EMPLOYMENT DISCRIMINATION LITIGATION
UNDER THE ADA FROM THE PERSPECTIVE OF THE
POOR: CAN THE PROMISE OF TITLE I BE FULFILLED
FOR LOW-INCOME WORKERS IN THE NEXT DECADE?

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TABLE OF CONTENTS

INTRODUCTION ................................................................. 346
I. THE ADA IS NOT SELF-EXECUTING ...................................... 353
II. OUTCOME DATA IN TITLE I LITIGATION ............................. 359
    A. The National Study .................................................. 362
    B. The Eastern District of Pennsylvania ............................ 365
III. ARE THE DISABLED POOR PROTECTING THEIR RIGHTS UNDER
     THE ADA? .............................................................. 375
    A. In Forma Pauperis Status ......................................... 376
    B. Lawyers Representing the Poor .................................... 376
    C. Employment Positions at Issue .................................... 384
IV. EEOC ENFORCEMENT OF TITLE I PROTECTIONS .................... 385
    A. Administrative Enforcement ....................................... 385
    B. Litigation ............................................................ 387
V. IMPLICATIONS FOR WELFARE REFORM ............................. 388
CONCLUSION AND SUGGESTIONS FOR CHANGE .......................... 389

* Practice Associate Professor of Law, University of Pennsylvania Law School. I would like to express my sincere thanks and deep appreciation to my research assistant, Jason Leckerman, an enormously talented and thoughtful law student, whose commitment, hard work, and sense of humor not only made this article possible, but also a great deal of fun. I am also thankful for the assistance of another excellent law student, Courtney Phillips, who jumped in at a moment's notice to assist with court docket reviews. Finally, I would like to acknowledge the continuing efforts of a very talented employment lawyer, Lorrie McKinley, who toils each day to bring justice to victims of disability discrimination. If the promises of Title I are to be kept for low-income people with disabilities, it will be because of dedicated and compassionate lawyers like her.
INTRODUCTION

The tenth anniversary of the Americans with Disabilities Act of 1990 (ADA) provides an important opportunity to assess the nation’s progress in combating disability discrimination under sweeping legislation often referred to as “the most important and comprehensive civil rights enactment since the Civil Rights Act of 1964.” After two years of debate, negotiation and compromise, Congress adopted the ADA in order to end discrimination, ensure equality of opportunity, and promote economic self-sufficiency for people with disabilities.

Discrimination against the disabled occupies a dark chapter in American history. For many years, the nation hid the disabled from public view and confined them to institutions where they were subjected to inhumane and horrific conditions. When confronted up close, American society pitied the disabled, demeaned their worth, and employed the rule of law to restrain their integration into mainstream society. Some states prohibited people with certain disabilities to marry and forcibly sterilized others. A Chicago ordinance even made it a crime for anyone who was “in any way deformed so as to be an unsightly or disgusting object” to be exposed to “public view.”


4. In the early 1970s, reporter Geraldo Rivera, through a series of television reports, focused national attention on the inhumane conditions at the New York state institution at Willowbrook. See John W. Party, Mental and Physical Disability Rights: The Formative Years and Future Prospects, 20 MENTAL & PHYSICAL DISABILITY L. REP. 627, 627 (1996). The Willowbrook State School for the Mentally Retarded had 43 buildings and a resident population of 4,727 in 1972. New York State Ass’n for Retarded Children, Inc., v. Rockefeller, 357 F. Supp. 752, 755 (E.D.N.Y. 1973). Most of its residents were profoundly or severely retarded, and “for the most part confined behind locked gates” without having the ability to meaningfully waive their right of freedom. See id. at 764. The court found that institutional conditions were “inhumane,” the institution had failed to protect the physical safety of its residents, physical “conditions [were] hazardous to the health, safety and sanity of the residents,” and the institution failed to provide adequate staff to attend to the needs of profoundly or severely retarded residents. See id. at 755-56, 768, 770.


6. See Burgdorf & Burgdorf, supra note 5, at 863. The Chicago Municipal Code provided:

No person who is diseased, maimed, mutilated or in any way deformed so as to be an
Discrimination against the disabled is not confined to the distant past. In the 1980s, the National Council on Disability, a federal agency consisting of fifteen persons appointed by President Ronald Reagan, documented “the distressing reality that discrimination against persons with disabilities in employment, public accommodations, housing, transportation, communications, and public services [was] still substantial and pervasive. . . .” The Council concluded that the problem of discrimination was a “major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities.”

The organized struggle to advocate for the interests of the disabled began more than a century ago, but gained increasing force in the 1960s when persons with disabilities began to view themselves as oppressed minorities and demanded their constitutional rights. The disabled began to speak for themselves through grassroots movements, demanding an end to the paternalistic attitudes that oppressed them. Professor Bryan calls these the “staging years” of the disability rights movement, comparing it to the 1950s which served as the staging years for the civil rights movement, when citizens actively participated in marches and sit-ins to force integration. Yet, even as the nation made progress in remediying race- and gender-based barriers that separated millions from achieving their full promise in American life, the disabled were shunned. Beginning in the early 1970s, disability rights advocates turned to the courts in an attempt to reverse historical segregation of retarded children in public schools and to challenge conditions of confinement for mentally disabled individuals in state institutions. Disabled adults and children who had been largely excluded from mainstream life and kept from public view began to see the legal system as a means of remediying gross imbalances in political and social power that prevented them from securing

unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

8. See id.
9. See PELKA, supra note 5, at xi (describing organizing by the National Association of the Deaf, the League of the Physically Handicapped, the National Federation of the Blind, the American Federation of the Physically Handicapped, and the Paralyzed Veterans of America).
10. See WILLIE V. BRYAN, IN SEARCH OF FREEDOM 28-30 (1996).
11. See id. at 31.
12. See id.
the fruits of American life. Once the nation witnessed the inhumane treatment of the disabled in state institutions, such as Willowbrook State School for the Mentally Retarded in New York State, conditions became ripe for change.15

It is in this decade that a strong foundation for the ADA was established with the passage of the Rehabilitation Act of 197316 (Rehabilitation Act). Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities in programs or activities of recipients of federal financial assistance.17 With this important legislation, Congress acknowledged that the greatest obstacles to achieving economic and social equality for people with disabilities were not their disabilities, but rather societal prejudices and ignorance based upon deeply rooted stereotypes.18 Section 504 “viewed people with a disability as a class,” separated in part by their types of disabilities, but united as victims of unwarranted and illegal discrimination.19 Disability jurisprudence under the Rehabilitation Act soon highlighted the need to move beyond the limited classification of “covered entities” identified by the Rehabilitation Act, and to expand legal protections to all aspects of American life, especially private employment.20 As the 1980s unfolded, the need for comprehensive legislation became increasingly evident, just as the nation had previously recognized that it needed a civil rights act and a voting rights act to achieve the promise of equal justice for racial minorities.21 Accordingly,

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15. See Parry, supra note 4, at 627.
17. See 29 U.S.C. § 794. See also BRYAN, supra note 10, at 54.
18. See BRYAN, supra note 10, at 54.
19. See id. at 54-55.
20. See, e.g., School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that a teacher with tuberculosis was protected from discrimination by the Rehabilitation Act); Taylor v. U.S. Postal Serv., 946 F.2d 1214 (6th Cir. 1991) (holding that an unsuccessful applicant for letter carrier or distribution clerk was regarded as handicapped under the Rehabilitation Act because of his back and knee injuries). See also Thomlison v. City of Omaha, 63 F.3d 736 (8th Cir. 1995) (holding that city intentionally violated the Rehabilitation Act and must reinstate a disabled firefighter unless she did not satisfy the bona fide job requirements). In Thomlison, it was presumed that the plaintiff remained qualified, and the employer had the burden of proving that she was not qualified and could not become qualified within a reasonable time. See id. at 790.
21. Senator Harkin explained:

People with disabilities, like racial and ethnic minorities and women, are entitled to obtain a job, enter a restaurant or hotel, ride a bus, listen to and watch TV, use the telephone, and use public services free from invidious discrimination and policies that exclude them solely on the basis of their disability. . . .

Almost a quarter of a century ago Congress took the historic step of passing the Civil Rights Act of 1964 which, among other things, bars discrimination against persons on the basis of race, color and national origin by recipients of Federal aid and in such areas as employment and public accommodations. Americans with disabilities were not protected by this landmark legislation.

the Americans with Disabilities Act is sometimes referred to as "the Emancipation Proclamation for persons with disabilities."22

There is substantial legislative history detailing the passage of the ADA.23 As a major civil rights pronouncement, Congress intended to add disability to the list of protected criteria, along with race, color, national origin, religion, sex, and age. Disabled Americans were finally to be brought into the fold—on equal terms—in employment, government services and public accommodations. Disability advocates knew that integration in the face of historical discrimination and hostility would not be easy or instant, but they expressed optimism that it would succeed where state laws had failed to end "pervasive problems of discrimination."24

In adopting the ADA, Congress explicitly acknowledged that disabled individuals were a "discrete and insular minority"25 who were "relegated to positions of political powerlessness in our society,"26 and who continued to be subjected to pervasive discrimination in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."27 With comprehensive civil rights legislation on their side, disabled persons could finally envision a day when they too would be able to participate fully in society. They welcomed the time, in the words of one disability advocate, when "the whole idea of integration in employment and education...[would] seem perfectly natural, where it really doesn't now."28 Upon signing the bill into law, President George Bush proudly told the nation that the ADA "presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."29

In the ADA's statement of findings and purpose, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older."30 In 1990, 13.5 percent of all Americans lived below the poverty line.31 If the poor occupied a proportionate share of the disability popula-

22. Bryan, supra note 10, at 68 (internal quotation marks omitted).
23. See CIS Index, supra note 3, at 68-77.
26. Id.
31. See U.S. Census, Report: Poverty in the United States 23 (1990). In communities of color, this percentage was substantially higher with 31.9% of African-Americans and 28.1% of Hispanics living in poverty. See id. See also America's Poor Showing, Newsweek, Oct. 18, 1993, at 44.
tion, one would expect that approximately six million Americans with disabilities were impoverished at the start of the decade. Demographic research conducted prior to the passage of the ADA, however, reveals that people with disabilities related to their work had lower incomes than those with no disabilities. As a result, almost three out of every ten individuals with work disabilities, or almost 30 percent, lived below the poverty line. In 1988, 45 percent of families headed by a person with a disability lived in poverty. Individuals with severe disabilities were unemployed at the rate of 87.7 percent, while individuals with less severe disabilities were unemployed at the rate of 35.3 percent. In 1986, 40 percent of all adults with disabilities did not finish high school, three times more than the rate of non-disabled individuals. These statistics prompted then-Vice President George Bush to declare "that disabled people are the poorest, least educated and largest minority in America."

After almost a decade of life under the ADA, during which the nation has enjoyed sustained economic growth and record low unemployment levels, the disabled are still disproportionately poor. Although many employers find it difficult to secure sufficient numbers of workers, including entry level or low-skilled positions, only 29 percent of persons with disabilities between the ages of 18 and 64 are employed full or part time, compared with 79 percent of non-disabled Americans. This actually represents a 4 percent decline from the 33 percent of persons with disabilities who were employed in 1986.

Perhaps most disturbing is the finding that "over 72 percent of people

32. See Harkin Statement, supra note 7, at 8506 (discussing 1986 Harris survey). This compares with only one out of ten people without work disabilities.
33. See Poverty Trends, 1980-88: Changes in Family Composition and Income Sources Among the Poor, Testimony before the Subcomm. on Human Resources, HR Comm. on Ways and Means (statement of Richard L. Linster), cited in Bob Dole, Are We Keeping America's Promises to People with Disabilities—Commentary on Blanck, 79 IOWA L. REV. 925, 934 (1994).
35. See National Organization on Disability, Survey Program on Participation and Attitudes: Executive Summary [hereinafter NOD Survey] (visited Mar. 17, 2000)-http://www.nod.org/press survey.html>. The poll was commissioned by the National Organization on Disability (NOD) in cooperation with Louis Harris & Associates. See id. ("This survey is the first such national poll taken by Harris in cooperation with N.O.D. since 1994, and the third conducted by Harris since 1986.").
40. See NOD Survey, supra note 35.
41. See id.
with disabilities out of the work force want to work.” Thus, despite record low unemployment, people with disabilities are unable to secure employment. This is compounded by low educational attainment levels, as adults with disabilities are four times more likely than those without disabilities to have less than a ninth-grade education. In short, people with disabilities are poor, powerless and “[b]y almost any definition . . . uniquely underprivileged and disadvantaged.”

Employment represents a significant exitway from poverty for millions of individuals with disabilities and a much needed gateway to achieving independent living, especially for the mentally disabled. Work is such an integral part of life, and has such a large part in one’s self-worth and affirmation, that some believe work defines who we are. While successful employees regularly identify themselves by their occupational titles, “[n]ot working is perhaps the truest definition of what it means to be disabled . . . .” This is why the disabled poor may have the largest stake in ensuring that the ADA achieves its stated purpose of “provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” The importance of sustained gainful employment to the disabled community cannot be overstated.

Congress understood this need when it divided the ADA into several titles addressing disability discrimination, but chose as its very first title a series of comprehensive prohibitions on discrimination in the workplace. A commemoration of the tenth anniversary of the ADA, therefore, should examine closely the effectiveness of the ADA in combating employment discrimination on the basis of disability, not only for highly educated and skilled employees, but perhaps most importantly, for job applicants and marginal workers at the other end of the financial spectrum who seek to overcome poverty and disability. Unfortunately, the poor are frequently invisible in the nation’s fight against disability discrimination in the workplace. Instead, ju-

42. See id.
43. See id.
44. Harkins Statement, supra note 7, at 8506.
46. See BRYAN, supra note 10, at 42-43.
47. See id.
48. Harkins Statement, supra note 7, at 8506 (citing the finding of Louis Harris & Assoc., The ICD Survey of Disabled Americans: Bringing Disabled American Into the Mainstream (1986)).
dicial resources, academic debate, and media attention focus largely on disabil-
ity discrimination encountered by lawyers, doctors, airline pilots, and even professional golfers. The disabled poor remain largely forgotten.

This article examines how the disabled poor fare in employment discrimination litigation under the ADA. Part I illustrates that the ADA, similar to other civil rights laws, is not self-executing, and that litigation is an important and necessary tool to remedy deeply rooted discrimination.

Part II reviews a national study of reported Title I employment cases finding that defendants win in 92.1 percent of all adjudicated cases. These findings are then compared with the findings of a more detailed review of reported decisions of the United States District Court for the Eastern District of Pennsylvania, a politically moderate judicial district that is home to a large disabled community. This article demonstrates that case outcomes in reported decisions of the Eastern District of Pennsylvania conform closely to national findings. Because reported decisions alone do not account for the larger universe of filed cases that reach judicial outcomes, Part II discusses an empirical study conducted by the author of every Title I case filed in the Eastern District of Pennsylvania during a three-year period. The findings are quite disturbing—plaintiffs prevail in only 2.7 percent of the cases that result in dispositive judicial rulings. So that preliminary conclusions can be drawn about case outcomes generally in ADA litigation, these results are then compared to norms reported in other types of civil litigation, with special attention focused on low-income people with disabilities. Studies of adjudicated case outcomes rarely address the number or quality of negotiated settlements that comprise a large part of litigation and this part also reports on efforts to learn of the settlement terms in a small sample of the cases.

In Part III this article examines whether the poor are participants in court litigation to remedy disability discrimination in the workplace. This


52. See Menkowitz v. Pottstown Mem. Med. Ctr., 154 F.3d 113, 123 (3d Cir. 1998) (holding that a doctor with staff privileges, although not covered by Title I, has a cause of action under Title III for a hospital's failure to accommodate his attention deficit disorder); Judice v. Hosp. Serv. Dist. No. 1, 919 F. Supp. 978, 982 (E.D. La. 1996) (finding that when a hospital processed a doctor's application for hospital privileges this brought the doctor-applicant, a recovering alcoholic, within the protection of the ADA).


54. See Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1253 (D. Or. 1998) (finding that allowing a disabled professional golfer to use a golf cart was a reasonable accommodation and did not frustrate the purpose of the PGA walking rule).

55. One critic suggests that the employment provisions of the ADA have become a tool for the already-employed to raise their pay. See Robert J. Samuelson, Dilemmas of Disability, WASH. POST, June 30, 1999, at A31.

56. See infra pp. 353-359.

57. See infra pp. 359-375.

58. See infra pp. 375-385.
part finds that the poor experience enormous difficulties in obtaining access to counsel and as a result are only marginally involved in federal litigation involving employment discrimination based upon disability. Part IV discusses federal administrative agencies entrusted with the enforcement of Title I. Part V suggests that there are heightened consequences for disabled welfare recipients under the states’ new welfare to work policies. This article concludes with observations and suggestions for change in the coming decade to ensure that the goals of Title I are realized for low-income victims of disability discrimination.

I. THE ADA IS NOT SELF-EXECUTING

There may be some merit to the observation that “attitudes cannot be legislated,” but it is also true that comprehensive civil rights legislation can provide vital support to the efforts of citizens to obtain their full rights. It is important, therefore, that civil rights statutes such as the ADA be assessed periodically in order to determine their effectiveness. Senator Bob Dole, an ardent supporter of the ADA, expressed this view when he wrote:

Some people seem to think that evaluating the impact of the ADA is irrelevant, given that its purpose is to establish certain rights and protections. But I believe we have an obligation to make sure our laws are working. At the very least, we need to know that people affected by the ADA are aware of their rights and responsibilities and that its remedies are in fact available and effective.

This inquiry is necessary because history has demonstrated that civil rights laws are not self-executing. Experience has shown that successful enforcement of civil rights legislation requires vigorous grassroots advocacy, effective administrative agency action, and active involvement of public and private lawyers who provide access to federal courts for victims of discrimination. Without widespread access to lawyers, courts mostly adjudicate the disputes of financially advantaged members of society, and civil rights belonging to all of us become the exclusive possession of the privileged few.

The enactment of the ADA led to visible societal changes that created optimism that the ADA would have a significant impact on the quality of life.

59. See infra pp. 385-388.
60. See infra pp. 388-389.
61. See infra pp. 389-394.
62. BRYAN, supra note 10, at 69.
64. During legislative hearings leading to the passage of the ADA, Elmer Bartels, Commissioner of the Massachusetts Rehabilitation Commission, testified, “We know that any law is not self enforcing and that continued efforts to educate and press for policy implementation and support will be necessary.” H.R. Rep. No. 101-485, pt. 2, at 40 (1990), reprinted in 1990 U.S.C.C.A.N. 322.
of the disabled, and would create a society in which people with disabilities were judged on their merits rather than on stereotypical notions of pity or fear. Title II of the ADA, which prohibits discrimination in state and local governmental services, and Title III, which prohibits discrimination in public accommodations operated by private entities, combined to open the doors of institutions of power and influence, as well as ordinary venues of daily life, to the disabled. Even the poorest and most vulnerable of individuals with disabilities who were institutionalized in health care facilities or prisons benefited from the reach of the ADA. Still, many of these gains would not have been possible without access to litigation, for too often ADA compliance did not come voluntarily or easily.

Protracted litigation against the Municipal Court of Philadelphia, needed to obtain reasonable accommodations for the disabled, serves as a powerful reminder that even public institutions entrusted with the ultimate authority for the faithful protection of our laws do not always readily comply with civil rights legislation unless compelled to do so by litigation. The Municipal Court is Philadelphia’s “peoples court.” It has both civil and criminal jurisdiction and adjudicates thousands of cases each year. In civil matters, litigants mostly file and argue their cases on their own without the

66. According to one survey, two out of three adults with disabilities felt in 1998 that things for Americans with disabilities had generally improved in the previous ten years, and one in three thought the ADA made his or her life better. See NOD Survey, supra note 35.


69. See, e.g., Helen L. v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995) (holding that the State cannot require a paralyzed person to reside in a nursing home when she was eligible for less restrictive program).


72. Reference is made to the once-popular television show that provides ordinary people with an opportunity to have their civil disputes adjudicated in a simple, unformalistic way and generally without the need for lawyers.
benefit of counsel.

While the jurisdiction of the court is comparatively modest, the stakes are high for the litigants—especially the poor. For many who are too poor to afford counsel, this is the final tribunal for their claims and defenses. For poor tenants, Municipal Court is often the final arbiter of whether they are evicted or permitted to remain in their homes. For impoverished consumers, the Municipal Court decides whether they lose their property to the claims of creditors or obtain reimbursement for shoddy goods or unsatisfactory services.

Prior to the passage of the ADA, and continuing for approximately five years after its adoption, the Municipal Court required all persons having business with the court to appear in person at the downtown courthouse. Litigants unable to come to court routinely lost their right to file court claims or to defend against lawsuits brought against them. Personal attendance was required of all litigants or their attorneys without regard to an individual’s disabilities. Two cases, Engle v. Gallas and Peoples v. Nix, challenged this rigid requirement.

The Engle litigation began in 1993, when two indigent disabled residents of Philadelphia were unable to comply with the Municipal Court’s attendance requirements, and tried unsuccessfully on their own to have the Municipal Court accommodate their special needs. Diane Engle was a middle-aged woman who suffered from a crushed pelvis, diabetes, and hypertension. She weighed over 300 pounds and experienced severe pain when forced to sit in a wheelchair. She was unable to leave her home without assistance. Dorothy Calder was an eighty-one-year-old woman who suffered from arthritis, skin cancer, complete blindness in her left eye, and only partial vision in her right eye. These conditions substantially limited her mobility. Due to her physical disabilities, Engle could not attend a scheduled court hearing when she was sued by a large Philadelphia bank for $2,000 in unpaid credit charges. Although Engle asserted that she had informed the court by telephone of her disability and had requested a continuance, she was refused any accommodation. A default judgment was entered against her on the day of the hearing for her failure to appear and the judgment creditor promptly

73. The Philadelphia Municipal Court’s jurisdiction includes the following non-criminal matters: summary offenses (except for traffic offenses and offenses related to juvenile matters), landlord and tenant disputes, civil actions in assumpsit, in trespass, and for fines and penalties by a government agency, in which the plaintiff seeks relief of less than $10,000, civil actions involving real estate taxes and school taxes in which the plaintiff seeks relief of less than $15,000, actions seeking an injunction involving the Liquor Code, and actions to enjoin a public nuisance. See 42 Pa. Cons. Stat. Ann § 1123(a) (West 2000).

74. Under these requirements, a physically disabled litigant who could not come to court lost her right to file a civil claim or to defend against an unmeritorious claim. A defendant absent from court due to a disability faced almost certain entry of default judgment and probable loss of property in execution upon that judgment.

77. See Engle, 1994 WL 263347, at *1.
78. See id.
scheduled a sheriff sale of her property in execution on the modest default judgment. Calder wanted to file a small claim against a roofing contractor, but was unable to do so because she was unable to travel to court. She was unaware of any accommodation that the court offered to meet her needs.

Both Engle and Calder sought legal assistance from their local legal services program, Community Legal Services, which provides free legal help to impoverished Philadelphians. When efforts to resolve their disputes informally and short of litigation failed, Community Legal Services filed a federal class action under Title II of the ADA, alleging that the Municipal Court had illegally excluded Engle and Calder and persons similarly situated from participating in the services of a public entity. Rather than comply voluntarily with the accommodations requirements of the ADA, the Municipal Court chose to defend against the plaintiffs' claims and filed a motion for summary judgment against the plaintiffs, which was ultimately denied by a federal judge.

Around the same time the Nix litigation began. A blind attorney, whose office was in suburban Philadelphia, sued the Municipal Court to challenge the court's personal attendance requirement. The lawyer-plaintiff alleged that "much of his work involve[d] filing the claims of unpaid creditors against defendants who frequently fail[ed] to appear or defend." Although it was a hardship for him to come to the downtown courthouse due to his disability, the Municipal Court required that he do so in every case. The lawyer identified more accommodating court rules adopted elsewhere in Pennsylvania that required the court be notified in advance of a litigant's intent to assert a defense, so that a plaintiff or her counsel would be excused from appearing needlessly in court on the day of the hearing if no defense was intended. As a blind person, he was unable to drive and alleged that he found the city's public transportation system to be "extremely inconvenient" and "dangerous." He acknowledged that there were court proceedings where his appearance was appropriately required. He was willing to appear for those; however, he alleged that the Municipal Court's attendance rules resulted in a "quantitative burden." Once again, the Municipal Court chose to litigate and filed a motion to dismiss the action, which was also denied by a federal

79. In Philadelphia, the primary provider of free legal services to the poor is Community Legal Services, Inc.
81. Engle, 1994 WL 263347, at *6. The court also denied the plaintiffs' motion for partial summary judgment, while ordering that the action be certified as a class action. See id.
82. See Nix, 1994 WL 422856, at *2. The attorney challenged Municipal Court Rule 120, which required that a party personally appear for all proceedings even in cases in which the other party defaults. See id. at *1.
83. Id. at *1.
84. See id.
85. See id. at *2.
86. See id.
87. Id. at *4.
judge.88

After the Municipal Court lost its motion for summary judgment in the Engle class action, lawyers for both sides engaged in many months of active negotiations attempting to resolve the lawsuit.89 The defendants resisted the language of the plaintiff’s proposed notice statement90 and advocated for a shorter statement that did not set forth the court’s obligation to provide accommodations under the ADA or inform disabled persons of their rights. With the assistance of the federal court, the plaintiffs’ notice statement was ultimately chosen. The parties finally reached an agreement that led to the adoption of a disability-friendly court rule in which Municipal Court explicitly pledged to comply with Title II of the ADA.91 The final rule provided for reasonable and inexpensive mechanisms to accommodate persons who were unable to travel to court as a result of their disabilities, such as permitting hearings and mediation services to be conducted by telephone, allowing court filings by mail, and when needed, moving the location of a hearing.92

This result did not come quickly or easily. It is regretful that a high volume “people’s court” did not on its own and without recourse to litigation embrace a policy that permitted persons with disabilities to participate fully in court operations and proceedings. But it is instructive that the mere passage of the ADA did not, without more, result in voluntary compliance by a public institution. Attempts by disabled individuals to navigate the system informally and on their own, and above all consistent with their disability-based limitations, proved unsuccessful. This was not only true for relatively unsophisticated consumers with disabilities, but also for a highly educated attorney with a disability. Only after pretrial motions were denied and class certification granted to plaintiffs Engle and Calder did the Municipal Court seriously consider adopting an amended rule to bring it into compliance with the ADA. This favorable result would not have occurred without resort to federal litigation as an enforcement tool, and in the case of two indigent indi-

88. The court did, however, grant the defendant’s motion to dismiss the plaintiff’s claim of intentional infliction of emotional distress. See id. at 84.
90. Plaintiffs had proposed a statement to provide as follows:
    The Municipal Court complies with the Americans with Disabilities Act, which requires that all court services and facilities be accessible to persons with disabilities on an equal basis to those without disabilities. If you have a disability, and require reasonable accommodations to file a claim, participate in a Municipal Court proceeding, or use any service provided by the Court, please call 686-2910.
92. Plaintiffs’ counsel were actively involved in drafting the new rule and in securing training on the ADA for Municipal Court staff. After an agreement was reached by the parties, the case remained open on the dockets for one year in order to assure court compliance with its new ADA rule. Ultimately, the case was dismissed pursuant to Local Rule 41.1(b) on October 10, 1996.
viduals, without access to free legal representation.

If protracted federal litigation proved necessary to secure ADA compliance from the courts, what might disabled Americans reasonably expect from private entities? On the ninth anniversary of the ADA, a disability rights group located in Pennsylvania’s capitol city of Harrisburg launched a midtown campaign to force local downtown businesses to make their facilities accessible to the physically disabled.93 Despite the presence of several multi-family complexes in the immediate neighborhood, which housed many wheelchair users, local business owners routinely ignored their accessibility obligations. Disabled patrons were forced to either travel long distances to accessible malls or to remain outside local businesses on the adjoining sidewalks while retail clerks attempted to serve them there. Frustrated by the unwillingness of local businesses to remedy these conditions, disabled patrons began to question whether they were somehow complicit partners in the lack of compliance because of their reluctance to sue friends and neighbors in their local community.94 The group came to believe that friendly well-meaning business leaders operating in the shadows of the state capitol were unlikely to ever provide needed accommodations, even for their disabled friends and neighbors. As a result, the group decided to commence a public campaign, bolstered by litigation under the ADA, to compel retailers to accommodate their needs.

The Harrisburg advocacy group’s decision to rely on litigation as one tool in its public campaign reflects their confidence in the critical role that courts play in enforcing ADA requirements. As it pertains to access to public accommodations and participation in public services, this confidence appears to be largely justified. Under the ADA, persons with physical disabilities have made great strides in obtaining increased access to public transportation,95 entertainment facilities,96 movie theaters,97 and restaurants.98

94. See id.
95. See cases cited in supra note 68.
96. See Caruso v. Blockbuster-Sony Music Entertainment Centre, 193 F.3d 730, 740 (3d Cir. 1999) (holding that the Technical Assistance Manual for Title III does not require seats with sight lines for wheelchair users over standing patrons, but does require an accessible route from the pavilion to the lawn area); Independent Living Resources v. Ore. Arena Corp., 982 F. Supp. 698, 785-86 (D. Or. 1998) (holding that regulatory standard does not require sight lines over standing spectators for wheelchair users, but the statute requires the correct amount of wheelchair spaces, correctly-drawn accessible parking spaces, and accessible executive suites and camera positions).
98. See Small v. Dells, No. 96-3190, 1997 WL 853515, at *6 (D. Md. 1997) (“Regardless of whether defendants already had accessible restrooms available to their disabled patrons in the existing section of the restaurant, the plain language of the regulations required defendants to construct the new restrooms in compliance with the [ADA] Accessibility Guidelines.”); 23
In addition to Titles II and III of the ADA, other legislative initiatives have proven to be powerful legal tools, among them the Individuals with Disabilities Education Act, the Rehabilitation, Comprehensive Services and Developmental Disabilities Act Amendments of 1978, and the Fair Housing Amendments Act of 1988. These laws have helped to change public attitudes and lessen prejudice. Disabled citizens confirm that society is making progress in improving “access to public facilities, quality of life and public attitudes toward people with disabilities... and access to public transportation...” Yet, in the face of such progress, there is grave cause for concern.

II. OUTCOME DATA IN TITLE I LITIGATION

Title I of the ADA prohibits discrimination in employment against a qualified person with a disability.... The underlying premise of this title is that persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job.... Discrimination occurs against persons with disabilities because of stereotypes, discomfort, misconceptions, and fears about increased costs and decreased productivity.

To combat these stereotypes and misconceptions, Title I requires that job criteria be the actual skills required by the position at issue, and the statute prohibits disability discrimination in job applications, hiring, promotions, discharges, compensation, job training, as well as most other terms, conditions and privileges of employment.

The benefits to be gained from ending workplace discrimination against the disabled are enormous. The U.S. Department of Labor reports that these benefits include greater independence for handicapped individuals, a more productive workforce, a larger pool of skilled workers, and the transformation of welfare recipients into taxpayers. Such benefits inure not just to disabled individuals but to “the whole society.”

In contrast to significant changes achieved under the ADA in public transportation, mass communication, and access to public accommodations, the ADA has not resulted in comparable success in the workplace. In October of 1999, President Clinton commemorated National Disability Employ-
ment Awareness Month noting, "At a time when the unemployment rate in our Nation is at the lowest level in a generation—4.2 percent—a staggering 75 percent of Americans with disabilities remain unemployed, even though the vast majority of them want to work." A 1998 poll "found that 71 percent of people with disabilities of working age were unemployed in 1998, 5 percentage points higher than in 1986, when the study was first conducted." Not surprisingly, lack of employment has a disastrous impact upon family income. One in three adults with disabilities resides in low-wage households with annual incomes of less than $15,000, compared with only 13 percent of non-disabled adults. Clearly, poverty continues to go hand in hand with having a disability.

Despite the legal requirements of the ADA, some employers resist voluntary compliance because of perceived economic disadvantages. Some express concern that the ADA unfairly requires them to restructure or accommodate difficult jobs or that job task restructuring is not cost effective for them. Others worry that they will be saddled with unproductive employees who may litigate routine employment decisions, thereby interfering with the running of their businesses. They worry that accommodation requirements will be unduly costly and disproportionate to the benefits gained in the workplace. These economic concerns are often fueled by misunderstandings and fears that tend to be exaggerated. For example, Peter Blanck's

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109. See NOD Survey, supra note 35. The survey found that large gaps still exist between adults with disabilities and other adults with regard to employment, education and income, and employment continues to be the area with the widest gulf between those who are disabled and those who are not. See id. Only three out of ten working-age adults with disabilities are employed, full or part-time, compared with eight out of ten nondisabled adults. See id. Lack of employment contributes to the finding that only one in three adults with disabilities was very satisfied with life in general, compared to fully six out of ten nondisabled adults. See id.

110. See Kirstin Downey Grimsley, Worker Bias Cases Are Rising Steadily, WASH. POST, May 12, 1997, at A1, available in 1997 WL 10692897. Ann Reesman, general counsel of the Equal Employment Advisory Council, which represents Fortune 500 companies, was reported as believing that "employers are being buffeted by waves of lawsuits brought by workers who see dollar signs dancing before their eyes." See id. She warned that "[t]he increased level of litigation could—and should—have every employer concerned." Id. See also John Leo, Let's Lower the Bar, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19, available in 1998 WL 8127730 (The "ADA has the potential to force the rethinking and watering down of every imaginable standard of competence, whether of mind, body, or character." (quoting WALTER OLSON, THE EXCUSE FACTORY (1997))). Leo notes Olson's assertion that companies feel that they are no longer free to hire or fire employees or run their businesses effectively for fear of ADA litigation. See id.

111. See BRYAN, supra note 10, at 182-83. See also Peter Coy, Dubious Aid For the Disabled, BUS. WEEK, Nov. 9, 1998, at 30, available in 1998 WL 19884831.

112. See Amy Saltzman, Suppose They Sue? Why Companies Shouldn't Fret So Much About Bias Cases, U.S. NEWS & WORLD REP., Sep. 22, 1987, at 68-70, available in 1997 WL 8332750 ("Many of the claims in the press and public literature are greatly exaggerated." (quoting John Donahue, Professor of Law at Stanford University Law School)). See also Hearing on H.R.
comprehensive examination of workplace practices at Sears found that nearly all employer accommodations required little or no cost. In addition, Sears did not experience the explosion of Title I litigation that critics feared. The study concluded that "the degree to which companies have trouble complying with civil rights legislation on behalf of disabled people appears to have more to do with their cultures than the demands of the law." Just as there was considerable resistance to the Civil Rights Act of 1964, it is reasonable to anticipate resistance to the requirements of the ADA. Unfortunately, the complexity and ambiguity of Title I may itself be responsible for increased resistance.

The premise of the ADA differs sharply from other civil rights statutes. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, for example, permitting any individual victimized by racial discrimination to seek legal redress. On the other hand, the ADA opens its doors only to those who qualify under a difficult statutory definition of disability that has been the subject of intense disagreement and confusion. While prohibited discrimination on the basis of race, color, national origin, religion, or sex is by its very nature discrimination against a class of individuals, the ADA rejects a class-based model in favor of a highly individualized approach that places an enormous burden upon individuals to demonstrate

2273, The Americans with Disabilities Act of 1989: Hearings Before Subcomm. on Employment Opportunities and Subcomm. on Select Educ., House Educ. and Labor Comm., 101st Cong. 69 (Sept. 13, 1989) (statement of Arlene Mayerson, Directing Attorney for the Disabilities Rights, Education and Defense Fund). Mayerson stated that the discrimination faced by people with disabilities includes the use of standards and criteria that have the effect of denying such individuals equal job opportunities, the failure to provide or make available reasonable accommodations, and the refusal to hire based upon presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others. See id. at 69-71. See also Lynne Bernabei, Are Employment Laws Doing Their Job, AM. L.R. Sept. 1997, at 45 (book review).

113. See Peter David Blanck, Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Company, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278 (1996). The author is a professor of law and psychology at the University of Iowa. Sears is a large employer with a 300,000 person work force and an estimated 20,000 of them had physical or mental disabilities. For workplace accommodations studied from 1993 to 1996, the cost of accommodations totaled only $3,209, an average of just $45 per accommodation in direct costs. See id. at 278. Workplace accommodations studied for prior periods also reflected low costs of accommodation. See id. According to the author, these findings were consistent with other studies conducted of workplace accommodations implemented after consultation with the Job Accommodation Network, as well as the 1995 Harris survey of business executives who reported minimal or low increases in costs associated with workplace accommodations. See id. at 280.

114. See id. at 281.

115. See id. at 283.


their entitlement to the ADA's protections. To survive summary judgment motions, plaintiffs must conduct extensive discovery of facts and evidence and marshal expert help on their behalf. Too often, the first year of litigation in an employment discrimination case focuses not on the causal relationship, if any, between the adverse employment action and disability, but rather on the threshold question of whether the plaintiff's disabilities even qualify for protection under the ADA. In the absence of clear direction by the statute or consistent interpretations from appellate courts, the fight over this definitional issue consumes extraordinary time and resources. And without sufficient resources to expend, victims of disability discrimination frequently succumb to legal process without ever having the opportunity to present evidence of disability discrimination in the workplace.

A. The National Study

Since the passage of the ADA, advocates on both sides have traded accusations. Employees contend that the statute is too complicated and unfriendly to disabled workers, and is a litigation minefield in which legitimate claims are lost to procedural hurdles while disability discrimination goes unimpeded. Employers charge that the statute favors employees, rewards workers with questionable disabilities, encourages frequent litigation, and imposes burdensome costs upon businesses, all resulting in reduced productivity. In view of these concerns, the editors of a leading disability law publication of the ABA's Commission on Mental and Physical Disability Law embarked upon a study of all Title I cases during the period of 1992-1997 in which there was a judicial case outcome ("the National Study"). The results were reported in its publication, the Mental and Physical Disability Law Reporter.

Of 1,200 employment case decisions under Title I, the National Study divided cases into two groups: "(1) cases in which one party or the other had won on the merits (or in which the employer had won by having the plaintiff's case dismissed); and (2) cases in which no party had prevailed." The National Study showed that "one party or the other prevailed in 760 of [the 1,200] cases (63.3 percent)." Remarkably, "[o]f the 760 decisions ... em-

119. See id.
120. See ABA Commission on Mental and Physical Disability Law, Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403 (1998) [hereinafter National Study]. The National Study analyzed reported decisions and unreported decisions otherwise known to the Mental and Physical Disability Law Reporter. The study also reviewed ADA-related statistics on administrative complaints compiled by the EEOC. See id. at 404.
121. The National Study covered 1,248 ADA Title I employment cases between 1992 and 1997. See id. The analysis excluded lower court decisions that were superseded by appeals court decisions for a total number of 1,200 cases analyzed. See id. The National Study analyzed each case to determine the court and federal circuit rendering the decision, the outcome of the case, and the type of decision rendered. See id.
122. Id.
123. Id.
ployers prevailed in 92.11 percent of those cases, meaning employees prevailed only 7.9 percent of the time.124 While there was some outcome variation reported among the twelve federal circuits, employers prevailed in 90 percent or more of the cases in all but four circuits.125

The National Study also determined that employees frequently lost without receiving any hearing on the merits and that many lost at the pretrial stage on motions to dismiss or on requests for summary judgment. It concludes that, among other reasons, employees fare poorly because of an overly restrictive judicial interpretation of the definition of disability under the statute.126 The authors note that employees face a Catch-22 situation—they must demonstrate a disability that is severe enough to be substantially limiting of a major life activity while at the same time not so disabling that they cannot perform the essential functions of the job.127 Unlike victims of race or gender discrimination, victims of disability discrimination found it difficult to establish their entitlement to the protections of the Act. Even when they did survive pretrial motions on the definition of qualifying disability, they often lost their claims to other pitfalls, such as judicial estoppel, undue burden, or even the limiting definition of "employer."128

In 1998, the ABA updated the National Study to include Title I cases from 1998. An additional year of statistics boosts employer win rates in federal court to 94 percent, providing only further cause for concern.129 Either plaintiffs are largely filing frivolous complaints, as some employers allege, or federal courts are increasingly unreceptive to such claims. If skilled upper-income employees with disabilities do not fare well under Title I, what is the experience of unskilled low-income workers with disabilities who try to hold on to marginal entry-level jobs or, harder yet, attempt to enter the workplace for the first time?

The win rates reported by the National Study are based upon case outcomes drawn exclusively from cases with dispositive court rulings that formally ended litigation in favor of one of the litigants. As the study notes, reported decisions alone do not provide a complete picture. Case outcomes of reported decisions, while helpful in understanding how some claims are faring in court, cannot provide a complete assessment of the overall effectiveness of Title I litigation. They do not account for cases that terminate in favor of one party or the other without a reported decision, and they do not

124. Id.
125. The percentage of employer victories ranged from a high of 98.1% in the Fifth Circuit to a low of 83.3% in the Ninth Circuit. See id.
126. See id. at 405.
127. See id.
128. See id.
129. See John W. Parry, Trend: Employment Decisions Under ADA Title I—Survey Update, 23 MENTAL & PHYSICAL DISABILITY L. REP. 290, 294 (1999) [hereinafter National Study Update]. The methodology remained the same for the updated survey. See supra note 121. The study examined 408 court decisions from 1998, of which 280 resulted in employer wins, 17 in employee wins, and 111 in decisions that did not resolve the merits of the claim. See National Study Update, supra, at 295.
account for cases that end in amicable settlements. Therefore, scholars such as Professor Burris conclude that it is difficult to generalize from reported outcomes to the full universe of Title I cases.\textsuperscript{130} As Clermont and Eisenberg caution, win rates drawn from reported cases may only reveal something about the set of adjudged cases and not much about the underlying mass of disputes and cases.\textsuperscript{131}

Still, even with these limitations, an employer win rate of 92 to 94 percent of all reported decisions over the entire life of the ADA is not just cause for concern, but reason for alarm. This concern deepens when Title I outcomes are compared with overall federal court outcomes showing that plaintiffs prevail in 57.97 percent of all civil cases.\textsuperscript{132} This norm is more consistent with case selection theory which suggests that disputes clearly in favor of either the plaintiff or the defendant under the law tend to settle readily. This is because both sides can save costs by settling in light of their knowledge of applicable law and other aspects of the case.\textsuperscript{133} Remaining unsettled cases that are closer on the merits will fall more or less equally on either side of the legal criterion and therefore would not result in an extreme equilibrium win rate.\textsuperscript{134} Thus, win rates in adjudged cases should approach 50 percent. Departures from 50 percent win rates may be explained by such factors as differing merits of individual cases, differing stakes among parties, inadequate access to information, miscalculations or incompetence in forecasting, misperceptions about the prevailing standards of decisionmaking, the biases of judges and juries, the availability of resources, and the relative competencies of counsel.\textsuperscript{135} Most litigation models are based on the idea "that parties litigate disputes to trial only when they have different expectations of the outcome" either in terms of liability or damages.\textsuperscript{136} Therefore, trial win rates may hold greater meaning as one tracks back to the mass of underlying cases and disputes.\textsuperscript{137}

\textsuperscript{130} See Scott Burris et al., Disguising Under the Americans with Disabilities Act: Empirical Answers, and Some Questions, 9 TEMP. POL. \\ 

\textsuperscript{131} See Kevin M. Clermont \\ 
& Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 381, \\ 
581 (1998) (calling win rate studies "the slipperiest of all judicial data"). Since many claims are withdrawn or settled prior to judgment, official outcomes alone are viewed by some to be limited in value. See id. at 586-87.

\textsuperscript{132} See id. at 593 n.42 (using Administrative Office data assembled by the Federal Judicial Center and disseminated by the Inter-university Consortium for Political and Social Research).

\textsuperscript{133} The parties' estimates of success drive litigation because differences in those estimates cause the non-settlement of disputes. See Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 GEO. L. J. 1567, 1571 (1989).

\textsuperscript{134} Because there is no reason to believe that one side errs more than the other, litigated disputes should approach 50% success rates for each side. See id. at 1572 (citing William Baxter, The Political Economy of Antitrust, in THE POLITICAL ECONOMY OF ANTITRUST 3, 16 (R. Tollison ed. 1980)).

\textsuperscript{135} See Clermont \\ 
& Eisenberg, supra note 131, at 588-90.

\textsuperscript{136} See Eisenberg, supra note 133, at 1570-71 (discussing that under expectations theory objectively strong or weak cases do not reach trial thus making trial outcomes "a skewed subset of all disputes").

\textsuperscript{137} See Clermont \\ 
& Eisenberg, supra note 131, at 591.
On the other hand, a “non-expectationist” theory of litigation presents intuitive reactions to influences on trial outcomes. It assumes that “the same attitudes, biases and legal doctrine that affect filed cases also . . . affect tried cases,” and thus allows for the extrapolation of case outcomes to the full universe of cases. Eisenberg believes that “most of us probably combine” these two theories: Tried cases may not “perfectly reflect underlying filed cases,” but it is also unlikely that “tried cases are completely divorced from underlying social values and trends.” Under this approach, trial outcomes present a useful tool for assessing the larger universe of filed cases, especially when one tries to learn more about the underlying cases and disputes.

B. The Eastern District of Pennsylvania

With the results of the National Study freshly in mind, I decided to examine Title I litigation in the Eastern District of Pennsylvania (“Eastern District”) to accomplish several objectives. First, I wanted to compare the Eastern District data with the National Study to see if national outcomes skewed in favor of employers apply with equal force to litigation in a largely urban and diverse judicial district. Second, I wanted to go beyond reported cases—to all filed cases—to see whether reported case outcomes are a reliable indicator for the full universe of filed cases. Finally and most importantly, I wanted to learn more about underlying trends in Title I litigation, particularly whether impoverished, low-income workers with disabilities are attempting to enforce their rights under the ADA. The National Study makes no reference to this important subset of the disability community. Thus, even if litigation successes under Titles II and III of the ADA provide the disabled with access to public transportation and the ability to cross city curbs, the question still remains whether the workplace will be open to them when they arrive.

The Eastern District sits primarily in Philadelphia, but also conducts hearings in Allentown and serves the residents of ten Pennsylvania counties. Highly regarded for the quality of its bench and bar, the district court has a busy docket of ADA cases, especially when compared to other district courts in Pennsylvania. During the time period studied, 87 percent of all reported ADA district court decisions in Pennsylvania were from the Eastern District.

138. See Eisenberg, supra note 133, at 1572-73.
139. Id.
140. Id. at 1573-74.
141. See id. at 1569.
142. The counties are Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia and Schuylkill.
143. See infra note 145 and accompanying text.
144. The share of reported ADA cases in each of Pennsylvania’s three districts was: Eastern District (87%), Middle District (4.7%), and Western District (8.3%).
1. The Reported Decisions Study

I examined all reported ADA cases in the Eastern District for three consecutive years, from 1996 through 1998. I found this time period sufficient to test reported outcomes, especially because those were among the busiest years in the history of ADA litigation according to the National Study. A search identified 130 reported ADA decisions in the Eastern District involving all titles of the ADA. Of these, 71 cases (54.6 percent) involved outcome dispositive rulings decided in favor of one party or the other ("the Reported Decisions Study"). In the Reported Decisions Study, plaintiffs prevailed in just 7.1 percent of the cases, while defendants won in 92.9 percent. The win rate of defendants actually increased over the three-year period, with the highest rate of success in 1998. Title I employment was by far the most frequent area of ADA litigation in the Reported Decisions Study, representing 73 percent. Title II state entities litigation represented the next largest category with 22 percent. Title III public accommodations litigation was the smallest with 13 percent of the cases.

Case outcomes in the Reported Decisions Study closely mirror the results of the National Study. In the Reported Decisions Study, employers prevailed in 94.2 percent of the cases, while employees prevailed in only 5.8 percent of the cases. Win rates of defendants were higher under Title I than under Title II or Title III. Based only on reported decisions, employers appear to be more successful than governmental entities or public accommodations in defending against ADA litigation. Most often employers prevailed on summary judgment motions (67.3 percent of all employer reported victories), or on motions to dismiss (24.5 percent of all employer reported victories).

Plaintiffs stumbled most often by not being able to satisfy the definition of disability, despite clearly possessing physical or mental impairments. In a lesser number of cases, plaintiffs lost because they were unable to demonstrate that they were "otherwise qualified" under the ADA, or they were precluded under the doctrine of judicial estoppel based upon assertions made to other entities about their disabilities. To an even lesser degree, employees were unable to meet their burden of proof by linking disability discrimination

145. For the purposes of case selection, all ADA reported decisions from Pennsylvania district courts dating from January 1, 1996 through December 31, 1998, were identified utilizing Westlaw. After eliminating decisions from the Western District and Middle District, as well as decisions that mentioned or cited the ADA only in its reasoning and which do not actually represent cases filed under the ADA, there was a total of 130 ADA reported decisions from the Eastern District remaining for purposes of examination.

146. Plaintiffs prevailed in only 5 out of 71 cases, while defendants prevailed in 66.

147. The overall rate of success for defendants ranged from a low of 87.5% in 1996 to a high of 96.3% in 1998. Defendants prevailed at higher rates in each successive year.

148. The percentage of outcome dispositive cases among all reported decisions held firm at around 54% for all ADA litigation in the three-year period studied.

149. Employers succeeded in 94.2% of the reported cases under Title I and defendants succeeded in 91.7% under Title II. Defendants succeeded in 85.7% of the cases under Title III.
to adverse employer action. 150

During this three-year period, employees prevailed in less than one of every ten reported cases. Thus, even in a politically moderate jurisdiction with considerable strengths unique to Philadelphia and its surrounding environs, including a large specialized private and public interest bar serving an active disabled community, plaintiffs fared poorly in reported Title I litigation. Mindful that these results reflect only reported decisions, I wanted to know whether defendants prevail as often when all employment cases filed under Title I are examined. 151

2. The Filed Cases Study

I obtained the official court dockets of every ADA case filed in the Eastern District152 for the same three year period153 as the Reported Deci-

150. Most litigation battles were fought and won in the pretrial stages. Only 7.7% of the total reported victories in ADA cases were achieved at trial.

151. I wish to reiterate that docket reviews as well as all of the empirical research conducted in this study were truly a team effort conducted jointly with my research assistant and at times another law student who expressed interest in the project. I was extremely fortunate to have their able assistance. I am also grateful to the Clerk's office for their prompt and cheerful assistance with my frequent requests.

152. There is no certain way to identify all ADA employment cases filed in the Eastern District. When a civil action is initiated, the litigant completes a civil cover sheet ("Form JS-44") required by the Clerk of the Court. While Form JS-44 contains check-off boxes intended to identify the nature of the lawsuit, it does not provide a specific box that exclusively identifies ADA cases or ADA employment litigation. The filing party refers to the Instructions for Completing Civil Cover Sheet and Appendix B in the Clerk's Office Procedure Handbook. See CHARLES R. BRUTON, HANDBOOK OF FEDERAL JUDICIAL PRACTICES AND PROCEDURES, EASTERN DISTRICT OF PENNSYLVANIA 649 (West 1996). In order to identify all ADA cases and the subset of ADA employment litigation, two pieces of information were needed. First, Form JS-44 asks the filing party to identify the "cause of action" and requires that a legal citation be given for the U.S. civil statute. Second, Form JS-44 asks for the "nature of the suit" and provides a myriad of check-off boxes, instructing that only one check mark be made in this area. Under Part V of Form JS-44 ("the nature of suit") are several codes relevant to this study: 442 ("employment"); 443 ("housing/accommodations"); and 440 ("other civil rights"). The filing party is instructed that if more than one category applies, to select the most explicit and specific classification. Most litigants check box 442 for Title I litigation and box 443 for Title II and III litigation. ADA cases that defy these categories are generally marked "other civil rights." Using these criteria, the Clerk's office was able to query its database for all cases filed under the ADA during my requested time period. This generated a list of civil action numbers that included 42 U.S.C. § 12101 as the cause of action.

153. As a result of the review process described in supra note 152, the Clerk of the Court provided a list of all cases identified for 1996, 1997, and 1998. The same three-year period as the Reported Decisions Study was used for the Filed Cases Study for consistency; however, the two time periods do not exactly coincide because a relatively small number of the decisions in the Reported Decisions Study were for civil actions filed in previous years. I then obtained hard copies of court dockets for all 376 ADA cases under all titles in the Eastern District. This permitted me to confirm the nature of the suit. The list of 376 cases that resulted admittedly may be under-inclusive because there may have been cases with multiple causes of action and filing counsel excluded the ADA citation. The list also may not be complete if counsel erroneously included the ADA as the cause of action statute. Still, the large number of cases identified through this method, and the follow-up to look at the case dockets of every case, suggest that the
sions Study. This revealed that there were 376 ADA cases filed in the Eastern District that were disposed of by judicial rulings ("the Filed Cases Study"). Of these, defendants prevailed in 90.9 percent of the cases while plaintiffs prevailed only 9.1 percent of the time. Employment cases represented the largest segment of filed ADA cases with 63.3 percent of all cases. When case outcomes of only employment cases are examined, the results are even more disturbing: employers prevailed in an incredibly high 97.3 percent of the cases (thus, employees won in only 2.7 percent). This result contrasts sharply with non-employment ADA cases where defendants prevail at a more modest rate of 82.8 percent (plaintiffs won in 17.2 percent). This contrast in win rates lends considerable support to the proposition that while plaintiffs find all ADA cases difficult to win, employment ADA cases are by far the most difficult to win.

Comparisons with reported outcomes in other litigation studies further highlight the seriousness of the problem. As previously noted, statistics compiled by the Office of Administrative Courts reveal a 57.97 percent win rate for plaintiffs in all federal civil cases. This is consistent with the expectations theory of litigation in which close cases tend to go to trial and plaintiff success rates are expected to fall within the 40 to 60 percent range. These same statistics, however, reflect much lower overall success rates for plaintiffs in civil rights and employment discrimination cases. Trial outcomes for civil rights and employment discrimination cases litigated in the federal courts during the period 1978 through 1985 reveal an overall plaintiff success rate of 35 percent in civil rights cases and 22 percent in employment discrimination cases. Plaintiffs in prisoner civil rights cases experience the lowest overall success rate of 14 percent. While these numbers document the lower trial success rate in civil rights and employment discrimination, as compared to other classes of civil litigation, they collectively reflect much

Clerk's computer run was a reasonably reliable accounting of ADA litigation in the local district court. Our follow-up review of docket entries helped to correct any apparent inaccuracies, but in the end, the accuracy of such a list depends upon the coding practices of the filing counsel.

154. This category includes all case-ending court rulings, including pretrial adjudications, bench trials, and jury trials.

155. At least 49.5% of the cases, and possibly as many as 62.8%, concluded through negotiated settlements reached by the parties, not through judicial ruling.

156. This was determined by the Form JS-44 codes, specifically box 442 designated "employment."

157. Contrary to the perception among some plaintiffs' lawyers, this study demonstrates that plaintiffs fare poorly in both pretrial and trial adjudications, jury as well as non-jury. Admittedly, the universe of cases that actually proceeded to trial during the three-year period studied was so small that it would be risky to draw firm conclusions. However, the preliminary findings of this study suggest that a plaintiff's heavy burden is not necessarily lifted once she survives summary judgment. Further study of actual trial outcomes with a much larger sample is needed.

158. See Eisenberg, supra note 135, at 1567, 1583. This success rate excludes prisoner cases which, as one might expect, sharply diminishes overall percentages. With prisoner cases included, the plaintiff success rate falls dramatically to 12.6%. See Stewart Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. 719, 728 (1988).
higher win rates than plaintiffs experience in ADA employment cases. This raises the difficult question of what accounts for such low success rates in ADA employment litigation. Is it possible, for example, that case outcomes are skewed when compared to other areas of the law because many ADA employment cases that might otherwise settle are proceeding instead to adjudication?

Litigation theory predicts that a high proportion of disputes are litigated if the costs of settling disputes comprise a large portion of the costs of going to trial.159 Title I cases are fact intensive, highly individualized cases that require extensive discovery and expert witnesses, and thus are expensive to litigate. This might lead to the conclusion that many cases should settle, especially early in the litigation, because it is in the financial interest of the parties to do so. This, however, does not appear to be the case.

Employers engage in aggressive pretrial litigation of these claims because the complexity and ambiguity of the ADA gives them many opportunities to win at this stage and, quite understandably, employers use their considerable resources to avail themselves of these opportunities. Pretrial litigation may also be fueled by the notion that plaintiffs and defendants have very different expectations and interpretations of the prevailing disability law or of how the courts are expected to apply current law. The fact that so many plaintiffs appear unable to satisfy definitional sections of the ADA, or cannot overcome the ADA’s procedural hurdles, may explain why many cases that should settle are pushed more aggressively to pretrial adjudication.

Of course, it may also be that ADA cases are more difficult to settle because the parties have very different interests at stake. Plaintiffs seek not only monetary damages, but often vindication and an individualized notion of justice that is tied to their self-worth.160 Employers fear that if they settle discrimination claims they may establish costly precedent or adversely impact pending or future litigation. Some may view the act of settling as an act of weakness or vulnerability. Differences in the competence of counsel or disparities in the amount of litigation resources available to each party may also contribute to this result.

One may expect reported cases to favor defendants more heavily than plaintiffs because reported decisions include many summary judgment motions or motions to dismiss decided in favor of defendants. Filed cases, on the other hand, take into account cases that do not merit published decisions and include the results of bench and jury trials. This may lead one to expect that competing win rates should balance more closely when the full universe of experience is considered. Again, this is not the case.

159. See Eisenberg, supra note 135, at 1571-73.

160. According to one study, “31% of those reporting discrimination problems sought ‘justice,’” compared to only “4% of those with serious problems related to expensive purchases” and “2% of those with neighborhood problems.” See Leon H. Mayhew, Institutions of Representation, 9 LAW & SOC’Y REV. 401, 403-04, 406, 409-11 (1975), cited in Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. REV. 4, 30 (1983)).
As in the Reported Decisions Study, plaintiffs in the Filed Cases Study were largely unable to survive summary judgment motions or motions to dismiss, and even when they did they fared poorly at trial.\textsuperscript{161} Repeatedly, plaintiffs failed to satisfy the burdensome and confusing statutory definition of "disability" as interpreted by district court judges.\textsuperscript{162} It is absolutely striking that such a great amount of plaintiff resources and time went into unsuccessful pretrial litigation efforts deciding the threshold question of whether the plaintiff's disabilities qualified for the protections of the ADA. In other cases, but to a lesser degree, plaintiffs were trapped by their own representations made to other agencies about their disabilities\textsuperscript{163} or were unable to demonstrate that they were "otherwise qualified" for the employment position at issue.

The Filed Cases Study demonstrates that as we learn more about the Title I cases we find that the win rate of plaintiffs actually decreases to an in-

\textsuperscript{161} See Ruth Colker, The Americans with Disabilities Act: A Windfall For Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 100 (1999). "These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly." Id. at 100 (finding that ADA "defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases" and in eighty-four percent of cases on appeal). The author concludes that the poor showing by plaintiffs is primarily because courts have misused the summary judgment device and did not allow legitimate fact issues to go to juries, which are more sympathetic fact-finders to plaintiffs. See id. at 160. Also, Colker finds that courts have refused to defer to agency interpretations of the ADA. See id. at 144-57.

\textsuperscript{162} For a discussion and analysis of this disturbing trend in ADA litigation see Wilkinson, supra note 24, at 912-22. For a discussion of the background leading to some of this confusion, see Jamie C. Ray & Stephen S. Pennington, The Substantial Limitation Approach to Defining Disability: Why Does it Create an Insurmountable Barrier to Individuals Who are Regarded as Disabled?, 9 Temp. Pol. & Civ. Rts. L. Rev. 333, 334-40 (2000).

\textsuperscript{163} Another important area of confusion involves the doctrine of judicial estoppel. Many people with disabilities who receive welfare are aggressively steered by state agencies toward applying for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) benefits because of potential savings to the states when recipients transfer from state financed welfare rolls to federally financed benefits. While some qualify for complete disability under those federal programs, many do not. They all, however, must complete the necessary forms in which they certify to the federal agencies that they are unable to work due to disability. This certification is then used against such applicants when they seek employment and try to bring themselves within the coverage of the ADA to remedy perceived discrimination. Until recently, many courts dismissed such cases in the pretrial stage based on the doctrine of judicial estoppel. However, in Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999), the Supreme Court held that an application for Social Security benefits does not automatically bar an ADA lawsuit. See id. at 801-06. The Court noted that the qualification standards under SSI and SSDI programs and the ADA are quite different and an application or even receipt of such benefits is not, by itself, inconsistent with the assertion that one is a qualified individual with a disability under the ADA. See id. As disability advocates have pointed out, SSI and SSDI programs do not consider the concept of reasonable accommodation in determining whether a job applicant is able to perform past work or other suitable work that might exist in sufficient numbers in the economy. While the automatic bar appears lifted, it remains to be seen whether trial judges and administrative agencies are able on a case-by-case basis to avoid penalizing disabled persons who in the past have applied for, or received, disability benefits but who now assert that they can perform the essential functions of the job at issue (with or without reasonable accommodations). This question impacts most heavily on the poor for the reasons previously noted.
credibly low success rate of 2.7 percent. For some, this low win rate means there are many unmeritorious cases in the courts. For others, this unbalanced result raises the troubling possibility that the system treats this class of cases far less favorably than others.164

3. Negotiated Settlements Obtained Through Litigation

Low win rates for plaintiffs in adjudicated Title I cases do not negate the possibility that substantial benefits are achieved through negotiated settlements that would not be possible without litigation. In a litigious society most cases ultimately do settle, and it is important to the effective functioning of our judicial system that they do. For example, Anne-Therese Bechamps reports that 90 percent of all filed cases settle without a trial.165 Moreover, the proportion of filed-to-tried cases in the federal courts has declined by four-fifths over the last fifty years. Recent studies suggest that the percentage of filed civil cases that results in trials “dropped from eleven percent in 1961 to four percent in 1991.”166 More recently, this percentage is reported to have fallen to two percent.167

It is clear that most litigation resources are now spent on pretrial activities and negotiated settlements.168 This shift is not surprising given the litigation explosion that burdens the courts and the strong national policy encouraging settlement, which place greater emphasis than ever on disposing of cases efficiently with a minimum use of judicial resources.169 Parties are well aware of the expense, risk and delay attendant to formal adjudication and are thus likely affected by the strong systemic incentives for private dispute

164. At the 1999 Judicial Conference of the Third Circuit, veteran employment lawyer Alice W. Ballard raised the contention that employment rights cases in general are disfavored by the court. This drew sharp and immediate reactions from circuit judges in attendance who disagreed and challenged the contention. One circuit court judge alleged that many of these suits are frivolous. See Shannon P. Duffy, Judges Challenge Attorney's Contention Employment Suits "Disfavored" by Courts, LEGAL INTELLIGENCER, Oct. 19, 1999, at 1. But see Eisenberg, supra note 135, at 1601 (finding that low success rates of both filed and adjudicated civil rights cases raises the possibility that these cases receive less favorable judicial treatment).

165. See Anne-Therese Bechamps, Note, Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?, 66 NOTRE DAME L. REV. 117, 129 (1990) (citing Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. REV. 4, 28 (1983)). Professor Galanter relied on a study by the Civil Litigation Research Project documenting that 88% of all cases settled, and only 9% went to trial. See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 U.C.L.A. L. REV. 4, 18 (1983).

166. See Laurie Kratky Doro, Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 288 n.11 (1999) (citing Marc Galanter & Mia Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1342 (1994)).

167. See id. (citing Samuel R. Gross & Kent D. Syverud, Don’t Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. REV. 1, 63 (1996)). This figure was for both state and federal courts. See id.

168. See id. at 289.

169. See id. at 290-92, 304.
resolution. Settlement is favored in both formal and informal ways, although Professor Luban criticizes private settlements because these fail to provide the public with adjudication results that help to shape public policy and mold future conduct. This criticism has gained force in such areas as employment discrimination where the public, in addition to individual litigants, possess a large stake in the conduct of third parties and in achieving overall compliance with remedial civil rights legislation.

The merits of this criticism notwithstanding, studies of case outcomes are limited if they do not take into account favorable results achieved in settlements. Unfortunately, information on the benefits derived from settlements is difficult, if not impossible, to obtain. The Filed Cases Study revealed that between 47.1 percent and 62.6 percent of all Title I cases settled with the higher percentage probably closer to the actual settlement rate. These figures appear to represent a lower settlement rate than national norms for other types of federal civil cases. Lower settlement rates may be tied to the ambiguities and complexities of Title I, which encourage aggressive pretrial litigation. Lower settlement rates may also reflect the reasons that litigation theory provides for why discrimination cases do not settle. This may also reflect a general trend in discrimination cases that plaintiffs are less willing to settle because they seek a personalized notion of justice or vindication that is not fully satisfied by the payment of money, unaccompanied by an admission or public finding of wrongdoing. And, employers may be less willing to settle because of perceived adverse consequences to pending or future claims against them.

Why is it assumed, Professor Galanter asks, that settlement is better than adjudication, especially if we have not distinguished good settlements from less desirable ones? Should settlements that result in the transfer of limited tangible benefits to plaintiffs be regarded as favorable outcomes? Or

170. See id. at 290.
172. See Burris et al., supra note 130, at 259.
173. In 49.5% of the cases, the parties reached an amicable agreement and notified the court to dismiss the action pursuant to Federal Rule of Civil Procedure 41.1(b), which provides in pertinent part, "Whenever in any civil action counsel shall notify the Clerk or the judge to whom the action is assigned that the issues between the parties have been settled, the Clerk shall . . . enter an order dismissing the action with prejudice, without costs, pursuant to the agreement of counsel." FED. R. CIV. P. 41.1(b). In another 13.3% of the cases, the action was dismissed pursuant to a stipulation of the parties, without any reference to Rule 41.1(b). These additional cases tend to be settlements, with benefits exchanged, but that is not always the case. In some smaller number of cases, this category includes some agreements to dismiss without any exchange of benefits, but those cases are not apparent from the docket entries. Without a more detailed study of this category of cases, it is reasonable to estimate that the total settlement rate will be considerably closer to the higher figure of 62.76% of the total cases, rather than to the figure of 49.5% of the cases that represents dismissals referencing the local rule.
174. See supra Part II.B.1.
175. See Mayhew, supra note 160.
are these settlements just token transfers, representing little more than nuisance value, that fail to achieve employment or advancement in the workplace?

Some believe that settlement "win rates" correlate to judgment win rates. If they are correct, then settlements in Title I cases may not represent significant achievements for filing plaintiffs. On the other hand, it may not be unreasonable to conclude that plaintiffs (assisted by lawyers) see real benefits in negotiating settlements that they do not see in continuing with litigation. If plaintiffs' concerns for justice and vindication lower the number of settlements that are reached, it would follow that those settlements that do take place contain sufficient monetary benefits to justify non-adjudicatory dispositions. Indeed, in strong cases under the ADA, employers might be foolish to allow them to go to trial.

However, it is difficult to assess settlement results with any degree of confidence as long as underlying data about those settlements are not readily ascertainable. In most cases studied, court dockets and files do not reflect the terms of negotiated settlements. The Filed Cases Study determined that less than two percent of litigants filed the terms of their settlements. The public has little information, therefore, from which to draw conclusions about the quality of settlements or the effectiveness of settlements in enforcing Title I rights.

To gain further information about these settlements, I conducted an informal survey by contacting the attorneys of record. In an admittedly very small sample taken from 1997 cases, eleven lawyers for plaintiffs agreed to speak with me or my research assistants. Of those, only two disclosed any meaningful information about the settlements reached in their cases. More than half of those we spoke with said they were duty-bound by confidentiality agreements not to disclose any settlement terms.

177. See Clermont & Eisenberg, supra note 131, at 591.
178. I selected every third settled case during 1997 by civil action number from a master list of settled cases arranged in chronological filing order, and attempted to survey the lawyers of record for the plaintiffs in each of those settled cases. I chose every third settled case in 1997 for two reasons. First, 1997 was a busy year for ADA litigation and the most recent year in which the overwhelming majority of cases were closed on the court dockets. Second, every third settled case was a manageable sample of settled cases for testing whether enough lawyers would be willing or even able to disclose settlement terms. During the period of November 10-22, 1999, we attempted to contact one-third of the 54 lawyers who appeared on the dockets as counsel of record for settling plaintiffs in cases filed in 1997. This work was conducted primarily by my research assistants, Jason Lockerman and Courtney Phillips. When this effort was completed, 11 of the 18 lawyers responded to our contacts.
179. The few lawyers who felt free to speak with me or my research assistants confirmed that their cases had settled, and revealed that in a few instances their clients received substantial sums and other valuable employment benefits. Most lawyers who confirmed settlements expressed the opinion that their settlements were fair and reasonable under the circumstances of their cases. Needless to say, however, such a limited sampling coupled with the absence of any public documentation upon which to confirm or independently assess such statements, makes it difficult to derive any meaningful conclusions.
180. Anecdotal information gained from these contacts was interesting and instructive. For example, one plaintiff's lawyer said that in his experience nearly every initial settlement agree-
The informal survey did, however, raise a larger question of whether federal courts are fulfilling their public responsibilities by closing ADA employment discrimination cases on the dockets without compiling any information about the nature of those resolutions, thereby depriving the public of access to important information. In short, it prompts the question whether courts should require more information from litigants related to settlements reached in their cases once the parties have chosen to avail themselves of publicly funded courts for dispute resolution.

Court decisions and academic writings both have addressed the thorny question of whether the public should have access to confidential court filings, including settlement terms, when courts are asked to order or approve confidentiality at the request of one or both of the litigants. Lawyers for defendants often seek confidentiality in order to protect sensitive or proprietary information or to avoid disclosure of harmful information that might adversely affect pending or future litigation. Lawyers for plaintiffs often agree to confidentiality in order to reach settlement or maximize recovery for their clients. This tension between confidentiality and public access assumes that settlements that are not filed of record, or that do not involve court approval or a court order, are completely private. Indeed, the Third Circuit Court of Appeals has suggested that parties who want to prevent public access to their settlement agreements may simply choose to file voluntary stipulations of dismissal of their actions pursuant to local rules.

181. See United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995) ("We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access."); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 784 (3d Cir. 1994) ("The Newspapers have... shown that the putatively invalid Confidentiality Order which the district court entered interferes with their attempt to obtain access to the Settlement Agreement, either under the right of access doctrine or pursuant to the Pennsylvania Right to Know Act."); Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 345 (3d Cir. 1986) ("Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality normally accorded settlement agreements."); Anderson v. Cryovac, Inc. 805 F.2d 1, 12 (1st Cir. 1986) ("We... hold that there is no right of public access to documents considered in civil discovery motions."). These decisions examine the standards under which judicial documents should be accessible to the public. For example, must the documents be physically on file with the court? Must they play a role in the adjudication process? Or, must they be relevant to the performance of the judicial function and useful in the judicial process? None, however, suggested that the public has any right of access to settlement documents that were never the subject of any court order or court filing. See generally Bechamps, supra note 165; Dore, supra note 166.

182. See Bechamps, supra note 165, at 117.

183. See Bank of America Nat'l Trust & Sav. Ass'n, 800 F.2d at 344 (majority opinion). But see id. at 351 n.4 (Garth, J., dissenting) (arguing that breaking the secrecy of agreements in order to enforce them is more efficient than bringing suit).
Unquestionably, lawyers have important reasons to encourage private settlement of public litigation. Lawyers are duty-bound to zealously pursue the best interests of their clients and therefore readily (or sometimes reluctantly) accept confidentiality restrictions in order to achieve settlement and to maximize recovery. In such instances, lawyers rarely pause to consider the public’s need for information. Litigants who tend to place settlement terms on the public record are usually governmental entities, or in some cases, public interest lawyers who represent broader public interests. Private lawyers tend to place settlement terms on the record only if they are concerned about future compliance in specific situations and desire continuing federal jurisdiction over anticipated enforcement problems.\(^{184}\)

Strong societal interests in encouraging negotiated settlements need not present an absolute bar to compiling information that would permit informed assessments of ADA enforcement, especially negotiated settlements. Without sacrificing legitimate privacy interests, the filing of limited settlement information in the form of clerical or statistical reporting to a clerk’s office would result in aggregated reporting. This data in turn would allow informed study and meaningful discussion of this important public policy. The time has come to design and implement mandatory settlement reporting requirements and to collect information from settling parties in carefully designed ways.\(^{185}\)

III. ARE THE DISABLED POOR PROTECTING THEIR RIGHTS UNDER THE ADA?

As job applicants and employees experience disproportionately unfavorable adjudications (but potentially valuable negotiated settlements that would not be possible without litigation), the question arises whether low-income persons with disabilities are actively enforcing their rights under Title I. Do the disabled poor have a meaningful chance of obtaining counsel and gaining access to federal courts, especially when their cases present the potential of only limited recovery? There is no certain way to identify the ADA cases that are brought by or on behalf of low-income individuals. Thus, while conducting the Filed Cases Study, I also examined several indices that might identify impoverished plaintiffs. My efforts were admittedly imprecise: First, I identified cases that contained requests by plaintiffs to proceed under the federal in forma pauperis statute.\(^{186}\) Second, I identified the categories of lawyers who entered their appearances on behalf of plaintiffs.\(^{187}\)

\(^{184}\) Of course, this discussion does not include those instances when settlements must be placed on the record or approved by the court, such as in class actions under Federal Rule of Civil Procedure 23(e).

\(^{185}\) The inauguration of reporting requirements could be done on a pilot basis in selected judicial districts.

\(^{186}\) See 28 U.S.C. § 1915 (1994) (authorizing a federal court to permit the commencement of an action without prepayment of fees and costs by a person who signs an affidavit that he or she is unable to pay such costs).

\(^{187}\) While being able to identify private lawyers from the court dockets, it was not possible to
Third, I categorized the types of employment positions involved in litigation.\textsuperscript{188} By combining information learned about \textit{in forma pauperis} status, with information about the categories of lawyers representing plaintiffs, and the types of jobs at issue in the litigation, I hoped to be able to draw informed, albeit not entirely scientific, conclusions about the financial status of plaintiffs in Title I litigation.\textsuperscript{189}

\textbf{A. In Forma Pauperis Status}

The $150 filing fee required in federal cases is a substantial expense for indigent plaintiffs and as a result the poor often seek \textit{in forma pauperis} (IFP) status which waives this fee. While granting an IFP request would by definition identify a low-income plaintiff, the absence of an IFP request does not necessarily mean that the plaintiff was able to afford the costs of litigation. Experienced poverty lawyers routinely file IFP petitions in federal court on behalf of their indigent clients. However, private lawyers, and even some public interest lawyers who are unfamiliar with IFP practice, simply advance filing costs to their clients. Surprisingly, I found that out of 235 ADA employment cases filed,\textsuperscript{190} only two cases (less than one percent) contained requests for IFP status.\textsuperscript{191} The remaining cases involved paid complaints. In contrast, out of eighteen Title II or Title III accommodations-related cases filed,\textsuperscript{192} a total of eight cases (44 percent) contained requests for IFP status. This suggests, but certainly does not prove, that the poor are underrepresented in Title I litigation.

\textbf{B. Lawyers Representing the Poor}

Perhaps the single most important factor in attempting to remedy disability discrimination through the courts is access to legal representation. Without counsel, most low-income individuals are unable to file federal
complaints. If they try to do so on their own, they are substantially disadvantaged in the discovery process and when confronted with pretrial motions. Moreover, without counsel they seriously jeopardize their opportunity to place their cases in a sufficiently strong litigation posture so as to invite a successful settlement offer. Without question, lawyers for the poor make a huge difference, especially on behalf of those who lack the education or sophistication to be able to advocate successfully for themselves in a confusing and highly technical legal system.

There is no better example of the difference that lawyers make than the successful record of the ABA Children's Supplemental Security Income ("SSI") Project. After Congress changed the SSI law, threatening the discontinuation of disability benefits to many of the nation's disabled children, thousands of volunteer lawyers received training on how to handle these cases. Over half of the 150,000 children who initially lost their disability benefits had them restored with the help of counsel. This result would not have been possible without the availability of free competent counsel.

Nonetheless, access to lawyers for the poor is severely limited. Unlike criminal proceedings, there is no constitutional right to counsel in civil matters. National and state legal needs studies document the unmet legal needs of low- and moderate-income people and conclude that at best only about twenty percent of low-income people with legal needs have access to an attorney. Often, poor people do not recognize when they have a legal problem or when the services of a lawyer might prove helpful to them.

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193. During the three-year period studied, there were only two pro se employment complaints under the ADA. Generally, though not always, litigants who file their actions pro se in federal court are low-income.


196. See Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that due process clause of the Fourteenth Amendment mandates that the right to appointed counsel in criminal matters be applied to the states). For a renewed call to establish a "civil Gideon," see Robert W. Sweet, Civil Gideon and Confidence in a Just Society, 17 Yale L. & Pol'y Rev. 503 (1998).


198. See Powers, supra note 197, at 595-96.
1. Securing Legal Representation

When the poor seek legal help, they face difficulty in obtaining it because the primary providers of civil legal representation to the poor—publicly funded legal services programs—have suffered deep funding cuts. By necessity, these programs sharply limit the number and types of cases that they can accept. Despite statutory fee shifting provisions, which are supposed to provide a financial incentive to lawyers to take on disability discrimination cases, federal restrictions prohibit legal services programs from making claims for attorney's fees. For many legal services programs, scarce resources are usually reserved for the more traditional poverty cases, such as landlord-tenant and housing disputes, family and domestic violence issues, and welfare and social security cases. Because employment discrimination cases under the ADA are highly individualistic and particularly labor intensive, such cases are frequently rejected. After a while, the poor do not even seek assistance from their local legal services programs knowing that they cannot receive help for this type of legal problem. While larger (and non-restricted) legal services programs may continue to accept some employment or disability discrimination cases, they too have reduced their intake due to scarce resources.

The non-availability of traditional legal services lawyers to handle Title I cases is quite evident from the Filed Cases Study. Of the 238 employment cases filed, only one case was brought by a traditional legal services program. It is troubling, but nonetheless accurate, to report that poorly funded and inadequately staffed local legal services programs are currently unable to be a primary source of legal help for indigent victims of disability discrimination in the workplace.

The poor may receive free legal help from public interest organizations that specialize in disability advocacy issues. However, the resources of these

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200. 42 U.S.C. § 12205 provides in relevant part that "in any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party... a reasonable attorney's fee, including litigation expenses, and costs..."

201. See 45 C.F.R. § 1642.3 (1999).

202. See Powers, supra note 197, at 595.

203. In fact, there is evidence to suggest that even before this narrowing of case acceptance policies, poor people have been the least likely to seek legal assistance in employment matters and are more likely to bring domestic and personal or economic injury matters to the legal system. See id. at 597. Once legal services programs communicate that they are not handling certain types of cases, however, the number of calls seeking assistance for those matters quickly and dramatically declines. Thus, the inaccessibility of legal services may well cause low-income people not to seek advice and assistance regarding matters that fall outside of standard case priorities.

204. There are at least 10 publicly-funded legal services programs serving the civil needs of the poor residing in the geographical area encompassed by the Eastern District of Pennsylvania. Further information about those programs can be obtained from Legal Services, Harrisburg, Pa.
groups are also extremely limited and these organizations tend to be located only in the largest urban areas. Moreover, they mostly focus on issues of broad impact to the disabled community.205 Some public interest organizations receive funding from the Protection and Advocacy system for the purpose of assisting the disabled in a variety of legal matters, including employment issues under Title I. The Protection and Advocacy system is "a nationwide network of federally-mandated disability rights offices" that have the unique authority "to act like private attorneys general to vindicate the rights of persons with disabilities."206 Protection and advocacy organizations ("P&As") are authorized under several federal statutes and programs207 to provide legal representation and other advocacy services, including individual representation, advocacy for groups, educational efforts, information and referral services, and self-advocacy training.208 Priorities for P&As are established at the state level and historically have focused mostly on the needs of disabled persons within institutional settings.209 More recently, P&As have addressed the needs of disabled individuals who wish to live in the community.210 While most of their work does not involve litigation, some engage in class action litigation or law reform efforts to remedy oppressive conditions confronting the disabled.211

Of the 238 Title I cases in the Filed Cases Study, only five (2.1 percent) were brought by public interest lawyers212 or organizations. In contrast, of the 138 non-Title I ADA cases, public interest lawyers or organizations filed thirty-four cases (24.6 percent). The limited resources of these organizations required that most of their attention be directed toward larger systemic issues such as securing reasonable accommodations for the disabled to public and private entities, rather than directed at individual Title I claims.213 Thus, P&As tend not to handle many individual cases of disability discrimination in the workplace.214

Almost all of the Title I cases in the Filed Cases Study were filed by pri-

205. The Public Interest Law Center of Philadelphia is one example of a long-standing public interest legal organization that includes within its priorities the protection of the rights of the disabled.


208. See Gary P. Gross, supra note 206, at 674.

209. Id. at 678-80.

210. Id. at

211. Id. at 675.

212. This refers to non-legal-services lawyers.

213. Id. at 674.

214. It should be noted that some P&As actively litigate Title I complaints.
This holds important consequences for the disabled poor. First, in order for low-income workers or indigent job applicants to obtain access to the courts in Title I cases, they must compete with higher income and more mainstream employees for the services of the private bar. While it is possible that some indigent plaintiffs receive free legal help from private attorneys on a pro bono basis, the Filed Cases Study suggests that this occurs only occasionally in Title I cases. Most low income plaintiffs must turn to the private sector and hope that the economics of their cases, bolstered by the ADA’s statutory fee shifting provision should they prevail, provide sufficient inducement to allow them to secure representation in the private market on a traditional fee contingent basis.

The ADA authorizes an award of attorney’s fees to a prevailing party.

215. Of the 238 ADA employment cases brought during the three-year period studied, 230 (96.6 percent) were filed by private lawyers. The remaining 8 were brought by legal services lawyers (1 case), public interest lawyers (5 cases), or were filed pro se (2 cases).

216. The primary general pro bono organization in Philadelphia is the Volunteers for the Indigent Program ("VIP"). An interview with the VIP’s Executive Director confirmed that VIP does not place ADA employment discrimination cases with private lawyers; rather, any requests are referred to the district court’s pro bono panel for employment discrimination matters. See Interview by Telephone with Margaret DeMartelie, Esquire, Executive Director of VIP, Philadelphia, Pa. (Dec. 3, 1999). An interview with the coordinator of the pro bono panel, and a discussion with the clerk of the district court assigned to the panel, and a discussion with the pro se writ clerk of district court assigned to the panel, revealed that statistics are not kept that would identify the number of pro bono ADA employment cases successfully placed. See Interview by Telephone with Lorrie McKinley, Esquire, Coordinator of the Pro Bono Panel, in Philadelphia, Pa. (Dec. 3, 1999); Telephone Interview by Jason Leckerman with Andrew Follmer, pro se writ clerk of the district court assigned to the panel, in Philadelphia, Pa. (Dec. 1, 1999). The coordinator said that in her experience there are some ADA employment discrimination cases placed by the panel, but the number is small. This observation is confirmed by the overall statistics provided by the Employment Discrimination Attorney Panel. Between July 1, 1996 and September 30, 1998, there were 59 orders for appointment issued, resulting in only 12 actual appointments. See PENNSYLVANIA BAR INSTITUTE, LITIGATING EMPLOYMENT DISCRIMINATION CASES 43 (1998) (PBI No. 1998-2179). Most cases considered by the panel, according to the coordinator, are Title VII cases alleging race or gender discrimination. Therefore, it is unlikely that many ADA employment discrimination cases are placed by the employment discrimination panel.

217. See Kirstin Downey Grimsley, Worker Bias Cases are Rising Steadily; New Laws Boost Hopes for Monetary Awards, WASH. POST, May 12, 1997, at A1. This accounts the experience of Richard Seymour, Director of the Employment Discrimination Project at the Lawyers Committee for Civil Rights. He stated that many strong claims never make it into the courts because workers cannot afford to hire attorneys to represent them. See id. Few attorneys have the money to fund long litigation efforts on behalf of individual workers, and many potential litigants report that attorneys simply turn them away. See id.

218. Under the ADA, Congress intended that people with disabilities should have the same remedies available to minorities under Title VII of the Civil Rights Act of 1964. H. R. REP. No. 101-485, pt. 2, at 82 (1990), reprinted in 1990 U.S.C.C.A.N. 365. Among the remedies available to prevailing parties is the provision for an award of reasonable attorney’s fees, including litigation expenses and costs, similar to other civil rights laws. Id. at 423. See also Bruce v. City of Gainesville, 177 F.3d 949, 951 (11th Cir. 1999) (holding that attorney’s fee jurisprudence of Title VII applied by Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), also applies to the ADA). A prevailing ADA plaintiff should ordinarily be awarded attorney’s fees in all but unusual circumstances, but prevailing defendants may be awarded fees only if the action is frivo-
The purpose of fee shifting provisions is to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws are able to retain competent counsel. This raises the question whether the ADA’s fee shifting provision provides sufficient financial incentive for lawyers to take the cases of disabled and poor individuals who experience disability discrimination in entry level, minimum wage, or other low paying employment. Unfortunately, there is little empirical evidence to suggest that this is the case.

Title I cases are time consuming, expensive to litigate, highly individualistic, and labor intensive. They are certain to draw vigorous defenses from experienced counsel for employers who often possess superior resources. At the same time, the disabled poor frequently lack the ability to pay retainer fees or even partial litigation costs and, therefore, private lawyers must be convinced that such cases present reasonable chances of success. However, even meritorious claims of low-income workers or indigent job applicants may lack the promise of sufficient economic recovery to justify the investment and expenditure of lawyer resources required in these difficult cases.

Because comparatively few Title I cases actually go to trial, plaintiffs are most likely to achieve success through negotiated settlements. The precarious financial position of a lawyer who is attempting to settle an indigent plaintiff’s case has been worsened by Supreme Court decisions over the past two decades, especially by Evans v. Jeff D. Prior to Jeff D., the Third Circuit and other courts banned simultaneous negotiations of merits and attorney’s fees in order to avoid potential ethical conflicts between lawyer and client in the negotiation of settlement funds. However, in Jeff D. the Supreme Court overruled such restrictions, and permitted defendants to condition settlement offers upon waivers of attorney’s fees and allowed negotiations of fees to take place simultaneously with negotiations on the merits.

The Supreme Court reasoned in Jeff D. that the vindication of civil rights through voluntary settlements would be hampered if defendants were not able to tender offers of settlement that, if accepted, would constitute their total liability. Still, the Court recognized that its holding might result in individual clients bargaining away fee awards which, in turn, might ultimately diminish the number of lawyers willing to represent plaintiffs in such cases. Although the majority in Jeff D. thought this possibility to be “remote,” Justice Brennan strongly cautioned that the holding of Jeff D. would in fact “make it more difficult for civil rights plaintiffs to obtain legal assistance, a
result plainly contrary to Congress' purpose" in enacting fee shifting provisions. Justice Brennan noted that the fees act was intended to give "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, obtain access to courts, and thereafter to vindicate their rights by means of settlement or trial."  

History has proven Justice Brennan correct. Since the Court's decision in *Jeff D.*, defendants routinely offer plaintiffs lump sum settlement offers. While each plaintiff and her counsel must consider how division is possible, it is the client who retains final authority over a settlement offer. The poor are unlikely to reject modest settlement offers that satisfy pressing financial obligations simply because their lawyers will not receive full compensation from settlement funds. As a result, lawyers for the poor bear the financial brunt of the *Jeff D.* holding and, not surprisingly, lawyers for defendants exploit this economic reality. Where settlement funds are sufficiently large and plaintiffs sufficiently wealthy, lawyers for plaintiffs can safeguard their interests through retainer agreements that hold clients fully responsible for compensating their lawyers to the full value of their services. But when settlements are meager and clients are indigent, lawyers are unable to secure meaningful safeguards. The consequences are both immediate and long lasting. In such instances, lawyers waive large portions of their fees in order to ensure that their clients receive reasonable measures of compensation for their damages. Afterwards, they think long and hard before taking another case that fits this economic profile. In the long run poor people are the losers, as *Jeff D.* reduces settlement leverage and drives private lawyers further away from representing the poor. In Title I cases where the success rate for plaintiffs is already low, and settlement opportunities often represent the best and last opportunity for redress, the Supreme Court's holding in *Jeff D.* seriously impedes access to justice.  

2. The Poor as Clients

In addition to these difficulties in obtaining counsel for the poor, certain characteristics associated with poverty present their own unique challenges.

224. *Id.* at 743 (Brennan, J., dissenting).
225. *Id.* at 751-52 (Brennan, J., dissenting).
226. There are other developments that often work against the interests of the poor in ADA employment cases. Under Federal Rule of Civil Procedure 68, a defending party may make an offer of judgment up until ten days before trial. If not accepted, the rejecting party will not be entitled to any post offer attorney's fees or costs if the amount of the final judgment is not larger than the rejected offer. While the purpose of the rule is to promote settlement and avoid litigation, it creates enormous risk for plaintiffs that may fall particularly heavy upon plaintiff's counsel when the plaintiff is low-income and the amount of potential recovery quite modest. In addition, since ADA employment cases present greater risk to plaintiffs' counsel than most other cases, the Supreme Court's elimination of contingency risk enhancers has adverse impact in this area and further serves to diminish the availability of counsel. See City of Burlington v. Dague, 505 U.S. 557, 563-64 (1992) (declining to adopt a method of contingency fee enhancement that requires assessment of riskiness or showing that without enhancement counsel would be difficult to obtain).
The legal paradigm of Title I cases is heavily fact intensive and relies largely on the individual circumstances and perceived credibility of the plaintiff. Struggling with daily survival, the poor are less likely to be able to muster up evidence, secure witnesses, or present their own cases in the most compelling light. Often poorly educated and unsophisticated, many low-income people do not realize the value of documenting their cases as important events unfold. They often lack the continuity of medical care needed to fully substantiate their medical needs and limitations, and frequently they possess language difficulties or cultural differences that diminish their effectiveness as witnesses and spokespersons on their own behalf. These same limitations also make it very hard for the poor to participate as effective partners in the interactive process that is so essential to achieving reasonable accommodations in the workplace.\(^\text{227}\) Moreover, the poor generally do not possess long work histories that would make them sympathetic to the legal system, nor do they often possess unique workplace skills that create additional incentive for employers to reach out and accommodate them. In reality, jobs occupied by poor people with disabilities largely involve fungible, marginal skills. All of these factors contribute to making Title I cases on behalf of the poor unattractive to the private bar, and in making the stories behind such cases un-compelling to the legal system as a whole.\(^\text{228}\)

3. Missed Opportunities on Appeal

The importance of obtaining counsel to enforce rights under Title I does not end at the trial level, for the persistence and diligence of counsel in the face of unfavorable district court decisions can make a vital difference. By securing appellate review, lawyers play a vital role in correcting trial court errors and in helping to shape favorable statutory interpretations. For these reasons I also studied every reported appellate decision of the U.S. Court of Appeals for the Third Circuit involving the ADA ("the Appeals Study").

There were twenty-eight reported ADA appellate cases in the Appeals Study.\(^\text{229}\) Of these, 78.5 percent involved Title I employment cases, 14.2 percent were Title II public services cases, and 7.14 percent were Title III ac-

\(^{227}\) See 29 C.F.R. pt. 1630, app. § 1630.9 ("The appropriate reasonable accommodation is best achieved through a flexible, interactive process that involves both the employer and the qualified individual with a disability.").

\(^{228}\) This may help to explain why so many Title I cases apparently involve highly skilled, well-compensated jobs. Not only do lawyers, doctors, airline pilots and similar professionals have access to counsel, but society (including judges) believes that their unique skills deserve accommodation. When disability discrimination injures their careers or reputations, legal claims offer the potential for significant damages. Without such factors in their favor, however, the poor do not receive the benefit of such enlightened views. They are simply left behind.

\(^{229}\) The time period for the Appeals Study covered the same time period as the Filed Cases Study (1996-1998) plus ten months of 1999. The appellate decisions were identified utilizing Westlaw and included all Third Circuit ADA decisions during this time period, without regard to the district court from which the case originated. As a result, the review discussed here includes appeals filed from district court rulings throughout the Third Circuit and not just from the Eastern District of Pennsylvania.
commodations cases. This breakdown resembles the proportion that each title garnered at the district court level. In only one case was the appeal filed by a party who was a defendant in the trial court.230 Unlike district court outcomes, however, the ADA plaintiffs fared comparatively well in the Appeals Study.

In the aggregate, plaintiff-appellants in ADA cases were partially or fully successful on appeal in 53.6 percent of all ADA cases, and district court judgments were affirmed in only 46.4 percent of the cases. In Title I appeals specifically, employees won some form of relief in 45.5 percent of the cases, obtaining full reversals in 18.2 percent of the cases and partial reversals in another 27.3 percent of the cases. District court rulings for employers were affirmed in only 54.5 percent of the cases.231 Reversal rates were even higher in Title II and III appeals. These statistics, along with supporting reasons identified by the Third Circuit when granting full or partial reversals, suggest that district court judges were often too quick to dismiss complaints or grant summary judgment to defendants when in fact they should have allowed disputed issues to proceed to trial.232 Of course, victims of disability discrimination without access to counsel, or whose cases do not justify the time and expense of an appeal, are not in a position to benefit from appellate rulings.

C. Employment Positions at Issue

The conclusion that low-income workers are not frequent participants in Title I litigation is also drawn from a third index of poverty: the types of employment positions involved in the cases comprising the Reported Decisions Study. This discussion is by necessity only observational and does not purport to be a scientific analysis because there is very limited information available about the exact job positions at issue in ADA cases. It is nonetheless revealing that more than 55 percent of the positions at issue in the Reported Decisions Study involved highly skilled white collar positions such as doctor, vice president for human resources, nurse, teacher, administrator, professor or computer engineer. It is safe to assume that these positions were probably not occupied by low-income workers. Another significant group was comprised of skilled blue collar positions such as police officer, fire fighter, bus driver, or steel worker. Assuming that jobs in this skilled blue collar grouping were not held by the poor, the Reported Decisions Study found only a small pool that may have involved lower-income work-

230. The fact that 27 of 28 appellants (96.4%) were plaintiffs who lost in the trial court, mostly on pretrial adjudications, provides further confirmation of the unfavorable case outcomes documented in this study and experienced by plaintiffs in ADA litigation.

231. See Colker, supra note 161, at 107 (reporting that defendants in district courts prevailed in 84% of appellate cases nationally based upon her empirical study of appellate court employment decisions under the ADA).

232. This observation is consistent with Professor Colker's finding that district courts engaged in summary judgment "abuse" by not permitting factual questions to proceed to trial. See id. at 119 ("The overwhelming trend under the ADA has been for judges to decide most of the normative, factual issues themselves and rarely send cases to the jury.").
ers—at most 35 percent of the decisions. These were positions such as hospital cook, general laborer, machine operator, landscaper, or grocery clerk.

Without more information it is not possible to quantify reliably the claims of low-income workers, but it is unlikely for the reasons discussed elsewhere that there were numerous claims by the unemployed poor or by lower-income workers. For example, very few of the cases alleged a refusal to hire a marginal worker for an entry level position. These observations are not offered in order to find fault with the frequency with which professionals and higher paid employees turn to the federal courts for enforcement of their Title I rights. Rather, they are offered to suggest that the high incidence of skilled positions at issue in Title I litigation, and the comparative lack of low paying entry level positions being litigated, provide additional information about whether low-income workers are obtaining access to lawyers and enforcing their rights in court under the ADA.

IV. EEOC ENFORCEMENT OF TITLE I PROTECTIONS

If the poor are not frequent participants in federal litigation, then the effectiveness of federal administrative agencies that are entrusted with the enforcement of Title I takes on pronounced public importance. Title I of the ADA adopted the enforcement mechanisms of Title VII of the Civil Rights Act of 1964 and entrusted enforcement responsibilities to the Equal Employment Opportunities Commission (EEOC). Congress intended to ensure that

the Federal Government plays a central role in enforcing these standards [of the ADA] on behalf of individuals with disabilities. This means that discrimination on the basis of disability in any form [should] not be tolerated and people with disabilities [should] be able to hold their federal government accountable for ensuring the enforcement of their rights.

The effectiveness of agency enforcement of the ADA is important to all victims of disability discrimination, but it is especially vital to those who lack the resources for an attorney and who are unlikely to obtain counsel on a fee contingent basis.

A. Administrative Enforcement

One might expect that low-income employees would receive more favorable treatment under the relatively informal administrative process of the EEOC, where the poor turn for help in large numbers. To understand how complainants fare at the EEOC, the National Study also examined the reported statistics of the EEOC for fiscal years 1992 through 1997. Again, the question was whether administrative ADA complaints were resolved pri-

233. See discussion supra Part III.A-B.
235. Harkin Statement, supra note 7, at 8507.
arily in favor of employers or employees. The National Study found that of 83,158 complaints resolved from 1992 through 1997, 86.4 percent were resolved in favor of the employer, while 13.6 percent were resolved in favor of the employee. The National Study Update revealed that employers prevailed in 85 percent of the cases. The low success rates for employees in the administrative process was only slightly higher than the low national win rate for employees in federal court.

These results are fairly consistent with a more recent study of EEOC enforcement of the ADA conducted by Kathryn Moss and her colleagues. From July 26, 1992 through March 31, 1998, there were 175,226 charges filed under the ADA, of which 83.2 percent were closed by the administrative agency and “15.7 percent brought some benefit to charging parties.” However, only 1.7 percent resulted in new hires or reinstatements. Of cases investigated by the EEOC, only 11.5 percent brought some benefit to charging parties, with an median actual monetary benefit of $5,646. Claimants were more likely to receive benefits during the first three years of ADA implementation than during the last three years. The bottom line is that only a small percentage of charging parties secured any relief from the EEOC when alleging disability discrimination under the ADA.

The Moss study suggests several factors that may explain the low rate of success for charging parties. One is that attorneys are not required to file with the EEOC; thus, the screening function performed by the involvement of lawyers is missing. Additionally, there are no filing costs or complex

236. Under EEOC terminology, employers prevail when the case is closed administratively because the complainant no longer has a valid claim, the complainant has not followed proper procedures, or the EEOC has made a determination that there is no reasonable cause to believe that discrimination has occurred. On the other hand, employees prevail in negotiated merits settlements, when the employer grants benefits to the plaintiff, if conciliation is successful, or where the EEOC determines that reasonable cause existed to believe that discrimination occurred and, in most cases, begins conciliation efforts. See National Study, supra note 120, at 404. See also Equal Employment Opportunity Comma’s, Definition of Terms (visited March 15, 2000) <http://www.eeoc.gov/stats/define.html>.

237. See National Study Update, supra note 129.

238. See Kathryn Moss, Michael Ullman, Barbara Starrett, Scott Burris, & Matthew C. Johnsen, Outcomes of Employment Discrimination Charges Filed Under the Americans with Disabilities Act, 50 PSYCHIATRIC SERVICES 1028 (1999).

239. Id. at 1029-30.

240. See id. at 1031.

241. See id. at 1032. Administrative ADA claims are also investigated by state fair employment practices agencies. See id. at 1029. These agencies brought some benefits to charging parties in 23.3% of their cases, however the median actual monetary benefit was quite low at $2,400. See id. at 1032-33.

242. See id. at 1032.


244. See Moss et al., supra note 238, at 1034. If this is true, then one might expect that the presence of natural screening devices involved in the filing of federal complaints in district courts would result in more favorable case outcomes for charging parties there. However, formal success rates (that admittedly do not take into account the results of negotiated settlements)
filing procedures. Nonetheless, Moss asserts that these statistics should not diminish the important fact that many charging parties are obtaining benefits in the administrative process and that the mere existence of the statute and federal enforcement mechanisms provides powerful incentive for voluntary compliance that is not captured by these statistics. ADA implementation, like all civil rights implementation, takes time and must be assessed in the long term.

B. Litigation

Despite the low rate of success in the administrative process, the EEOC remains vitally important to the enforcement efforts of the poor. Poor people with disabilities need a vigorous EEOC that can administratively resolve small claims, which mean so much to the individual involved (and to the nation as a whole) but which lack sufficient economic value to find their way to federal court. The EEOC is also needed as an institutional litigator on behalf of the disabled poor when individuals are unable to pursue important claims because of poverty and when the overall interests of ADA compliance are directly at issue.

Is the EEOC a frequent litigant in ADA cases filed in the Eastern District? I examined this issue as well and found, based upon a review of the district court’s docket and the EEOC’s online litigation docket, that the question must be answered in the negative. The EEOC has filed, co-filed, or intervened in only ten federal cases in the Eastern District since the adoption of the ADA. This amounts to just over one case per year.

In those few cases that involved EEOC participation, the agency came to the aid of employees who occupied such positions as lawyer, shuttle driver, teacher, security guard, warehouse worker and food worker. With regard to the issues involved, the EEOC challenged employer policies that provided different long-term disability benefits to individuals with mental disabilities from those with physical disabilities, and union health and welfare funds that placed a lower lifetime cap on medical coverage for AIDS-related treatment than that provided on all other catastrophic illnesses. Obviously, the EEOC chose important cases that held substantial impact for many people. Of these ten cases, eight resulted in settlements, at least seven of which were actually lower in district court.

245. See Moss et al., supra note 238, at 1034.
246. See id.
247. The EEOC has authority to bring Title VII actions under 42 U.S.C. § 2000e-5, and thus may bring Title I ADA actions. See 42 U.S.C. § 12117.
249. See id. The time period studied was from July 26, 1992 to November 1, 1999. The total figure of 10 cases is based upon computerized searches of the district court’s docket and the EEOC’s trial docket posted on its website. See id. It is possible that cases exist that were not identified by using these two methods.
250. See id.
251. See id.
on terms very favorable to plaintiffs. This limited but highly successful involvement of the EEOC suggests that a greater litigation role by the agency would prove very helpful in enforcing the provisions of the Act.

V. IMPLICATIONS FOR WELFARE REFORM

Many individuals with disabilities who face difficulties obtaining or retaining employment due to disability discrimination rely on public assistance for their support. One program, now defunct, was Aid to Families with Dependent Children (AFDC), a federal entitlement program of guaranteed support to individuals who met nationally established eligibility criteria. Studies of AFDC recipients have documented that a range of 16.6 to 30.8 percent had disabilities. One study by the U.S. Department of Health and Human Services reported that 19 percent of recipients between the ages of fifteen and forty-five had a disability. Additionally, almost two-thirds of AFDC recipients with disabilities reported that a health condition limited their ability to work.

The nature of public assistance is changing, however. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed the AFDC program, replacing it with a block grant program known as the Temporary Assistance to Needy Families program (TANF). Under TANF,

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252. One case ended with a stipulation of dismissal by plaintiff, although the dockets of this case do not reflect the terms of settlement. One other case was still pending at the time of the writing of this article. Of the settled cases with settlement terms outlined on the dockets, seven appeared to contain benefits very favorable to plaintiffs, including in some instances payment of full back wages or substantial sums as well as reinstatement of employment. Only one case settled for a small sum, of slightly more than $1000, which may have been reasonable under the circumstances of that case.

253. The Department of Justice (DOJ) enforces the ADA under Title I with regard to the employment practices of state and local government. See 28 C.F.R. § 35.190(b)(6)(1996). The DOJ, through lawsuits, settlement agreements, and sometimes through pre-filing agreements, is able to have a positive impact. Obviously, any pre-filing settlements are not captured in these numbers. The DOJ places summaries of its enforcement activities on the Internet at U.S. Dep't of Justice, Civil Rights Div., Americans with Disabilities Act Information on the Web (visited Mar. 18, 2000) <http://www.usdoj.gov/crt/ada/>.

254. Recent changes in the nation's welfare laws threaten even this measure of support.


256. See KRISTA OLSON & LA DONNA PAVETTI, PERSONAL AND FAMILY CHALLENGES TO THE SUCCESSFUL TRANSITION FROM WELFARE TO WORK (1996), quoted in Dietrich et al., supra note 255, at 54.

257. See MICHELLE ADLER, DISABILITY AMONG WOMEN ON AFDC 2-5 (1996), quoted in Dietrich et al., supra note 255, at 54.

258. See id.

259. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed the former AFDC program which had established a federal entitlement program of guaranteed support to individuals who met nationally established eligibility criteria, and replaced it with a block grant program to states known as the Temporary Assistance to Needy Families program (TANF). See Pub. L. No. 104-193, 110 Stat. 2105, 2133-60 (1996) (to be codified at 42 U.S.C. §§ 601-619). See also Dietrich et al., supra note 255, at 53.
states are charged with "ending welfare ... dependence" by (among other things) promoting job preparation and work over welfare.\textsuperscript{260} States are held to performance standards in transitioning recipients from welfare to qualified work activities and are given broad discretion in setting benefit levels and eligibility criteria. States may impose sanctions upon recipients who fail to meet transition requirements.\textsuperscript{261} For example, if recipients fail to engage in work activities within twenty-four months after receipt of assistance.\textsuperscript{262} Even apart from sanctions, TANF establishes a five-year lifetime cap on receipt of welfare benefits, premised upon the expectation that recipients will be able to successfully secure lasting employment to support themselves and their families.\textsuperscript{263}

If the disabled poor do not know their rights under the ADA, or cannot secure enforcement because they lack access to lawyers or the courts, or cannot obtain vigorous enforcement from the administrative agency, the chances of transitioning from welfare to work are diminished. For example, the ADA strictly limits disability-related questions that may be asked of job applicants to ensure that hiring decisions are made upon qualifications and ability to perform essential functions of the job, and not upon stereotypes or fears.\textsuperscript{264} Thus for many welfare recipients with disabilities, the success of a job search may depend upon ADA enforcement at the earliest possible employment contact. If the disabled poor are asked illegal questions in the hiring process and consequently fail to obtain jobs for which they are qualified, they face the loss of welfare benefits either temporarily or permanently.\textsuperscript{265} This will only drive the disabled poor deeper into poverty and undermine the potential success of welfare reform efforts.

**CONCLUSION AND SUGGESTIONS FOR CHANGE**

During the past decade, the Americans with Disabilities Act has brought dramatic change to the nation. People with disabilities are now able to participate effectively in many of the services of public entities that were off limits to them just a few years ago. Although the struggle to make all public accommodations fully accessible continues, individuals now access movies, retail stores, restaurants, and concert halls, and utilize transportation and communication systems with much greater success than ever before. These

\textsuperscript{260} See Dietrich et al., supra note 255, at 53.


\textsuperscript{263} See Dietrich et al., supra note 255, at 53.

\textsuperscript{264} See 42 U.S.C. § 12112 (b)(6).

\textsuperscript{265} This may be the most problematic in the area of substance addiction. Alcoholics and recovered or recovering drug addicts (i.e., those who no longer use illegal drugs) are entitled to statutory protection but will face prejudice and discrimination if required to answer questions about such conditions. This is not an insignificant area of concern as up to 39% of welfare recipients may have a drug or alcohol problem impacting their functioning. See Dietrich, supra note 255, at 55.
changes have been largely achieved through the collective action of disability groups and citizen initiatives that have confronted injustice and demanded change, and by lawyers that have enforced legal obligations required by the ADA. As a result, people with disabilities have entered all aspects of American life and are visible in business, social and recreational settings as competent, valuable, and contributing members of society. While the journey for equality of opportunity, full participation, and independent living for people with disabilities is still far from complete, the nation has made a healthy start.

The next decade of life under the ADA must commit the nation’s resources to accomplishing comparable change in the workplace. People with disabilities, especially the poor, remain disproportionately unemployed even though they want to work, and disability discrimination stands in the way of their achieving self-sufficiency even in a strong economy. If the nation is serious about accomplishing the goals of Title I, it cannot simply continue along the same path.

This article documents that even in a politically moderate and highly regarded judicial district like the Eastern District of Pennsylvania, plaintiffs who turn to the courts to enforce their rights under Title I prevail in only 2.7 percent of all adjudicated cases. Without minimizing the importance of benefits achieved through negotiated settlements that are made possible only by litigation, the time has come to acknowledge that the scales of justice are unbalanced. We can ill-afford to dismiss this disturbing outcome for it represents the actual experience of all plaintiffs in adjudicated cases filed in the Eastern District over a three-year period. Moreover, it raises serious questions about the ability of the poor to enforce their rights under Title I as long as legal representation is unavailable and federal agency enforcement appears unresponsive. New and innovative approaches to combating disability discrimination in the workplace are needed if substantial progress under Title I is to be achieved in the next decade.

The highest priority should be for Congress to revisit the ADA. Scarce resources are being wasted during months, and sometimes years, of pretrial litigation just to determine the threshold question of whether a plaintiff’s dis-

266. The number of ADA cases brought in state court appears to be quite small, but it is difficult to identify these cases. Computerized searches of Pennsylvania state appellate opinions involving the ADA revealed only 12 cases decided since the adoption of the ADA, with the majority coming from the Commonwealth Court, Pennsylvania’s intermediate appellate court possessing special jurisdiction over state governmental agencies. State appellate cases tend to involve issues of alleged disability discrimination in zoning, driving privileges, and juvenile dependency proceedings. Only three involved employment settings under Title I. While the outcomes of the 12 appellate decisions do not provide a basis upon which to draw any meaningful conclusions, it is nonetheless interesting to note that plaintiffs prevailed in 16.7% of the appellate cases, defendants in 83.3%. As of April 3, 2000, the Supreme Court of Pennsylvania has not decided any cases involving claims under the ADA. Of course, disability rights are also protected by state laws in many states. See In re Holliday Am. Legion Ambulance Serv., 731 A.2d 169, 173 (Pa. Super. Ct. 1999) (finding that the Pennsylvania Human Relations Act is "interpreted in a coextensive manner" with the ADA because they "deal with similar subject matter and are grounded on similar legislative goals").
abilities qualify for protection under the ADA. If experienced lawyers cannot advise their clients with any high degree of confidence on this primary question, how can employers be expected to apply the law correctly in the workplace? While new statutes often create some amount of ambiguity and uncertainty for courts to resolve, confusion under the ADA appears only to grow as each year progresses.

In 1998, the Supreme Court appeared to broaden the definition of disability in *Bragdon v. Abbott*,267 when it held that a person infected with the human immunodeficiency virus (HIV), but not yet experiencing the disabling symptoms of AIDS, was disabled under the ADA because the virus had such a detrimental effect on the individual’s hemic and lymphatic system that it substantially limited the major life activity of reproduction.268 In 1999, the Court narrowed the definition of disability in *Sutton v. United Air Lines*,269 and *Murphy v. United Parcel Service*,270 when it ruled that visual impairments and high blood pressure disabilities must be viewed in their mitigated or corrected states.271 Consequently, persons whose visual impairments were corrected by lenses, and whose high blood pressure conditions were controlled by medication, were found not eligible for ADA protection as disabled persons even though those conditions were the precise reasons they were not hired for their prospective jobs. These recent decisions have prompted Leonard Glantz to question whether a woman who inherits high blood pressure, and who chooses not to have children because of the risks created by pregnancy and the chances of passing the condition on to her child, would be disabled under *Bragdon* but not under *Murphy*.272 Or further, if a messenger service refuses to hire a powerful and award-winning runner who has no legs but excels with the assistance of a prostheses, is the runner disabled under the ADA? After all, she runs as well with her prostheses as the *Sutton* pilots see with their corrective lenses.273

These poignant questions and observations highlight some of the apparent inconsistencies that make it difficult for employment lawyers to provide clear guidance to their clients and for trial courts to apply the law with consistency and uniformity. Expensive pretrial litigation over the definition of a qualifying disability will continue to be the norm in Title I cases unless the ADA is amended to bring its qualifying requirements closer to, if not identical with, the class-based approach adopted by Title VII of the Civil Rights Act of 1964. In this way, limited resources can be expended more productively on whether adverse employment action is the product of prohibited discrimination or legitimate employment considerations.

268. See id. at 648.
271. See *Sutton*, 527 U.S. at 481 (visual impairment); *Murphy*, 527 U.S. at 520 (high blood pressure).
273. See id.
The changes ahead must also include the federal government as a vigorous and effective enforcer of Title I. The EEOC is failing low-income workers who are compelled to rely on it for meaningful, and often exclusive, investigation and resolution of their claims. The poor are especially disadvantaged in the administrative process because without the assistance of counsel they are unlikely to be able to engage in fact investigation on their own and assist an overburdened EEOC investigator with well-documented support of their claims. In a busy administrative system, the absence of such preparation and assistance too often proves fatal to the claim. In the next decade, the EEOC should be adequately funded and staffed so that it ceases to be regarded by represented parties as a petty annoyance and frustrating delay on the road to federal litigation, or by unrepresented parties as a dead-end resting place for their claims without any real hope of remedy. In addition, the EEOC should assert itself as a frequent institutional litigant in appropriate cases on behalf of those who have no advocates to plead their cases. The EEOC’s record of involvement in only ten federal cases since the inception of the Act in a judicial district as busy as the Eastern District of Pennsylvania, which is home to an EEOC regional office, is grossly inadequate.

If the goals of Title I are to be accomplished, lawyers must also embrace their historical role as counselors. Lawyers for employees can help their clients to begin responsible dialogues with employers to develop ways that the workplace can comply with the law and at the same time satisfy business objectives. Because efforts to achieve reasonable accommodations require negotiation and mediation skills, lawyers can help employees to participate in constructive ways that encourage the identification of joint interests. Employees with disabilities will benefit from long-term relationships with employers that foster economic growth and upward mobility. These relationships will benefit from steady, firm and cooperative approaches in which lawyers serve as helpful intermediaries.

Similarly, lawyers for employers must take their role as counselors seriously. They should resist the urge to treat all discrimination concerns as frivolous and instead should endeavor to help their clients to understand legitimate employee needs. The ADA is the law, and ethical, responsible lawyers should use their professional training to help governmental and business clients comply with the law. To avoid any ambiguity in this regard, states should consider amending their rules of professional conduct to explicitly prohibit lawyers from counseling their clients to commit illegal conduct, which lawyers do when they devise clever ways to violate anti-discrimination mandates. Lawyers for employers should also review their clients’ job ap-

274. The *New Jersey Rules of Professional Conduct* expressly forbid a lawyer to “assist a client . . . in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law . . . .” *NEW JERSEY RULES OF PROFESSIONAL CONDUCT* Rule 1.2(d) (2000). Neither the *Pennsylvania Rules of Professional Conduct* nor the ABA’s *Model Rules of Professional Conduct* contain such an explicit prohibition. *See PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT* (2000); *MODEL RULES OF PROFESSIONAL CONDUCT* (1999). The
plication forms periodically for compliance with the ADA and assist clients
with training programs to ensure ADA compliance in hiring, promotions,
and discipline. And finally, lawyers should encourage their clients to adopt
progressive employment practices, including informal mechanisms for al-
ternative dispute resolution, as a way of establishing a disability-friendly envi-
ronment and resolving competing needs before they escalate into major dis-
putes.

Of course, litigation—for the poor as well as for the rich—must remain a
viable enforcement tool that deters wrongful conduct and remedies past in-
justices. Although case outcome studies have their limitations, there is seri-
ous reason for concern when such studies repeatedly show that people with
disabilities fare so poorly in adjudicated cases under Title I. In recent years,
some federal courts of appeals have conducted studies to determine whether
race or gender bias exist in our federal courts. These were undertaken to
insure that all citizens would have confidence in the fair and impartial ad-
ministration of justice. In light of disturbing Title I litigation outcomes, the
time has come for the appointment of a task force to study the treatment of
ADA employment discrimination claims in our federal courts.

It may be that case outcomes in Title I litigation are in greater equilib-
rion when the results of negotiated settlements are included. Voluntary set-
tlements should be encouraged wherever possible, but such encouragement
need not come at the expense of recordkeeping and public reporting. Dis-
trict court civil cover sheets should be revised to include check-off boxes for
ADA litigation, and more specifically Title I cases, so that this category of
litigation can be studied more easily in the future. In addition, parties con-
cluding litigation under Title I through negotiated settlements should be re-
quired to complete statistical reporting forms to be filed with the clerk. In
this way, information on the benefits of negotiated settlements can be cap-
tured and studied in a manner that neither inhibits settlement nor violates
legitimate interests of privacy.

Finally, and most importantly, significant resources must be provided to
allow greater access to counsel for impoverished individuals with disabilities
who experience employment discrimination. Increased public funding
should be directed to legal services and public interest organizations with in-

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drafters from the Kutak Commission recommended to the ABA that such a prohibition be in-
cluded in the Model Rule of Professional Conduct. See MODEL RULES OF PROFESSIONAL
CONDUCT Rule 1.2(d) (Discussion Draft, Jan. 30, 1980). However, this proposal was deleted
when the model rules were adopted in 1983. See MODEL RULES OF PROFESSIONAL CONDUCT
Rule 1.2(d) (Final Draft, Nov. 1982).

275. See Dolores K. Sloviter, Personal Reflections on Creation of the Third Circuit Task Force
on Equal Treatment in the Courts, 42 VILL. L. REV. 1347, 1348 (1997) (“In September 1990, the
Judicial Conference of the United States approved the recommendation of the Federal Courts
Study Committee encouraging the federal judiciary to ‘expand efforts to educate judges and
supporting personnel about the existence and dangers of racial, ethnic, and gender discrimina-
tion and bias.’”) (footnotes omitted). See also Comm’n on Gender & Comm’n on Race and
Ethnicity, Report of the Third Circuit Task Force on Equal Treatment in the Courts, 42 VILL.
structions that additional monies be utilized for representation in Title I cases, so that representation can be expanded in this vital area. Pro bono representation must also be increased through new initiatives that address the reasons why lawyers are hesitant to volunteer their services in this area of practice. And, without question, private lawyers must be encouraged to accept Title I cases on a fee contingent basis by removing economic disincentives and by ensuring that lawyers receive fair compensation in successful settlements as well as successful adjudications. All of these efforts should be supplemented by specialized law school clinics that utilize certified law students to provide legal representation under faculty supervision. The skills needed for successful representation in this area of law include interviewing, counseling, fact gathering, negotiation, mediation and litigation. Law school clinics are well-suited to play a meaningful role in supplementing scarce legal resources while at the same time preparing the next generation of lawyers for its important role in achieving equality of opportunity under the law.

Unlike other discrete and insular minorities, disability has been called an "open minority" because "almost everyone will become disabled at some point in his or her life." Thus, the struggle for independence holds personal significance for all of us. As the first decade of American life under the ADA comes to a close, there is reason to celebrate. But especially in the workplace, there is much work ahead.

276. Public interest and legal services organizations cannot meet this responsibility without additional funding. Public interest organizations tend to use their scarce resources in ways that have the greatest favorable impact on the largest number of people, and away from highly individual time-consuming fact-intensive and expensive litigation.

277. The availability of litigation funds for lawyers who represent low-income clients should help to attract more pro bono resources to Title I cases. Some district courts have established civil litigation funds to assist pro bono lawyers with the costs of litigation, although reimbursements are usually capped at modest amounts in light of the limited funds for this purpose. See Shannon P. Duffy, Attorneys Who Take Federal Pro Bono Cases Now Can Have Expenses Reimbursed, LEGAL INTELLIGENCER, Nov. 29, 1999, at 1.

278. See PELKA, supra note 5, at xii.

279. Upon accepting the ACLU of Pennsylvania's lifetime achievement award, the highly regarded disability rights lawyer Stephen F. Gold observed that even progressive lawyers fail to embrace the disability rights movement as enthusiastically as other civil rights movements. He stated that the time was long past due for disability to be recognized on par with race, gender, and sexual orientation as the great civil rights issues of our time. He chided advocates: "[P]rogressives have not understood that [the] disabled do not want pity or charity, but do want equal rights and civil rights." Shannon P. Duffy, Award Winner Scolds Liberals for Leaving the Disabled Behind, LEGAL INTELLIGENCER, Oct. 28, 1999, at A1.