ADA 25th Anniversary – The State of the Florida Bar and Courts

And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.

… I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

Remarks of President George Bush at the Signing of the Americans with Disabilities Act, July 26, 1990.

Last month, Florida Supreme Court Chief Justice Jorge Labarga signed a proclamation honoring the 25th anniversary of the enactment of the Americans with Disabilities Act and designated July 2015 as a month of commemoration for the anniversary within Florida's state courts system.

In 1990, the Americans with Disabilities Act was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Since 1990, many more persons with disabilities have entered into the legal profession, but equally as important, the Florida Bar has attempted to create an inclusive profession where more attorneys who have obtained a disability later in life or chose not to disclose their disability were able to stay in the profession and are able to obtain accommodations so as to focus on doing his or her job, rather than focusing on barriers that prevent such lawyers from doing their jobs

In 2004, the Florida Bar recognized persons with disabilities as an element of diversity to be included in the definition of diversity and inclusiveness in the Florida Bar at the First Diversity Symposium. Then Bar President Miles McGrane was committed to increasing representation of and services to its members with disabilities in the Bar. From that symposium, the Bar, with the assistance of Disability Independence Group, engaged in a systematic process to survey and develop focus groups of lawyers with disabilities to identify all barriers - architectural, policy and attitudinal barriers - for persons with disabilities in the legal profession in Florida. Every Florida Bar president since President McGrane has renewed the Bar's continuing dedication to the needs of lawyers with disabilities.

In his June 2006 passing of the gavel address, Chief Justice Lewis vowed to make architectural accessibility of the courts one of his top priorities and drew attention to this issue, declaring, "These artificial barriers must not be in place for Florida's citizens." This vow was carried out when each court facility was surveyed and a plan was developed to eliminate architectural barriers in our state courts. Thereafter, in 2010, the Florida Bar proposed, and the Supreme Court amended, Rule 2.540, Rules of Judicial Administration, to ensure that all participants of services of the courts receive accommodations to have an equal opportunity to participate in programs and services of the courts. This rule was precipitated by a lawyer with a hearing impairment who required an accommodation to represent his

criminal defendants but could not receive an accommodation unless he paid for it himself. This rule transformed an ad hoc process to obtain accommodations into a specialized and formalized process to ensure that all participants with disabilities have full and equal participation in all programs and services of the court without additional cost or burden. Additionally, each court maintained and trained an ADA coordinator who would be able to address disability-related issues.

Further, the Court kept up with technological advancements. By 2009, electronic filing became the new rule. In 2012, e-fling was required to be ADA compliant, which means that persons who are visually impaired could have the same opportunities to read documents with screen reader programs on their computer as other lawyers. The Florida Supreme Court further found that a litigant with a visual impairment had the due process right to receive documents and information in a format that was accessible to that person.

> First, the Due Process Clause of the Fourteenth Amendment and Sixth Amendment to the United States Constitution grant the Petitioner a clear legal right of access to the courts. See *Tennessee v. Lane*, 541 U.S. 509, 523, 529, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). Second, the Fourth District has an indisputable legal duty to provide accommodations to the Petitioner. …. The substantive merit or lack of merit in the Petitioner's underlying claim does not determine the ADA analysis. The Fourth District has refused to provide the Petitioner with an accommodation as mandated by the ADA and the Florida Rules of Judicial Administration. Third, the Petitioner has no remedy available other than to petition this Court for relief. Consequently, the Petitioner has satisfied the requirements for mandamus and we grant the mandamus petition as it pertains to Braille formatted documents.

Gabriele v. State, 99 So. 3d 943 (Fla. 2012).

While the mandate of the ADA has been implemented, it still has far to go before its mission has been accomplished. As our Bar both grows and ages, we need to ensure that the tools are available to ensure that the environment is inclusive for lawyers with disabilities and all barriers are eliminated to a successful practice. Twenty five years after the enactment of the Americans with Disabilities Act, persons with disabilities still face barriers to the legal profession and the legal system. We still have a long way to go.

1. Mental Illness

In February of 2014, the Department of Justice entered a settlement with the Supreme Court of Louisiana prohibiting it from requesting information regarding whether an applicant to the bar suffers from a mental illness, except if the information was related to conduct that would otherwise disqualify the applicant from becoming a lawyer. Notwithstanding the Department of Justice's settlement with Louisiana, the Florida Board of Bar Examiners continues to use mental health questions and evaluations to screen and disqualify potential applicants with disabilities from becoming members of the bar.

For example, many members of the bar with a history of treated mental illness have "conditional" admission and are required to have their mental health provider report to the bar every quarter, and they must pay $75.00 per quarter for that privilege. Those lawyers have difficulty in finding jobs because of their "conditional admission" status. This self-appointed duty to screen for mental illness has a more dramatic effect on law students. I have spoken to many law students that have refused to receive mental

health treatment for fear of being required to submit mental health records or of being subjected to "conditional admission" by the bar.

While this may seem Orwellian, this is the reality of what bar applicants face in the guise of protecting the public. However, there is no established correlation between merely having a mental illness - without any unlawful conduct, and the ability to practice. The Florida Board of Bar Examiners continues to demand disclosure of mental health history and records and screens all applicants for mental health status that is acceptable to them. According to an April Article in the ABA Student Lawyer, *Shedding the Stigma of Mental Illness*, depression rates for persons entering law school are at eight to nine percent, and then the depression rate skyrockets to twenty-seven percent after the first semester, thirty-four percent after two semesters, and forty percent after three years. Because of the stigma attached to mental illness, depression in lawyers is not often treated. Lawyers rank fifth in incidence of suicide by occupation, and *one third* of actively practicing lawyers suffer from depression, alcoholism, or both.

Focusing on actual dangers and conduct rather than stereotypical views relating to persons with *treated* mental illness is the essence of the mandate of the ADA. The existence of mental health eligibility screening by the Florida Board of Bar Examiners, and the imposition of differing standards of admission to lawyers with a mental disability is discrimination without evidence of need and is unlawful. If the Florida Bar attempted to screen existing members of the Bar for mental illness or treatment for mental illness, the ranks of the Bar would be decimated. However, the issue that is more of a threat are those persons who do suffer from mental illness, drug or alcohol addiction and do not receive assistance.

Instead of stigmatizing mental illness, we must work to ensure that lawyers and law students have access to mental health treatment as well as wellness programs to find methods in which to control depression and anxiety caused by the stressors that are part and parcel of our profession. Our Supreme Court must respond to the epidemic of mental illness by forming a committee with mental health professionals, lawyers who have mental disabilities, members of the bench, members of the Florida Board of Bar Examiners and the Florida Bar Board of Governors to develop appropriate questions to ensure that the public is protected from persons who demonstrate behavior that pose a safety to the public, to end stigma against lawyers and applicants to the bar with a history of mental illness, and to encourage psychological wellness and treatment for mental illness.

2. Ensuring that court accommodations are strictly administrative

Since the enactment of Rule 2.540, Florida Rules of Judicial Administration, there has been an unwritten exception to this rule, where the ADA coordinator, who is the administrator who provides accommodation, does not have the authority to control courtroom procedure. While the need for a sign language interpreter is not considered an alteration of courtroom procedure, appearing by telephone would be considered a change of courtroom procedure. For example, if a person is required, due to disability, to attend a court proceeding telephonically or videoconferencing, the attorney or party must file a written motion to the presiding judge as part of the case.

According to the Americans with Disabilities Act, an accommodation does not need to be provided if it is a fundamental alteration in the nature of the court's program or activity. This would include an issue which would deny a criminal defendant the Constitutional right to confront his or her accusers. This should not include appearing by telephone for motion calendar or for an evidentiary hearing, or moving to a more accessible courthouse.

Of course, the danger is that, once the issue of disability is raised in litigation, it becomes subject to argument and evidentiary proof and becomes a corollary and distracting issue in the case. While the bench should work with the ADA coordinator to ensure that the burden to a court is minimized, the nature or extent of a disability and the court accommodation needed should not be subject to the rigors of the adversary process.

3. Ensuring that Courthouses remain accessible for persons with disabilities.

Crumbling courthouses have a greater effect on persons with disabilities than those who do not have disabilities. The Miami-Dade County Courthouse houses a total of forty-one judges and only twenty-three courtrooms with a total caseload of 192,000 cases, forcing delayed access to the judicial system. Judges have been forced to leave their chambers as mold is discovered growing behind walls causing an unprecedented amount of illness. Water intrusion has ruined court files and has made it necessary for employees to wear boots and masks when working on lower floors. The probate division in Miami moved to a different facility to avoid further carbon dioxide exposure.

While this has an effect on the timeliness of hearings for lawyers and litigants without disabilities, it creates untenable work situations for those with breathing difficulties, mobility disabilities and other disabilities who are not able to use court facilities.

4. Ensuring that all rules do not discriminate against persons with disabilities

When the Court ensured that electronic documents are accessible to persons with disabilities in Rule 2.526, Rules of Judicial Administration, it implemented a rule that required court documents to be in compliance with state and federal accessibility requirements. However, when reviewing all policies and procedures, the Bar and the courts should always be aware of the needs of lawyers and litigants with disabilities. For example, in March, the Supreme Court approved the amendments to the Florida Rules for Certification & Regulation of Spoken Language Court Interpreters. However, by limiting the rule to "Spoken Language" court interpreters, it allows courts to obtain sign language interpreters that are not certified.

Lack of qualified interpreters for the deaf community has been a long-standing problem for access to the courts for the deaf. Approximately twenty percent of my current caseload are claims by the deaf

who cannot obtain interpreters for medical treatment, employment, or governmental services. Many lawyers also refuse to provide interpreters for prospective deaf clients. The one place where the lack of effective communication access should not be an issue is the courts. While there are currently very few certified interpreters that are qualified to interpret in a legal situation, the failure to require such a certification provides no incentive for interpreters to increase their skills to meet the needs of the deaf community and the courts.

Conclusion

Persons with disabilities should not be "inspiring" or be required to "overcome" their disability to be a member of the Florida Bar. No other population needs to proffer its superstars to become eligible to be a lawyer. The ADA's intent was to open the door and create a level playing field so anyone who has the intellectual ability and required ethical standards to be able to practice law should be able to do so. As a profession, we need to examine our practice, our rules, and our profession to remove attitudinal barriers and accept each other as equals.