude for providing accommodations.²²⁹ At some point in the mid- to late-1990s, both the Universities of California at Berkeley and Davis, feeling that the costs of interpreting were getting too high, decided that they would not provide CART interpreting to deaf students and “forced” them to make do with (less costly) sign language interpreters even though the deaf students requested CART interpreting, or otherwise hired (even less costly) inexperienced and/or inadequate interpreters.²³⁰

Predictably, a group of deaf UC students (including Boalt students Janine Kramer (Madera) and Emily Alexander) filed a class action lawsuit against the UC system alleging Rehab Act and ADA violations.²³¹ The case eventually settled, which both sides claimed was a victory.²³²

There were other examples of how the ADA forced law schools to “get with the program” regarding accommodations. One lawyer (who requested anonymity) recalls a recalcitrant law professor who stubbornly refused to attach an FM microphone to her lapel for class lectures, saying that she had a “personal aversion to microphones.” When the administration proved unwilling to talk to the professor (she was married to a dean), the student complained to his state rehabilitation

classmates—all of whom were top students on prestigious law journals who took law school very seriously. They asked if I would be their fourth person for the project. They had been impressed enough with my classroom participation that they wanted me for their team. This never would have happened if I did not have CART interpreting throughout law school. I accepted their offer, and after working together, we all received A’s for our class project.

²²⁹ See Davis, *supra* note 38, at 1 (recounting the UC schools’ history of being ahead of the curve in providing accommodations for students with disabilities).

²³⁰ See *id.* at 3 (“[Emily] Alexander thought that a public university, particularly the University of California [Boalt], would be eager to accommodate her needs. She was wrong.”); *id.* at 5 (“Although [deaf student Kirstin Wolf (Kurlander) was] accepted to Harvard Law School, she chose to attend Berkeley’s Boalt, across the country from her family and friends, because of its promise for accommodating disabled students. But there were problems from the first day.”).

²³¹ See generally *Kramer v. Regents of the Univ. of Cal.*, 81 F. Supp. 2d 972, 972-73 (N.D. Cal. 1999).

²³² See Michael Arnone, *U. of California Settles Federal Lawsuit*, CHRON. HIGHER EDUC., Nov. 22, 2002 (recounting details of settlement). The most significant benefit for the students was that the defendants agreed to give more deference to the students’ choice of interpreting. *Id.*

department officer, who, in turn, got involved. Rather than wearing the FM microphone on her lapel, the professor instead proposed attaching it to the lectern and promised to teach the class from the lectern. The next class, however, she reverted to her usual habit of walking around the classroom, rendering the FM microphone useless. Following another round of complaints, she finally agreed to attach the FM microphone to her lapel. The lawyer says "I firmly believe that this outcome would not have been possible without the ADA's requirements for reasonable accommodation." He also reports that he had no other issues with accommodations in other classes, and that he received a first rate legal education.

C. *Preparing for Employment*

After law school comes the bar examination. Prior to the ADA, bar review courses did virtually nothing to make courses accessible to students with disabilities.²³³ Not having access to such bar review courses (some of which boasted passage rates as high as ninety percent) clearly put law school graduates with disabilities at a disadvantage from their hearing peers.²³⁴ Many deaf students did not bother signing up for bar review courses, reasoning that without accessibility, the lectures were next to worthless.²³⁵ Several failed their bar examinations. Some paid classmates to take the course if the classmate shared notes with the deaf student afterwards.²³⁶

In 1992, Suzanne Rosen (Singleton)—then fresh out of UCLA Law School—requested interpreters after she signed up for Bar/Bri's bar

²³³ See Moss, *Overcoming the Barriers*, *supra* note 99, at 7.

²³⁴ See *id.* ("One attorney recalls asking her law school registrar what happened to students who could not get the requisite accommodation and ended up failing the test as a result. 'They go back into their closets,' came the reply.").

²³⁵ See, e.g., Tucker, SILENCE, *supra* note 19, at 159 (Professor Tucker recounting that she passed the Arizona and California bar examinations "without any participation in the bar review courses" because she had "no choice"). Professor Schwartz recalls: "Like Professor Tucker, I opted out of my Bar/Bri course because it was not accessible. Instead I showed up the first day, picked up my books, and left to study in Washington Square Park For nearly two months, I sat in the park mornings and afternoons, studying for the bar exam. When I walked into the examination room, everyone did a double take: I was deeply tanned. I passed the New York bar exam on my first try and repeated on the New Jersey bar exam ten years later." E-mail from Michael Schwartz, *supra* note 161.

²³⁶ See, e.g., Tucker, SILENCE, *supra* note 19, at 159 ("My fellow [U. of Colorado Law] graduates all signed up to take the bar review course, which was given via a series of lectures to several hundred aspiring lawyers four or five nights a week for two to three hours, lasting about five weeks. Obviously I was not a candidate for this method of review, since I wouldn't be able to hear the lectures. Somewhat panic-stricken, I offered to pay the fee for the course for a CU classmate if he would take notes of the lectures for me. He agreed, and we both passed and became members of the Colorado bar.").

review classes.²³⁷ Bar/Bri offered transcripts of the lectures to Ms. Singleton, rather than interpreters. Ms. Singleton countered that transcripts were not the same as a live lecture because, among other things, the lecturer's body language may indicate the significance of the material being discussed, and filed suit against Bar/Bri's parent company.²³⁸ When another recent deaf law school graduate (Jennifer Olson) and a blind student made similar complaints against Bar/Bri, the U.S. Department of Justice filed suit in federal court alleging ADA violations. Bar/Bri and the government reached a settlement in which Bar/Bri agreed to provide interpreters for live lectures for deaf students, and to pay restitution.²³⁹

There was also the matter whether deaf students needed accommodations for the examination itself. Relatively minor accommodations such as interpreters to relay the proctor's instructions or to alert the examinee to time warnings have been provided.²⁴⁰ More controversial is whether extra time should be allotted for deaf examinees—particularly for those whose native language is ASL—because the student usually “thinks” in ASL and translation into English takes extra time. I am sympathetic to such requests, but question whether the “disability” being accommodated is deafness (which is a legally recognized disability) or lack of English proficiency (which is not).²⁴¹

Then there is applying for jobs. An ongoing debate for deaf lawyers is whether to disclose their disabilities in the job application process. I have discussed the issue with many deaf lawyers, and sentiment appears

²³⁷ Teresa Moore, *Deaf Lawyer Sues Bar Review Firm*, S.F. CHRON., Feb. 3, 1994, at A17.

²³⁸ *Id.* Ms. Singleton proceeded to take the course when the California Department of Rehabilitation agreed to pay for her interpreters. *Id.*

²³⁹ See Consent Order, *United States v. Harcourt Brace Legal & Professional Publications, Inc.*, No. 1:94-cv-03295 (June 23, 1994) (on file with author); William Claiborne, *Bar Review Course Agrees To Aid Disabled Students*, WASH. POST, May 28, 1994, at A2. From my own experience, Bar/Bri's policy was to provide the deaf student with whatever accommodations the student used in law school. Hence, I received CART interpreting for Bar/Bri lectures in preparation for the Maryland Bar Exam. I passed the exam easily, thanks to Bar/Bri, as well as Ms. Singleton and Ms. Olson.

²⁴⁰ See, e.g., Tucker, *Students and Faculty*, *supra* note 29, at 358.

²⁴¹ Compare *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1007 (9th Cir. 2007) (deafness a disability), with *Perez v. Barnhart*, 415 F.3d 457, 464 n.6 (5th Cir. 2005) (illiteracy not a disability). Professor Tucker believes that allowing extra time on this basis is not required by reasonable accommodation laws. See Tucker, *Students and Faculty*, *supra* note 29, at 358. For contrary views, see Ruth Cokler, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413 (2008); *Assisting Law Students With Disabilities in the 21st Century: The Bar Examination*, 15 AM. U. J. GENDER SOC. POL'Y & L. 861, 872-73, 874-75, 878-79 (2006-07) (comments of Jo Anne Simon).

divided.²⁴² Some (especially those who can speak and lipread well) prefer not to bring up accommodations until after they have a job offer in hand, fearing that only negative consequences can arise if they give a potential employer advance notice of their deafness. Others (myself included) are upfront about the nature of the disability and list the accommodations that would be necessary for me to perform the job.²⁴³

Some deaf law students have brought interpreters to on-campus law firm interviews.²⁴⁴ This created its own frustration. Recruiting attorneys, not being used to interpreters, would improperly direct their questions to the interpreter rather than the applicant.²⁴⁵

D. For Deaf Lawyers

After the ADA was enacted, employment prospects for deaf lawyers improved (although were far from perfect). For one thing, with improved accommodations they were not only able to get into better law schools but also could perform better at those schools. In turn, this made it easier for employers to take a “chance” (if one were to use that term) on them.

Law firms also seemed more receptive to providing for accommodations.²⁴⁶ For example, Brobeck hired a full-time interpreter

²⁴² This is an issue in the greater disability law community as well. *See, e.g.,* Basas, *supra* note 110, at 69–71, 75–76 (discussing disclosure issue); E. Ann Puckett, *How Potential Employers Approach Disability: A Survey of Law Students in Georgia*, 69 U. PITT. L. REV. 509, 509–10, 516–19 (2007–08) (surveying law students with disabilities regarding job application process and finding that most chose not to disclose their disabilities).

²⁴³ Prominent disability advocates likewise encourage advance disclosure. *See, e.g.,* *Clinical & Externship Programs: Assisting Law Students with Disabilities in the 21st Century*, 15 AM. U. J. GENDER SOC. POL’Y & L. 817, 842–43 (2006–07) (quoting Christine Griffin, who today is the Deputy Director of the U.S. Office of Personnel Management); Moss, *Overcoming the Barriers*, *supra* note 99, at 12 (quoting Lisa Lederer, job placement director of the International Center for the Disabled). *But see* Wendy F. Hensel, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. PITT. L. REV. 637, 645 (2007–08) (“There is little doubt that an applicant’s identification of disability during the hiring process will create significant roadblocks to employment.”).

²⁴⁴ *See, e.g.,* McKee, *supra* note 37, at 1.

²⁴⁵ *Id.* (Kirstin Wolf (Kurlander) recounting “I would say there were very few [law firm] [recruiters] that dealt with the situation well They kept focusing on the interpreter and concentrated on questions about me being deaf” (second alteration in original)). Ms. Kurlander did have a productive interview with a representative from Brobeck, Phelger & Harrison, who happened to have a deaf niece. *Id.* at 6. At the time Ms. Kurlander joined the firm, Brobeck was one of the most prestigious firms in the nation. However, the firm imploded and dissolved in 2003 following the “dot.com crash.” *See generally* Todd Wallack & Harriet Chiang, *Top S.F. Dot-Com Law Firm to Close*, S.F. CHRON., Jan. 31, 2003.

²⁴⁶ *See, e.g.,* E-mail from Howard Rosenblum, *supra* note 161 (on file with author) (“While it may still be difficult to convince law firms that we deaf attorneys are effective and savvy

for Ms. Kurlander and had the interpreter perform legal assistant tasks during “downtime.”²⁴⁷ The Phoenix office of Meyer, Hendricks, Victor, Osborn & Maledon agreed to “share” the cost of an interpreter who served as both Jamie McAllister’s interpreter and a firm paralegal.²⁴⁸ Albert Lin, a partner in the Austin office of Brown McCarroll, LLP, reports that his firm provided CART interpreting for meetings and conference calls, as well as a CapTel (captioned telephone) for him to perform his responsibilities.²⁴⁹ As Melissa Felder, an associate in the D.C. office of Boies, Schiller & Flexner, L.L.P. puts it:

Because litigation is all about communication—with adversaries, clients, witnesses, and even the court—people often ask how I do what needs to be done. The answer? In today’s world of advanced technology, there are accommodations for nearly every situation, and if not, some on-the-spot improvising fills the gap. Thanks to these relatively unobtrusive accommodations, I am able to do everything I need to do as a litigation associate—talking to clients, and actively participating in meetings, trials, and depositions.²⁵⁰

This is not to suggest by any means that all law firms set out the welcome mat for deaf lawyers after the ADA. While no law firm would be caught dead expressing some of the sentiments that were made prior to the ADA,²⁵¹ discrimination in private firms did not end after the ADA was enacted.²⁵² For example, three years after her hiring, Ms. McAlister’s

as lawyers, those of us who have secured jobs [at firms] are usually able to get the accommodations we need to perform our duties.”).

²⁴⁷ McKee, *supra* note 37, at 6. Federal Circuit Judge David Tatel of the District of Columbia Circuit, who is blind, worked out an analogous arrangement when he was a partner at the D.C. office of Hogan & Hartson, “where secretaries who were not busy would serve as readers for me.” Lunch Address, *supra* note 227, at 852.

²⁴⁸ See Arenofsky, *supra* note 17, at 34. I was not able to ascertain how precisely the firm “shared” the costs of an interpreter, as Ms. McAlister passed away in 2003.

²⁴⁹ E-mail from Albert Lin to author (Sept. 13, 2010) (on file with author).

²⁵⁰ E-mail from Melissa Felder to author (Sept. 27, 2010) (on file with author).

²⁵¹ See *supra* notes 165–67 and accompanying text.

²⁵² Again, this is true for the greater disability lawyer community as well. See, e.g., Basas, *supra* note 110, at 36–37, 64–65 (Professor Basas recounting her own experiences in interviewing at firms, and recounting several stories of lawyers with disabilities having difficulty securing employment at firms); Hensel, *supra* note 243, at 645–46 & nn.38–41 (citing a 2004 survey of California attorneys reporting that “45% of the lawyers with disabilities surveyed believed that they had been denied employment on the grounds of their disability, with the number rising to 68% when limiting the class to those with visible disabilities”).

firm faced hard times and laid off many lawyers—including McAlister.²⁵³ She was not able to secure employment at another firm, and notes with some bitterness, “[i]t would be impossible to prove discrimination But when you compare the credentials of people [other firms] hired with my own credentials, there’s a disparity.”²⁵⁴ Ms. McAlister ended up taking a position with the Maricopa Public Defender’s Office and found the work very rewarding.²⁵⁵

As was the case during the Rehab Act era, many deaf lawyers found employment with the government.²⁵⁶ But governments were not immune from such biases after the ADA was enacted. Scott Harrison remembers that the Florida First Judicial Circuit Public Defender’s Office was the only office to give him a job, recalling that he “had interviewed with many other [public defender] offices prior to being hired here, and none were inclined to give me the opportunity that [the First Judicial

²⁵³ See Arenofsky, *supra* note 17, at 34. McAlister’s firm apparently also broke up around or shortly after this time.

²⁵⁴ *Id.* I share Ms. McAlister’s sentiments. I personally sent resumes to almost every notable law firm in Washington D.C., but obtained only two call-back interviews and one offer (from Howrey & Simon). I suspect that I was one of the very few law students to receive twice as many call-back interviews with federal circuit judges for clerkships (four) than with law firms (two). Other commentators have noted the inherent difficulties of proof for potential discrimination claims in failure to hire cases for lawyers with disabilities. Vaughn noted:

Private-sector law firms are often accused of discrimination against the disabled. . . . [But] relatively few lawsuits have been filed by injured parties. Why?

“It’s very hard to tell what’s really going on,” [Deborah] Kaplan says. “More people want to secure jobs rather than establish a principle. And they don’t want to face retaliation.

Anyway, after you’ve interviewed with 20, 30, even 40 firms and never hear back from any of them, who do you sue? Which one? It’s sometimes not until you’ve seen a consistent pattern of rejection that you’re aware of the possible discrimination.”

Vaughn, *supra* note 147, at 20, 53; see also Voorhees, *supra* note 100, at 1596 (“It cannot be established readily that any particular firm is guilty of discrimination when its total contact with a handicapped student has only been to deny an interview. In all likelihood, it also has failed to grant interviews to scores of other job applicants. When, perhaps unwittingly, it has granted an interview to one who is handicapped and then failed to offer employment, the firm could respond to a discrimination charge by pointing out that many others also were denied jobs, and the ones who secured them happened to be better qualified.”).

²⁵⁵ See Arenofsky, *supra* note 17, at 34.

²⁵⁶ Again, the same is true for the greater disability lawyer community. *Cf.* Lunch Address, *supra* note 227, at 853–54 (Judge Tatel advising law students with disabilities that “the very best employer for students, for lawyers with disabilities, is the United States government. . . . The government has all kinds of resources for employees with disabilities”).

Circuit Office] did.”²⁵⁷ Sheila Conlon-Mentowski applied for an attorney position for a federal agency in San Francisco, but was rejected because the agency did not want to pay the costs for an interpreter.²⁵⁸ Marsha Taylor remembers that she was rejected for a position at a state agency because they “didn’t feel I was making an effort to find a way to talk on the phone.”²⁵⁹ Alice McGill says that after she was invited for a second interview (with an interpreter provided) at the California State Legislative Counsel’s Office, “you know when you are singled out when the Legislative Counsel (himself) asks ‘how will you communicate?’ I was fuming—I knew no other applicants would be asked that question.”²⁶⁰

The ADA did create opportunities for deaf lawyers to use disability rights as substantive law for their professions. Several went into public interest (particularly disability rights), hoping to use their personal experiences and perspectives to be advocates on behalf of people with disabilities.²⁶¹ Others, such as Michael Stein and Howard Rosenblum, either joined or established private firms specializing in disability rights.²⁶²

Indeed, several other deaf lawyers have set up their own firms providing various legal services to their localities. Susan Harris spent many years being mentored by a tax and probate lawyer at a large firm before moving to a smaller firm, and then establishing her own trust and estates firm.²⁶³ Scott Harrison left his public defender position to set up a

²⁵⁷ Pudlow, *supra* note 25, at 25.

²⁵⁸ See E-mail from Sheila Conlon-Mentowski, *supra* note 143.

²⁵⁹ See E-mail from Marsha Taylor to author (Sept. 4, 2010) (on file with author). Not long after, Ms. Taylor got a job at a public defender’s office. But she was let go three days after she requested an interpreter for that job. *Id.*

²⁶⁰ See E-mail from Alice McGill, *supra* note 161. In their correspondence with me, Ms. Conlon-Mentowski, Ms. Taylor, and Ms. McGill, all—without prompting—expressed regret that they did not bring suit against those agencies after their experiences.

²⁶¹ See, e.g., *Profile in Advocacy: Laura Gold*, VOLTA VOICES, May/June 2006, at 27 (“[M]y hearing loss as well as my knowledge of the law affords me a unique perspective and enhances my ability to educate others regarding the ADA’s requirements.”); see also E-mail from Karma Quick to author (Sept. 7, 2010) (on file with author) (Ms. Quick is “passionate” about disability and deaf rights and hopes she is “able to continue working in those areas” in her career).

²⁶² See STEIN AND VARGAS, LLP, <http://www.steinvargas.com/> (last visited November 5, 2010); see also E-mail from Howard Rosenblum to author (Sept. 12, 2010) (on file with author) (recounting that he was “hired as a law clerk for special education clinics, disability rights clinics, and a small law firm that focused on all areas that impacted people with disabilities. [He] ended up working as an associate attorney for the small law firm for ten years after graduating law school. Because the law firm was geared for disability rights, [he] never had a problem working with the partners or any lawyers at the firm”).

²⁶³ See E-mail from Susan Harris to author (Sept. 30, 2010) (on file with author). Ms. Harris reports that she has an associate and three staffers—all of whom she has trained to

private criminal defense practice.²⁶⁴ Leonard Hall spent thirty years as an Assistant City Attorney in Olathe, Kansas, handling a variety of criminal and civil matters before opening up his own shop.²⁶⁵

The ADA requirement that telephone companies implement relay systems for deaf callers also proved helpful for deaf lawyers.²⁶⁶ While many deaf lawyers still utilized interpreters for telephone calls, relay services allowed for small firm or solo deaf practitioners to make telephone calls. Relay services also allowed deaf lawyers to make calls when they were not in their offices. For example, Judge Brown uses relay services to communicate with his staff to rule upon motions requiring immediate action when he is outside of his chambers.²⁶⁷

But relay services work only if the recipient cooperates.²⁶⁸ Marsha Taylor recalls frustration when she attempted to make relay calls and the recipients hung up out of ignorance (believing the call was from a telemarketer), or impatience.²⁶⁹ Michael Stein recalls flat-out prejudice:

act as oral interpreters on the telephone and in court. *Id.*; see also SUSAN HARRIS & ASSOCIATES, LLC, <http://srhassoc.com/> (last visited Nov. 5, 2010).

²⁶⁴ See LAW OFFICE OF A. SCOTT HARRISON, <http://harrisonlaw.net/> (last visited Nov. 5, 2010).

²⁶⁵ See E-mail from Leonard Hall to author (Sept. 28, 2010) (on file with author); see also, HALL & GISI LAW OFFICE, LLC, <http://www.hallandgisilaw.com/3401/3422.html> (last visited Nov. 5, 2010).

²⁶⁶ See, e.g., *Profile in Advocacy: Rachel Arfa*, VOLTA VOICES, May/June 2006, at 25. For a more extensive discussion of relay services, see generally Susan J. Bahr, *Ease of Access to Telecommunications Relay Service*, 44 FED. COMM. L.J. 473 (1992).

²⁶⁷ See E-mail from Richard Brown to author (Sept. 1, 2010) (on file with author).

²⁶⁸ Receiving relay calls are not optional. The Department of Justice recently revised its ADA regulations to make clear that public accommodations must accept relay calls from deaf persons. See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 Fed. Reg. 56,236, 56,254 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 36) (revising 28 C.F.R. § 36.303(d)); cf. *United States v. Space Hunters, Inc.*, 2004 U.S. Dist. LEXIS 23699 (S.D.N.Y. Nov. 23, 2004) (rental property violated the federal Fair Housing Act by refusing to accept relay calls from prospective deaf tenants).

²⁶⁹ See E-mail from Marsha Taylor to author (Sept. 2, 2010) (on file with author). Ms. Taylor was especially hurt when one opposing counsel (whom Ms. Taylor considered a personal friend) flat out refused to meet with Ms. Taylor face-to-face in lieu of a telephone call to discuss a case because she did “not have time for the kind of communication[]” Ms. Taylor needed. *Id.* Ms. Taylor says ruefully, “the ADA [cannot] force other people to care.” *Id.* Perhaps not, but bar disciplinary committees can. I would imagine that that most bar associations would not look kindly upon a lawyer who refused to accept a relay call from a deaf lawyer regarding a case. Cf. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-38 (1980) (“A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.”).

“I had a case where the opposing attorney refused to talk to me through relay and said ‘God help us all if we have attorneys who can’t hear.’”²⁷⁰

Some deaf lawyers also found trouble receiving accommodations in courts. Access to the courts for the deaf community is discussed more extensively elsewhere in this special issue.²⁷¹ For present purposes, it will suffice to say that experience has varied from court-to-court in terms of providing accommodations.²⁷²

For example, when Scott Harrison left the public defender’s office to set up his own criminal defense practice in 2006, he was surprised when he was told that the Florida courts would not provide him with CART interpreting. The state took the position that any accommodations were the responsibility of the lawyer’s employer (in Mr. Harrison’s case—himself).²⁷³ When Mr. Harrison pointed out the obvious that as a solo practitioner, he could not afford to sustain the costs of an interpreter at trials, court administrators refused to budge. Mr. Harrison filed suit in federal court, alleging ADA violations against the Florida state courts. The parties eventually settled, and the state—while denying liability—agreed to provide CART interpreting for deaf attorneys and to pay for Mr. Harrison’s legal fees.²⁷⁴

²⁷⁰ See E-mail from Michael Stein to author (Aug. 20, 2010) (on file with author). Stein reports that this incident was the only time another lawyer had refused to accept his relay calls. However, he has been involved in suits against entities that refuse to accept relay calls. See *NAD Says Banks Must Accept Relay Calls*, ST. NEWS SERV., Aug. 24, 2009 (lawsuit alleging a violation of the ADA filed against Wells Fargo Bank for refusing to accept any relay calls).

²⁷¹ See Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927 (2011).

²⁷² See, e.g., E-mail from Howard Rosenblum, *supra* note 161 (“I’ve had my fair share of judges who were skeptical that I was a lawyer or that I was actually deaf. The difficulty with judges continues to this day, and that is an area where I hope to focus some advocacy efforts to improve the accessibility of courts”); see also E-mail from Martha Casserly to author (Sept. 3, 2010) (on file with author) (“One big change in the past ten years is how the courts, while not perfect, are more perceptive, knowledgeable, and willing to assist us in our accommodations. By contrast, in the [1990s], they’d respond with, ‘can’t your employer take care of that?’”); E-mail from Michael Stein, *supra* note 270 (“It’s been my experience with the federal courts that they aren’t familiar with their own policy requiring them to provide auxiliary aids and services for deaf attorneys. Once I send them a copy of their policy, however, they’ve been nothing but great in accommodating me.”). While the ADA does not technically apply to federal courts, see, e.g., *Sheridan v. Michels*, 282 B.R. 79, 92 n.15 (B.A.P. 1st Cir. 2002), the Administrative Office of the United States Courts requires federal courts to provide interpreters to deaf participants in federal court proceedings. See Memorandum from Leonides Ralph Mecham to All Chief Justices, U.S. Cts. (Apr. 12, 1996) (on file with author).

²⁷³ See Jan Pudlow, *State Settles Disability Access Issue Lawsuit*, 34 FLA. B. NEWS, Nov. 15, 2007, at 15.

²⁷⁴ See *id.*; see also Notice of Voluntary Dismissal by Alan Scott Harrison, *Harrison v. Florida*, No. 6:06-cv-01878-PCF/JGG (M.D. Fla. Oct. 27, 2007) (noting parties had reached

Teri Mosier found herself in a similar situation when the Kentucky state courts refused to provide her with an interpreter when she made court appearances.²⁷⁵ Disappointingly, the state mounted a vigorous defense of the decision not to provide Mosier with an interpreter, including that Ms. Mosier lacked standing, that her claims were barred by a statute of limitations, and sovereign immunity. The court rejected every defense proffered by the state,²⁷⁶ and the parties eventually settled with terms comparable to the *Harrison* settlement terms.²⁷⁷

With regard to whether deaf attorneys can ever form an effective organization, attempts have been made by deaf lawyers to organize bar associations. However, such efforts have not been fruitful. In the late 1980s, Leonard Hall established the Legal Network for Deaf and Hard of Hearing Attorneys, which was formed to put deaf lawyers in touch with each other and to put deaf clients with deaf lawyers (as many were serving deaf clients).²⁷⁸ However, organizing proved difficult before the internet facilitated better communications because the signing deaf lawyers would always prefer to meet at National Association for the Deaf conventions, whereas the oral deaf lawyers would always prefer to meet at the Self Help for the Hard of Hearing (today the Hearing Loss Association of America) or the Alexander Graham Bell Association for the Deaf and Hard of Hearing conventions.²⁷⁹ Unfortunately, lack of consensus and logistics proved too difficult to get much meaningful accomplished and Legal Network eventually dissipated when Mr. Hall tired of carrying the organization upon his own shoulders and few other deaf lawyers wanted to share in the work.²⁸⁰

In the 2000s, deaf lawyers formed internet chat groups. These groups led to easier discussions between signing deaf lawyers and oral deaf lawyers nationwide. Attempts were made to form a "Deaf Bar Association." However, the efforts failed because of lack of a clear

settlement). A copy of the October 26, 2007, settlement agreement in the *Harrison* case is on file with the author.

²⁷⁵ *Mosier v. Kentucky*, 675 F. Supp. 2d 693, 695 (E.D. Ky. 2009).

²⁷⁶ *See id.* at 696-701.

²⁷⁷ *See Kentucky to Provide Court Interpreters for Deaf Attorneys*, NAD (Nov. 23, 2010), <http://www.nad.org/news/2010/11/kentucky-provide-court-interpreters-deaf-attorneys>. A copy of the *Mosier* settlement is on file with author.

²⁷⁸ E-mail from Leonard Hall to author (Sept. 28, 2010) (on file with author).

²⁷⁹ *Id.* Mr. Hall would attend both groups' meetings in hopes of forming consensus between the camps. *Id.*

²⁸⁰ *Id.* Mr. Hall attempted to find successors as the Legal Network president, but no attorney would accept the position. *Id.*

mission for the association and because of infighting among the group's principals.²⁸¹

On the other hand, deaf lawyers have made inroads in joining bar associations that focused on the greater disability community. Many deaf lawyers have been involved in the ABA's Commission on Mental and Physical Disability Law and have been active in letting the ABA know of both the deaf community's legal needs as well as the needs of deaf lawyers.²⁸²

In 2009, the Committee on Disability Power & Pride ("CDP&P") was formed to serve the disability community by promoting, planning, coordinating, and publicizing events, projects, resources, and initiatives that strengthen the political power and showcase the pride of people with disabilities. The CDP&P is currently chaired by former Congressman and co-author of the ADA Tony Coelho. Among other things, it seeks to promote lawyers with disabilities in the federal political appointment process. It has already been involved in the appointment of a few deaf lawyers to federal positions, and hopefully will continue to do so in the future.

V. LOOKING TO THE FUTURE

It is true that lawyers are currently facing one of the worst hiring markets in the legal sector. Before the economy crashed in 2007, Judge Tatel offered the optimist's perspective of law firms hiring lawyers with disabilities:

Law firms, I think . . . are increasingly sensitive to this aspect of hiring [lawyers with disabilities]. . . .

The real reason it seems to me for firms to be interested in hiring students with disabilities has nothing to do with either their legal obligations or charity or anything else. . . . Law firms have no trouble finding really good smart young people to be lawyers. . . . But in legal practice you need other kinds of people also. You need people who are tough, you need people who know how to deal with difficult situations, you need people who have good judgments,

²⁸¹ See, e.g., Lockhart, *supra* note 3, at 29 (quoting Bernard Hurwitz as noting that the deaf lawyer internet groups created "a few vows of lasting enmity").

²⁸² Notwithstanding being ahead of the curve in providing interpreters for deaf lawyers (see *supra* note 176 and accompanying text), the ABA has been criticized for being fairly late to the party in recognizing the existence and needs of the greater lawyer disability community. See, e.g., Basas, *supra* note 110, at 41, 105-06 & nn.38, 358.

and there is no better pool of people, I think, for law firms to find than students with disabilities who have gone through law school that way.²⁸³

I fully agree with Judge Tatel's sentiments and that many lawyers with disabilities possess a certain resilience that provides an advantage over their peers.²⁸⁴ I do note, however, Dean Voorhees made essentially the same pitch to law firms and anyone else who would listen throughout the 1970s and 1980s without much success.²⁸⁵

But I do predict that when the economy improves and law firms begin hiring again, more and more deaf lawyers will join law firms. Even if deaf lawyers choose to work elsewhere for whatever reason, the law firm option should be open to them.

Just setting aside the ADA for a moment, much technology is being incorporated into mainstream law practice that removes the obstacles historically preventing deaf lawyers from succeeding in the profession. E-mail, for example, has displaced much communication that in years past would have been conducted over the telephone.²⁸⁶ And it is only a matter of time before tele-video technology becomes standard equipment for the profession. Applications such as Skype and iChat represent the infancy of this technology, but soon people will be corresponding via face-to-face over their computers or PDAs. Deaf lawyers should be able benefit from this technology by lipreading the "caller" through high definition screens.²⁸⁷ Should voice-to-text technology continue to improve and captions appear automatically on

²⁸³ Lunch Address, *supra* note 227, at 854 (comments of Judge David Tatel).

²⁸⁴ Some deaf lawyers were not shy about publicizing their talents. *See, e.g.*, Tucker, SILENCE, *supra* note 19, at 169 ("Due to my powers of concentration and ability to read and write at rapid speed, I generally produce twice as much work as anyone else in the same amount of time, sometimes three times as much. And I'm never frazzled when I have several projects that must be worked on at once."); Pick, *supra* note 19, at 49 (quoting Lowell Myers: "When I'm up against a lawyer who has been up against me before, know what will happen? He'll settle.").

²⁸⁵ *See, e.g.*, Voorhees, *supra* note 100, at 1596 ("The confident manner in which handicapped students have competed with all others during their law school years should dispel the belief that physical handicaps equate with inferior abilities.").

²⁸⁶ *See, e.g.*, Michelle R. Davis, *His Challenge: Linking S.C. to D.C.*, STATE (S.C.), Feb. 27, 1999 (citing Michael Tecklenburg as calling e-mail "the great leveler" for deaf persons).

²⁸⁷ Some deaf lawyers already have identified this as their "dream" technology. *See, e.g.*, E-mail from Melissa Felder, to author (Sept. 27, 2010) (on file with author) ("I'm anxiously awaiting the day when high quality video-conferencing is available for standard use. Because I do so much by lip-reading, this would greatly facilitate my communication. But until that day comes, I'm doing just fine.").

video screens for such calls, then deaf lawyers will truly have gotten beyond telephonic barriers.²⁸⁸

There are other examples of technology becoming standard practice in the legal profession that remove previous barriers to deaf lawyers. Ms. Felder observes that CART interpreting is always utilized at her depositions and trial—even at the request of hearing attorneys:

[Hearing attorneys] find [captioning] useful to refer to the real-time transcript to evaluate how a witness has answered a question or to review which questions they have already asked. Thus, the accommodation that I require in these instances—i.e. captioning—is usually already provided as a matter of course.²⁸⁹

For this reason, I also predict that “access to courtroom” lawsuits like Mr. Harrison’s and Ms. Mosier’s will become increasingly rare. In addition to the precedents established by Mr. Harrison and Ms. Mosier, many courts are actually incorporating accommodations for lawyers with disabilities into the courtroom’s design. For example, Madeline Cohen, a deaf lawyer with the Federal Public Defender’s office in Denver, remarks that her practice became much easier when the U.S. District Court for the District of Colorado’s new courthouse was built in 2002 and incorporated much of the latest technology:

The [new federal courthouse] incorporated real-time screens [i.e., CART] and infrared audio (mainly for translators, but also for audio amplification needs) into all courtrooms. It was and is fantastic. I use the infrared, and do not need to make any advance or special requests. I just walk into the courtroom, grab a headset, and I’m good to go. The judges have been great about remembering to speak directly into the microphones, and will often remind my opponents to do

²⁸⁸ Another “dream” technology would be an “automatic” interpreter for a deaf person to carry around for use in an ad hoc basis when a real interpreter is not available. Alice McGill jokes that she wishes she had a Princess Leia-like hologram that can appear and perform sign language interpreting on demand. See E-mail from Alice McGill, *supra* note 161. She will settle, however, for a voice-to-text PDA that can show what people are saying. *Id.* We may not be far from the latter.

²⁸⁹ E-mail from Melissa Felder, *supra* note 287. At least one lawyer wishes that CART would be provided to judges as a matter of course. See Karen Sloan, *Wisconsin Judge Overcomes Hearing Impairment*, NAT. L.J., Oct. 11, 2010, at 20. The lawyer theorized that Judge Brown asks better questions and gives better answers than his colleagues on the bench because he reads the arguments on the CART screen rather than listens. *Id.*

so, without any prompting from me. I only appear in district court a few times a year now, but it's a great courthouse, [and very] disability-friendly.²⁹⁰

I have seen (although not practiced in) several other courthouses that were either built or extensively renovated in the past decade, and they appear to incorporate the same technology as described above by Ms. Cohen. Such trends will continue to benefit deaf lawyers.

But some problems are of human nature that no law can fix. Many deaf people have difficulty modulating the sound of their voices. Secret or off-record conferences with clients, co-counsel, or the bench during trial that are not intended to be heard by others may pose an issue for deaf lawyers. This is usually done through whispering, and it is sometimes difficult for deaf persons to gauge the appropriate volume level their voices must be to be heard only by the listeners.²⁹¹ Another deaf lawyer who did not want to be identified said that he has been chastised by judges in court for "shouting," when he had no way to realize just how loud he was speaking.

Of course, just because we have the technology and the legal protections to succeed does not mean that success is a certainty. As Mr. Lin points out, as long as reasonable accommodations are provided, nothing in the ADA prevent employers for firing deaf lawyers "for poor work quality, for failure to timely deliver product, for rudeness, for unpleasantness, and, frankly, if they don't like [the lawyer] personally."²⁹² In other words, like any demographic of lawyers, deaf lawyers need to produce to succeed.

VI. CONCLUSION

In 2008, a federal court ruled that the ADA does not require movie theaters to provide captioning access for deaf patrons.²⁹³ So long as the theaters simply let the deaf patrons into the theater like anyone else, there was no "discrimination." The plaintiffs appealed to the Ninth Circuit and sought amici curiae assistance from the deaf community. The community responded with several amici briefs urging the Ninth

²⁹⁰ E-mail from Madeline Cohen to author (Aug. 16, 2010) (on file with author).

²⁹¹ One solution is to simply pass notes to the client or co-counsel. See Pudlow, *supra* note 25, at 25.

²⁹² E-mail from Albert Lin, *supra* note 249. Mr. Lin, who specializes in transactional and tax law, says that he strives to ensure that the revenues that he produces for his firm exceed the costs of his accommodations. *Id.*

²⁹³ *Ariz. ex rel. Goddard v. Harkins Amusement Enters.*, 548 F. Supp. 2d 723, 727-31 (D. Ariz. 2008).

Circuit to reverse the district court and hold that the ADA does indeed require movie theaters to provide captioning access for their feature presentations. At least in part of that effort, the Ninth Circuit reversed the district court.²⁹⁴

No fewer than five deaf lawyers (myself included) were involved in the preparation of those amici briefs. This type of assistance would not have been available prior to the enactment of the ADA. The result was a major victory for the deaf community, and in all candor, for the rest of society as well.

Deaf lawyers have come a long way, but there is still more to be accomplished. Those who have achieved success should be mindful of our history and appreciate that the world in which they have practiced did not always exist for deaf lawyers. And more importantly, they should take all steps to ensure that the paths for future deaf lawyers are even smoother than they were for us.

²⁹⁴ *Ariz. ex rel. Goddard v. Harkins Amusement Enters.*, 603 F.3d 666, 671-72 (9th Cir. 2010). For a more extended discussion of the case, see John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033 (2011).