



# A SILENT MINORITY **SPEAKS UP**

By Elizabeth W. Bauer and David M. Stokes

## **FAST FACTS:**

*Individuals with disabilities face problems every day in the legal system.*

*The Open Justice Commission formed a Disabilities Committee to ensure that justice is accessible to all.*

*The committee hired a facilitator to gather and assimilate data into a report.*

*The final report, when issued, will be used to ensure that persons with disabilities will have equal access to the courts, the legal profession, and legal education.*

**S**teve is running late for court again. This morning his busy practice, usually confined to his local courts, finds him covering a motion call for his firm at an unfamiliar court. Racing to make the 9 a.m. cattle call, he weaves and bobs in and out of traffic. Armed with his trusty Mapquest directions downloaded this morning from the Web, he is fairly confident of locating the courthouse. Wheeling into town, he spots the imposing edifice, old, hoary, and located smack dab in the middle of the town. “This thing must’ve been built when God was a child,” he thinks to himself...

...Now, if he can only find an open parking space. He spots one right up front and parks. But his joy is short-lived. He groans as he approaches the building entrance. Stairs, and lots of them! "I'm gonna be late, if I can get in at all," he fumes silently.

After circling the building, Steve finds an entrance into the building around the back, leading him to the ground floor. Approaching the court clerk's office he inquires about the location of the courtroom. "Second floor," a clerk curtly informs him, "but that's going to be a problem, I can see. There's no elevator." You see, Steve uses a wheelchair. "How am I going to get to the courtroom?" asks Steve. "That's not my problem," replies the clerk. Meanwhile, his case is called upstairs.

In a nearby town, Kerri is frantic. She was just visited by a process server, who delivered a complaint for divorce. She expected it, but still it came as a shock. After the initial shock fades, Kerri realizes she must contact an attorney. A quick look in her local yellow pages lists many lawyers. She decides on one who is close to her home. Using the Michigan Relay Center, she contacts David, a solo practitioner fresh out of law school and eager for work. "Hello," she types, "I need a lawyer to handle my divorce. Can we set up an appointment? I'm deaf and will need an interpreter so we can talk."

David is interested in the case but is not sure about this interpreter business. "Sure," he tells her, "you can bring anyone you want to. When is a good time?" Kerri types, "I can make it Friday afternoon. Will you call the interpreter?" David is nonplused. He thinks to himself. Call the interpreter? I don't know any interpreters. "Don't you have a friend or someone who can do that?" says David. Kerri is offended. "I



want to keep my business private. I think you should get a certified interpreter. They don't work for free, you know." David is having second thoughts. "Certified interpreter" sounds expensive. "Well, I don't know where to get one. Any ideas?" Kerri gives him the number of a referral agency. David says, "I usually don't charge for the initial visit, but I'll have to this time, to pay for the interpreter." Now it's Kerri's turn for a second thought. "That doesn't seem fair. Maybe this isn't a good idea. Bye!" Some time later David receives a complaint, naming him as a defendant in an American Disabilities Act suit.<sup>1</sup>

Lisa always dreamed of being a lawyer. Pumped up with the enthusiasm of youth and the idealism of a college student, she sends applications to all the schools in the state. She anxiously awaits word of acceptance. Finally the big day arrives. She is accepted at Big State University Law School, but the admission office wants to meet with her before classes start. Because Lisa has

"How am I going to get  
to the courtroom?" asks Steve.  
"That's not my problem..."

dyslexia, she requests an accommodation. "A what?" the admissions staff responds. "We expect all our students to compete on an equal footing. No one gets special treatment." "I'm not asking for special treatment," Lisa states. "I'm only asking for the support that will enable me to do what other qualified students do. Help with note taking and a few extra minutes for exams will level the learning field. That is a reasonable request. It is readily achievable and will not pose an undue burden on your school." He responds "I've never dealt with

a request like this before. I'll have to talk to the University president and I'll get back with you. It might take a while." Meanwhile, classes begin next week.

Scenarios like these are far too common for individuals with disabilities. They are a fictitious conglomeration of various experiences of individuals with disabilities but still represent some of the problems people with disabilities face every day with the legal system.

In 1998, the State Bar of Michigan Board of Commissioners created the State Bar of Michigan Open Justice Commission (OJC) to further implement recommendations made in reports from 1989 by Task Forces on Gender and Racial/Ethnic Issues in the Courts and the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession. The OJC is charged with the mission of raising awareness of open justice issues that adversely affect many minority groups, with the goal of reducing or eliminating discrimination within the justice system against these groups. Since the issuance of the task force reports noted above, the disability community has benefited from significant legal recognition addressing inequities in society as a whole. Because of these developments, the OJC decided to include, for the first time, a committee devoted solely to issues affecting individuals with disabilities.

The Disabilities Committee is charged with the broad mission to identify the needs of persons with disabilities in using the justice system. Further, that knowledge must be disseminated to members of the bar, the judiciary, and the public. The definition of the "justice system" is broad and includes the court system, the legal profession, legal education, admission to the bar, a client's access to attorneys, and accommodations for attorneys and court users with disabilities.

*Continued on page 48*

## What's the Score: the LSAT and the Blind

*By Naseem Stecker*

It takes perseverance, tenacity, energy, and financial resources to battle the status quo. For Farmington Hills lawyer Richard Bernstein, adversity also features prominently in this scenario. Blind since birth, he found it difficult to get into a good law school without taking the mandatory Law School Admission Test (LSAT), which he says puts blind applicants at a distinct disadvantage.



**Richard Bernstein**

"It used to be that law schools would waive the LSAT for the blind, but this is no longer the case. I had to fight very hard to get it done," Bernstein said. "It was a significant battle and I almost did not go to law school because of the LSAT. I don't know how many disabled people are affected. So many are intimidated by the process that they don't even bother to take the first step."

A 1999 graduate of Northwestern University's law school, he was granted a waiver from the LSAT based on his academic record, extracurricular activities, and strong recommendations. Described as an "exceptional and extraordinary student" Bernstein, who now devotes 50 percent of his practice to *pro bono* cases, is an impassioned advocate for his beliefs. He has appeared on a CBS news show in Detroit to describe his struggle.

"Everyone has adversity in their lives—adversity is a tremendous thing. It's a blessing that teaches you to look at a situation from another person's shoes," he said.

In this spirit, Bernstein is proposing that schools make the LSAT testing optional rather than mandatory for legally blind students. He maintains that many visually impaired students are under the impression that there is no option other than taking the LSAT. Law school applications in fact require that students complete the LSAT for their applications to be processed. But Bernstein warns that the decision to complete the LSAT can be damaging to blind students' law school prospects, even if appropriate test-taking accommodations are granted.

"There are lots of people like myself who are unable to complete the LSAT. They can't perform and do logic games that require charts and diagrams and graphs," he said. "If we keep going in this direction, we'll have a situation in which our lawyers are determined by LSAT scores. It's a ridiculous system and we need to re-examine it."

The Law School Admission Test is a standardized test and is administered by the Law School Admissions Council—a nonprofit corporation

whose members are 197 law schools in the United States and Canada. The test is made up of four 45-minute multiple choice sections (one reading comprehension section, one analytical reasoning section and two logical reasoning sections) as well as one 30-minute writing sample. The aim is to measure skills that are considered essential to a successful legal education. These include the ability to read and comprehend complex text, managing and organizing information, and processing information to reach conclusions. The score scale for the LSAT is 120 to 180. Typically, the LSAT score is combined with the undergraduate GPA in a calculation designed to measure the student's ability to succeed. Each school tends to use the LSAT and GPA information differently.

Joan Van Tol, corporate counsel for the Law School Admissions Council, said the LSAC "provides access to people who have documented the existence of a disability that substantially limits them from taking the LSAT under standard conditions." LSAC figures show that during the last test year (June 1999–February 2000) 155 people claiming visual impairment requested accommodated testing. During the previous year there were 157 requests. Depending on the nature of the disability, the LSAC provides accommodations that include Braille, audiocassettes, the use of a reader, a wheel-chair accessible test center, extra rest time, and additional testing time. For students who require extra time, the LSAC also sends a statement with their report advising the relevant law school to interpret the score with sensitivity and flexibility.

Nancy Marshall, information officer for the University of Michigan Law School, said accreditation standards require law schools to test all applicants and if the LSAT is not used, the school must establish that it is using an acceptable alternative.

"Yes, the students grade point average is important up to a point, however we

do have students who are not in the top numbers because we also look at their extracurricular and employment history," she said. "We also place a great deal of emphasis on the applicant's personal statement and letters of recommendation."

One of the top law schools in the nation, the University of Michigan has 10 applications for every slot available. The law school admissions policy has been attacked by two class action suits challenging the university's use of race in the admissions process. Marshall points out that it is precisely the university's policy of looking at the total picture that is the issue in the case. "We look very carefully at all pieces of the application. Other things being equal, a disability would enhance someone's chances of getting in."

John Meixner, a philosophy professor at Central Michigan University who advises pre-law students, said the LSAT tends to be a good predictor of how students do in the first year of law school. However, "there are plenty of exceptions and individual law schools realize that. I don't think a poor LSAT score would necessarily rule out students' chances of getting into a good law school."

Like many other schools, Northwestern University in Evanston Illinois, where Bernstein attended law school, considers the LSAT a very necessary requirement, although the school also takes into account oral and written communication skills, extra curricular activities, leadership, and work experience as well as career goals.

"There isn't a set policy for blind applicants," said Mary Beth Busby, Director of Admissions since 1996. However, since it's a private institution with a smaller entering class, the university can review things case by case.

"We are one of the very few universities in this country that conducts a unique interviewing program as part of the applications process. This allows us to find out about other aspects of the students background beyond the LSAT and the GPA," she said. Busby added that it's rare to get a blind applicant and that she has not come across one in the last three years.

Northwestern University Professor Steven Lubet, who is a specialist in legal ethics said that under appropriate circumstances, schools should continue to waive the LSAT requirement for blind students. In his opinion, it is "impossible to use the test in a way that would give you an accurate assessment of a blind students' capabilities and it is not a particularly useful tool for measuring people." According to Lubet, while the LSAT tests a student's literate facility with language it cannot measure tenacity, diligence, creativity, open-mindedness, curiosity, empathy, and intelligence—all qualities essential for a good lawyer.

Lubet's view is that optional testing as advocated by Bernstein is not something that is going to happen soon because of the influential rankings of law schools by *U.S. News and World Report*. "A prime criterion in these rankings is the median LSAT score. So the first law school to stop the LSAT would be committing rankings suicide. I'm not saying that's good but it is an undeniable reality." ♦

*Naseem Stecker is a staff writer for the Michigan Bar Journal.*

*Continued from page 46*

Hon. Paul S. Teranes, presiding judge, Civil Division, 3rd Circuit Court and chair of the Disabilities Committee, captured the need for the committee:

*The members of the Disabilities Committee believe that for too long people with disabilities have been the silent minority. They are often required to respond to stereotypical attitudes about their abilities and face physical barriers which prevent their full participation in the judicial process.*

Three individuals familiar with disability issues were selected to become members of the OJC and spearhead the Disabilities Committee: Judge Paul S. Teranes, and attorneys Marsha Lynn Tuck and Gina Torielli. These members then invited other attorneys and leaders in the disability community, including individuals with disabilities, to serve on the committee to advise them. The committee members bring a wealth of experience with a wide variety of disabilities. The committee members began meeting in December 1998.

## SUMMARY OF MISSION AND GOALS

Since its inception, the Disabilities Committee has fine-tuned its mission and goals and has set forth a new mission statement:

*To develop a report with recommendations to the Open Justice Commission which identifies the barriers to access of the legal system (court houses, courtrooms, law offices/firms, law schools and the legal process) and needed accommodations on behalf of persons with disabilities. This report will contain a baseline of information and data which originates from both outside studies on this issue and from a survey of representative individuals in the state of Michigan.*

## PROJECTS OF THE COMMITTEE

The projects of the Disabilities Committee are as:

- Gather information from studies and surveys completed by the State Court Administrative Office, State Bar of Michigan, and organizations and bars of other states concerning access of persons with disabilities to the justice system.
- Develop a questionnaire for the public and attorneys concerning problems and needs of persons with disabilities when dealing with the justice system.
- Disseminate information to attorneys, judicial personnel, and the public concerning the available accommodations and needs of persons with disabilities when dealing with the justice system.
- Increase awareness among attorneys, legal educators and persons in the judicial system of the needs of persons with disabilities.

## ACTIVITIES COMPLETED

The Disabilities Committee has made significant progress in attaining some of its goals. During the past year, the committee has employed the services of a consultant to assist it in conducting research and developing a questionnaire for persons with disabilities and persons in the court system, legal profession, and legal education field who deal with persons with disabilities.

In the beginning, the Disabilities Committee had three subcommittees focusing on the courts, the legal profession and legal education. The court subcommittee's primary duties were to seek out and investigate previous studies that had been conducted concerning the court process and persons with disabilities in the court process. This included litigants, jurors, court personnel, and witnesses who had both physical and mental disabilities. Another subcommittee dealt with the legal profession and persons with disabilities. This included attorneys as well as clients who had physical or mental disabilities. The last subcommittee dealt with persons with disabilities in the law school environment and the process of being admitted to the bar. After the work of the subcommittees had been completed, it was time to work as a single committee to further develop its mission and goals.

In October 1999, the committee decided that, to determine the status of persons with disabilities in the courts, legal profession, and areas of legal education in the state of Michigan, and to develop a report including the committee's findings, recommendations, and methods of implementing those recommendations, it would be necessary to use the services of a facilitator. The committee was looking for a person or firm who had experience in gathering data, assimilating that data into a report with recommendations, and developing a program to implement those recommendations. Several members of the committee recommended Michael Mulvihill of HealthDesign Consultants of Ann Arbor. Mulvihill had done work for committees of the State Bar in the past, and those committees were pleased with his work.

The first part of the project was to gather information from the various Michigan law schools concerning their policies toward students with both physical and cognitive disabilities. Students with disabilities, both presently in



law school and recently graduated, were interviewed to obtain their views of law school policies toward students with disabilities. In early 2000, the committee felt that sufficient information had been gathered concerning the practices of the law schools in Michigan for students with disabilities and the process of admission to the bar for persons with disabilities.

Law students from the University of Detroit–Mercy Law School and the Univer-

sity of Michigan Law School began assisting Mulvihill in gathering information. Circuit courts were selected ranging from large courts, such as Wayne County Circuit to medium courts, such as Washtenaw County Circuit, to small courts, such as Barry County Circuit, as well as varying-sized district and probate courts. Mulvihill contacted designated employees of the various courts to seek information concerning the availability of access and accommodations for persons with disabilities involved in the court system, as well as their progress in compliance with the ADA.

Members of the committee assisted Mulvihill in conducting these interviews and making on-site visits to several courthouses in the state of Michigan. Several centers for independent living were contacted by members of the committee to enlist their services to conduct on-site visits to various courthouses to determine the amount of compliance with the ADA. Mulvihill also met with focus groups of persons with disabilities who have been involved in the court system. Focus groups are an efficient and relatively inexpensive method of gathering information.

At the request of the Disabilities Committee, the State Bar approved a question on the State Bar dues notice that asked if any member of the State Bar had a disability. In April 2000, this information was compiled and given to the Disabilities Committee by the OJC. A total of 253 attorneys responded to the inquiry, indicating a variety of disabilities, both physical and cognitive.

This information afforded the Disabilities Committee an excellent sampling to obtain information concerning attorneys with disabilities. A questionnaire was drafted by Mulvihill and was mailed to each of the attorneys who indicated that the State Bar dues notice that he or she had a disability. This ques-

tionnaire was mailed out in early June and, as of this writing, returns are still coming in. This information will be valuable in identifying access barriers for members of the State Bar of Michigan.

Besides gathering information from individual attorneys, Mulvihill has interviewed the managing partners of several large law firms to

gather information concerning the policies of large law firms when dealing with attorneys, employees, and clients with disabilities. The committee continues to gather information concerning attorneys and clients with disabilities. Studies in this area have been conducted by various groups including the American Bar Association.

While gathering the necessary data, the committee has also been discussing the compilation of its final report. All committee members are dedicated to a final report, substantiated by facts, with recommendations to be presented to the OJC, so that persons with disabilities will have equal access to the courts, the legal profession, and legal education. The committee is also dedicated to seeing that its recommendations are implemented. It is the

“We expect all our students  
to compete on an equal footing.  
No one gets special treatment.”

As it would be too large a task to survey every court in the state of Michigan, the

committee's view that its work in the future will be directed primarily at implementation of the recommendations.

## STRATEGIES

The State Court Administrative Office (SCAO) has long supported initiatives targeted at the disability community. Model policies exist in a limited number of courts across Michigan, as well as in the country as a whole. The advent of the daily *e-Journal* from the State Bar prompted the committee to request a bulletin through this medium to all subscribers, apprising Bar members of the existence of SCAO Form MC 70, which is used to request a needed accommodation in court.

Another strategy to obtain information on potential issues is to consult the users of the system. Individuals with disabilities will readily explain the best way to accommodate their disability. Many advocacy organizations exist to provide help in determining an accommodation.

Current legislation, such as the ADA, 42 USC 12101 *et seq.*, the Rehabilitation Act of 1973, 29 USC 791 *et seq.*, the Michigan Persons with Disabilities Civil Rights Act MCL 37.1101, and other laws, already provides for a right of access to our public services, such as the court houses, as well as private attorneys' offices. If we applied these laws to the three scenarios that began this article, they could each result in the requested accommodation being provided.

There is no guarantee of success, however, because this area of the law is being closely scrutinized. The ADA is under serious attack in the appellate courts. This term, the United States Supreme Court granted certiorari to consider the case of

*Alabama v Garrett*, 120 S Ct 1669, 2000 US Lexis 2531, 146 L Ed 2d 479, 68 USLW 3654 (2000), where the state is raising an 11th Amendment immunity defense against enforcement of the ADA. This decision, expected in early 2001, will be crucial in determining the responsibilities of state and local governments. Recent case law from the 6th Circuit, also considering an 11th Amendment challenge, calls into question the application of the ADA to state and local governments in Michigan. See *Popovich v Cuyahoga County Court of Common Pleas*, 2000 Fed App 0330 (6th Cir). Despite these serious challenges, the committee is committed to access in the justice system for individuals with disabilities.

## CONCLUSION

The expected accomplishments of this committee include raising the awareness of the Bar to disability issues in general by making practical suggestions that educators, employers, and court personnel can adopt to increase access for individuals with disabilities to the profession and the legal process.

The committee is keenly aware that a description of the problem is only the beginning of reaching our goals. Recommendations may be thoroughly researched, succinctly stated and elegantly presented but, without a meaningful implementation plan, they are doomed to sit on a shelf collecting dust. Part of the impetus of the entire OJC is to integrate into everyday practice some of the findings made a decade ago. The Disabilities Committee is strongly committed to being action-oriented. It is our hope that members of the Bar, by implementing our recommendations, will open the courthouse door and truly provide justice for all. ♦

*Elizabeth W. Bauer is the executive director, Michigan Protection and Advocacy Service, Inc. She graduated from Mount Holyoke College with a BA and received her MA degree from The Ohio State University in Education for Exceptional Children. She was a doctoral student in Education Administration at Michigan State University, a teacher consultant in special education for the Pontiac School District, and prior to her current position, held several administrative positions in the Michigan Department of Mental Health.*

*David M. Stokes is the advisor for the Office of Disability Resources at Madonna University. Prior to this position he worked as a staff attorney for Michigan Protection & Advocacy Service, Inc. representing individuals with disabilities in a variety of civil rights matters. He is a graduate of Michigan State University (BS), the University of Detroit School of Law (JD cum laude) and Madonna University (AA) where he is an adjunct professor for the Sign Language Studies Department.*

## FOOTNOTE

1. A lawyer's office is considered a public accommodation and the lawyer has a duty to provide auxiliary aids and services to a person with a disability. 42 USC 12181(7)(F) and 42 USC 12182(b)(2)(a)(iii). A person who is deaf is entitled to effective communication, which can include using a sign language interpreter. See 28 CFR 36.303 App B and "The Accessible Law Office," *Michigan Bar Journal*, May 1996, Vol 75, No 5, for more detail