

FOREWORD

BREAKING DOWN BARRIERS: THE BENEFITS OF A MORE INCLUSIVE LEGAL PROFESSION

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*Intelligence is the ability to adapt to change.*¹

*Only when we eliminate bias and fully include people with
disabilities in our profession will our job be complete.*²

I. PROLOGUE

On August 2, 2017, in a 148-page opinion, the Delaware Supreme Court in *Rauf v. State*³ declared its state’s death penalty sentencing scheme unconstitutional by ruling that it violates the Sixth Amendment right to a fair trial. The issue at the heart of the decision emerged in January 2016 when the United States Supreme Court in *Hurst v. Florida*⁴ struck down Florida’s death penalty scheme because the jury’s decision of life or death was merely advisory. In *Rauf*, the court reasoned that, in light of the Supreme Court’s decision in *Hurst*, “the Sixth Amendment to the United States Constitution require[s] a jury, not a sentencing judge, to find that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . unanimously and beyond a reasonable doubt to comport with federal constitutional standards”⁵ The landmark ruling effectively ended capital punishment in Delaware and had national reverberations.

Having successfully argued the case before the Delaware high court made the experience and accomplishment extremely satisfying. It was a sweet moment; a case that doesn’t come in front of one often, if ever. Part of that overwhelming feeling was not simply predicated on the steep legal hurdles my appellate team faced or the battle that was waged in ultimately persuading the court. Rather, the sense of achievement also derived from the fact that, probabilistically, it was not expected. No, I don’t mean winning the case. I mean having this opportunity as a lawyer with a disability, which statistically is low. You could say that I have grown accustomed or at least comfortable with the notion of low odds. As noted above, my practice focuses primarily on appeals from criminal convictions. My cases are often seen as

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¹ STEPHEN HAWKING, A BRIEF HISTORY OF TIME 14 (1998).

² William T. Robinson III, Former ABA President, Third National Conference on the Employment of Lawyers with Disabilities (May 8, 2012).

³ 145 A.3d 430 (Del. 2016).

⁴ 136 S. Ct. 616 (2016).

⁵ *Rauf*, 145 A.3d at 434.

unwinnable. The deck almost always is stacked against my clients. However, this is a position that I learned to embrace in my own life.

II. THE SYMPOSIUM: ORIGINS AND GOALS

I am honored to have had the opportunity to introduce the *Widener Law Review's* symposium, *Breaking Down Barriers: The Benefits of a More Inclusive Legal Profession*. The impetus for the debut of this symposium topic has its origins in 2012, when the newly founded Delaware State Bar Association (“DSBA”) Committee on Legal Professionals with Disabilities collaborated with the University of Delaware Center for Community Research and Service on a study aimed at understanding the extent to which Delaware attorneys face barriers, impediments or disabilities that hinder their practice of law. As part of the research project, a survey was fielded to the entire DSBA membership to inquire whether they felt that they had some type of condition that hindered their ability to engage in the practice of law. Perhaps more importantly, the survey was also designed to generate recommendations as to how the DSBA could help reduce or eliminate obstacles, and facilitate a greater degree of participation in professional practice among attorneys with disabilities. The survey report recommended several actions the DSBA could take to increase awareness and sensitivity toward Delaware attorneys with disabilities. One of those actions was to offer continuing legal education and programs, such as the law review’s symposium.

Creating and developing this symposium is an important component of the Delaware State Bar Association’s mission, which includes working with its members, the judiciary, and others to promote diversity in our profession. When the DSBA becomes aware of an issue that affects Delaware lawyers, it mobilizes to address it. On the issue of diversity with respect to people with disabilities, the desire for more progress was readily apparent both locally and nationally. With these core values in mind, our committee welcomed the opportunity to partner with the Delaware Law School in conjunction with the *Widener Law Review* to create a positive synergistic result for law students, in addition to future and current members of the bar.

A working group of community partners was established to organize this important program. The visionaries included: The Honorable Andrea L. Rocanelli of the Delaware Superior Court; the Honorable James G. McGiffin, Jr. of the Delaware Family Court; Santino Ceccotti, Esq., Chair, Committee on Legal Professionals with Disabilities; Daniel G. Atkins, Esq., Executive Director, Community Legal Aid Society, Inc.; Melissa R. Allman, Esq., Staff Attorney, Fair Housing Clinic, The John Marshall Law School; Richard K. Herrmann, Esq., Partner, Morris James LLP, Executive Committee, Technology Inn of Court; Ross Flockerzie, Esq., Office of the Public Defender; Timothy L. Hitchings, Esq.; Alice Eakin, Co-Director, Academic

Success, Assistant Professor, Legal Methods at Delaware Law School; Erin Daly, Professor of Law at Delaware Law School; and Robert L. Hayman, Jr., Emeritus Professor of Law at Delaware Law School. The working group determined that rather than focusing on the historical ableism that is well documented, it was more critical and beneficial to concentrate on the recent trend of lawyers with disabilities as an untapped talent pool and one of the most under-represented groups in the legal profession with firsthand insight into a significant potential customer base. Hence, we advanced the following goals: (1) provide a brief history of attitudes towards disability and an overview of federal and state anti-discrimination law; (2) identify biases and preconceptions that marginalize persons with disabilities; (3) identify the benefits of diversity and inclusion in the legal profession; and (4) offer concrete solutions to make the bar more inclusive for people with disabilities and to increase professional opportunities.

III. THE SYMPOSIUM: PROCEEDINGS AND PUBLICATION

The symposium was held at Delaware Law School on April 8, 2016. It began with introductory remarks from former Delaware Governor Jack Markell, and Delaware Law School Dean Rod Smolla. Session I of the symposium provided an introduction to the framework of disability law, including the concept of disability and an overview of federal and state anti-discrimination laws. Session II concentrated on how old attitudes and perceptions are being replaced by new ones in the context of recruiting and supporting lawyers with disabilities. This session explored how the bar can become more inclusive and increase professional opportunities for lawyers with disabilities. Session III featured the remarks of Andrew J. Imparato, Executive Director of the Association of University Centers on Disabilities. Next, Session IV examined the 2013 survey of DSBA members to assess the presence of conditions that hinder their practice of law. Finally, Session V explored the special role of technology in securing access and inclusion for lawyers with disabilities.

The symposium publication consists of three pieces: an article based on the introductory session (Session I) of the conference, and the transcripts of the two panel discussions (Sessions II and V).

In their article, “Disability and the Law: From Theory to Practice,” Daniel Atkins and Robert Hayman provide both a theoretical and legal foundation for the discussion of inclusion.

In Part I of the article, they review the most recent development in the evolution of our understanding of disability. For centuries, they note, the dominant understanding of disability was as a biological phenomenon: disability was located entirely within the corpus—the body or mind—of the individual, and the primary societal goal was the elimination of disability through rehabilitation of the individual. That conception, perhaps benign on

its surface, was in fact quite problematic: its understanding of disability was woefully incomplete, and the desire to eliminate disability too easily devolved into a desire to eliminate people with disabilities.

It all changed, they observe, after the Second World War, when the biological understanding was largely supplanted by a social conception of disability. This conception recognizes the role of society in the construction of disability, locating disability in the gap between an individual's abilities and societal demands. Disability is thus the function of two variables, and the disability gap can therefore be closed not only through the rehabilitation of the individual, but through the modification of societal demands, i.e., through the reconstruction of society.

In Part II of the article, they observe the ways in which the social conception has come to be reflected in American law. Federal disability legislation, they note, now incorporates this understanding in its definition of discrimination: the failure to reconstruct policies and practices—the failure to make accommodations or modifications—is now actionable under each disability statute. They examine in detail the requirements of Title I of the Americans with Disabilities Act, and explore the ways in which it closes the disability gap in employment contexts and reforms exclusionary policies and practices to promote greater inclusion. Finally, they note that the law's embrace of the social conception is not quite complete: a slim majority of the Supreme Court still insists that the Constitution is wedded to the biological conception, as evidenced by the Court's decision in *Board of Trustees v. Garrett*.⁶

Next in the symposium is the transcript of the morning discussion, "Making the Bar More Inclusive." This session aimed to examine how the bar can become more inclusive and increase professional opportunities for lawyers with disabilities. The session was moderated by Ross Flockerzie, Assistant Public Defender at the Delaware Office of the Public Defender, and featured contributions by: Melissa R. Allman, Staff Attorney at the Fair Housing Clinic of the John Marshall Law School in Chicago; Melissa Felder Zappala, Partner at Boies, Schiller & Flexner LLP in Washington, D.C.; Daniel Goldstein, Partner at Brown, Goldstein & Levy LLP in Baltimore and counsel for the National Federation for the Blind; Won Shin, Senior Manager at Ernst & Young in Philadelphia; and Neal Suggs, Vice President and Associate General Counsel at the Microsoft Corporation.

The session initially addressed four topics: the tone and approach necessary to hire individuals with disabilities; the economics of accommodation and inclusion, i.e., the business and social impact of hiring individuals with disabilities; practical advice for recruiting, interviewing, and

⁶ 531 U.S. 356 (2001).

accommodating lawyers with disabilities; and policies and practices for ensuring advancement and opportunities for employees with disabilities.

Daniel Goldstein provides a look into the obstacles that often confront people with disabilities in the interviewing process. Consider, for example, what it's like to run through the maze of small group meetings if you are a person with autism. He cautions, too, against judging applicants with disabilities on their resume alone: "When you're looking at the resume, look for things that the prospective employee has great strengths and talents in, because there is a good chance they were not adequately accommodated in college and law school."

Among the significant strengths often found in employees with disabilities, the panel notes, are uniquely refined problem-solving abilities. "If you have gotten that far along in life as a person with a disability," Daniel Goldstein contends, "you are one hell of a problem solver, because that is really what being a person with disability in this country means." Melissa Allman notes that this insight extends not just to prospective employees, but to existing ones as well: employees with disabilities generally have to work harder than other employees, "because the technology is not there or the accommodations are not there." "I would like to see the day come," she concludes, "when you don't feel like you have to work harder than everybody else and put in more time than everybody else just because you have a disability."

Neal Suggs notes the tendency among employers to expect applicants and employees with disabilities to "assimilate, rather than us learning from them and adapting to what they can bring." He argues for the creation of "a learning culture" and "a culture that accepts people for where they are and what they bring, and ensures that those talents can help your department flourish and grow." Melissa Allman concurs: "If you're not looking at someone for what they can bring to the table, and all you're seeing is their disability and the accommodations that they might need . . . then that is really missing half of the picture." She continues:

I have a friend who once said to me, when I was kind of whining about a situation where I felt I was perceived as a burden due to my disability, that we are all burdens. So I would like to take that phrase, "We are all burdens," and sort of turn it on its head and think about it in a positive context. We are all gifts.

Toward the end of the session, Won Shin starts a discussion of a broader policy question: to what extent do public benefits policies discourage people with disabilities from even attempting to enter the workforce? Disability, he notes, is a significant determinant of poverty, and many people with disabilities "are in a position where they're forced to make a choice between

working and losing their benefits that they receive from the state and federal government.”

The final piece in the symposium is the transcript of the last session of the conference, “The Special Role of Technology.” That session was designed to examine the effects of technology on various aspects of the judicial system, and how technological advances facilitate lawyers with disabilities in the practice of law. The session was led by Richard K. Herrmann, Partner at Morris James LLP in Wilmington, Delaware, and member of the Executive Committee of the Richard K. Herrmann Technology Inn of Court; and featured additional contributions from Melissa Allman, Melissa Felder Zappala, and Daniel Goldstein, as well as a remote appearance by Fredric I. Lederer, Chancellor Professor of Law and Director of the Center for Legal and Court Technology at the College of William & Mary Law School.

The panelists note the remarkable innovations in technology that increase the prospects for access and inclusion for lawyers with disabilities: courtrooms re-designed to accommodate attorneys with mobility impairments; scanning devices (supplemented by court explicators) for lawyers and judges with vision impairments; and assistive listening systems for people with hearing impairments. The panelists also offer fascinating first-hand insights into the benefits offered by the technological advances, but they offer two cautions. First, technological advances for general society sometimes *decrease* access and inclusion: modern office phones, for example, may be less accessible non-visually than the rotary or push-button phones they replaced. Second, too much technology seems designed with a complete indifference to accessibility issues: law practice management software, for example, is largely inaccessible to lawyers with vision impairments, and many websites frustrate screen readers and other accessibility devices.

These are just a few of the highlights of the sessions; be sure to read the entire transcripts. As one audience member observed at the end of the first discussion, “My employment requires me to attend quite a few CLEs. I can’t think of one that has been more interesting, thought provoking or inspiring than what I’ve listened to today.”

IV. CONCLUSION

In 2015, to coincide with the 25th anniversary of the Americans with Disabilities Act, Microsoft’s legal and corporate affairs team launched a study, which found that people with disabilities face unique barriers on the road to becoming a lawyer. To no surprise, the study revealed that for people with disabilities, the breaks in the legal professional pipeline occur early in the education trajectory.⁷ According to the American Bar Association’s

⁷ Brad Smith, *The ADA at 25: Disability Rights and Diversity*, MICROSOFT (July 23, 2015),

(ABA) Commission on Mental and Physical Disability Law most recent statistics, “only 12.3% of working-age persons with disabilities held a Bachelor’s degree or higher, compared to 30.6% of non-disabled persons”⁸ This disparity helps explain why so few persons with disabilities become lawyers. The same ABA report approximates its membership of those with a disability to be just under 7%.⁹ Unfortunately, when they graduate from law school, they also face low employment rates. The Microsoft study found that 47% of people with disabilities who have master’s and professional degrees were employed, compared with 87% of those without disabilities.¹⁰

Despite these somber statistics, this symposium validated that the future is far from bleak. Medical, technological, and attitudinal advances have opened doors and eliminated barriers for individuals interested in pursuing a legal career to whom this avenue was previously closed. Additionally, as Jenny Lay-Flurrie, Microsoft’s Chief Accessibility Officer, expressed, “Disability is a personal journey, and everyone is at their own place on that journey.”¹¹ For me, that journey has been nothing short of spectacular. With the guidance and tutelage of others, I can say that inclusion, that which we all seek, is obtainable.

<https://blogs.microsoft.com/on-the-issues/2015/07/23/the-ada-at-25-disability-rights-and-diversity/#sm.00012cbbki75pde1up022wo97mlic>.

⁸ ABA Commission on Mental and Physical Disability Law, *ABA Disability Statistics Report*, ABA (2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf (last visited Mar. 9, 2017).

⁹ *Id.*

¹⁰ See Smith, *supra* note 7.

¹¹ Melissa Maleske, *Microsoft Turns Diversity Focus to Lawyers with Disabilities*, LAW360 (Aug. 14, 2015, 3:52 PM), <https://www.law360.com/articles/687039/microsoft-turns-diversity-focus-to-lawyers-with-disabilities>.

