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Michael Ashley Stein

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# Special Feature

## A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities

\* *Michael Ashley Stein*

\* *Professor, William & Mary School of Law; Executive Director, Harvard Project on Disability; Commissioner, American Bar Association Commission on Mental and Physical Disability Law. Professor Stein participated in the negotiations leading up to the adoption of the United Nations Convention on the Rights of Persons with Disabilities in several capacities, including as Senior Legal Counsel for Rehabilitation International.*

On December 13, 2006, the United Nations General Assembly adopted by general consensus the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>1</sup> Once in operation, the Convention will become the first human rights treaty of the twenty-first century, as well as the first legally enforceable United Nations instrument specifically applicable to persons with disabilities.<sup>2</sup> This article provides a quick overview of the background and contents of the UNCRPD, and also assesses its implications for Americans with disabilities.<sup>3</sup>

### I. Background: Toward Disability Human Rights

More than 650 million people, or some 10 percent of the world's population, have a disability. About 80 percent of these people live in developing countries, and are subject to material deprivation and social exclusion.<sup>4</sup> To provide a single, but graphic example, only 2 percent of children with disabilities in the developing parts of the world receive formal schooling.<sup>5</sup>

Nevertheless, before the UNCRPD, none of the seven core (meaning, legally enforceable) United Nations human rights treaties expressly protected people with disabilities. Each of these "hard laws" may be said to include people with disabilities within their purview, but only in varying degrees. To be protected, disabled persons had to either fall under a rarely enforced omnibus provision, or possess an identity characteristic in addition to that of their disability.<sup>6</sup> None was expressly applicable on the basis of a disability-related characteristic.<sup>7</sup> As a result, only a handful of disability-based human rights claims have been asserted under these treaties.<sup>8</sup>

Conversely, a number of "soft laws" expressly target individuals for human rights protection on the basis of a disability classification.<sup>9</sup> These include the General Assembly's designation of 1981 as the International Year of the Disabled,<sup>10</sup> and the period 1982-1991 as the International Decade of Disabled Persons.<sup>11</sup> Most significant is the

Standard Rules on the Equalization of Opportunities for Persons with Disabilities,<sup>12</sup> which are monitored by a Special Rapporteur.<sup>13</sup> Although laudable for explicitly referencing disability, as soft laws these series of resolutions, declarations, and protocols are not legally enforceable. In sum, before the UNCRPD, no existing international human rights instrument was both applicable to, and enforceable by, individuals on the basis of their "disability" status.<sup>14</sup>

Responding to this lacuna, in December 2001 the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human rights instrument.<sup>15</sup> The nearly five years of negotiations culminating in the UNCRPD's December 2006 adoption were unique for their participatory approach. For the first time in the 60-year history of United Nations human rights treaty formation, a targeted group was represented at and actively involved in the drafting of an instrument intended to protect their rights.<sup>16</sup> Further to the aphorism "Nothing about us without us," disabled persons and their representative organizations were accredited by the United Nations, leading to their active collaboration with member states throughout the drafting process.<sup>17</sup> The UNCRPD and its Optional Protocol opened for signature and ratification by member states on March 30, 2007.<sup>18</sup> It will enter into force 30 days after being ratified by 20 States parties.<sup>19</sup>

### II. Substance of the Convention: Beyond the ADA

The UNCRPD is a comprehensive human rights treaty that covers the spectrum of life activities of persons with disabilities. Contained in the instrument are foreseeable articles on fundamental rights such as education,<sup>20</sup> employment,<sup>21</sup> political participation,<sup>22</sup> legal capacity,<sup>23</sup> among others.<sup>24</sup> Several articles also exist that, at first blush, might look like newly created rights, but, in fact, are included for the purpose of clarifying the means through which other UNCRPD rights are culminated. Among this group are articles on living independently,<sup>25</sup> personal mobility,<sup>26</sup> and habilitation and rehabilitation.<sup>27</sup> The UNCRPD also contains articles specially dedicated to underscoring the rights of women with disabilities,<sup>28</sup> and children with disabilities.<sup>29</sup> Both sets of articles are meant to be horizontally integrated into the UNCRPD, meaning that they interrelate to all other UNCRPD articles rather than standing on their own.

Perhaps most significantly, the UNCRPD is a holistic human rights treaty. It combines the type of civil and political rights provided by anti-discrimination legislation (also called negative or first-generation rights) with the full spectrum of social, cultural, and economic measures (also called positive or second-generation rights) bestowed through equality measures.<sup>30</sup> Broadly stated, first-generation rights are thought to include prohibitions against state interference with rights that include life, movement, thought, expression, association, religion, and political participation.<sup>31</sup> They are conceptualized by what philosopher Isaiah Berlin famously

referred to as “negative rights.”<sup>32</sup> Second-generation rights focus on standards of living such as the availability of housing and education. These are thought of as “positive rights.”<sup>33</sup>

In combining these two generations of rights, the UNCRPD adheres to the United Nations human right to development theory.<sup>34</sup> This framework, which animates recent United Nations instruments, is evidenced in the Convention on the Elimination of All Forms of Discrimination against Women,<sup>35</sup> which demands both preventing direct discrimination and reinventing environments to eviscerate more subtle effects of cultural bias.<sup>36</sup> For example, the right to vote requires both freedom from restraints on political expression and affirmative government expenditure in facilitating the franchise’s exercise.<sup>37</sup>

From a practical perspective, the UNCRPD’s holistic approach accounts for factors normally exogenous to civil rights laws, including the Americans with Disabilities Act (ADA),<sup>38</sup> and in doing so better ensures that individuals can flourish and participate in their societies. Specifically, the full inclusion of a socially marginalized group (here, people with disabilities) requires invoking both negative and positive rights. This is because civil rights laws can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices.<sup>39</sup> Moreover, failing to counteract the unequal position of people with disabilities perpetuates their social stigma and the attitudes that maintain subordination. To illustrate, the UNCRPD is directed towards ensuring employment amongst persons with disabilities by prohibiting discrimination and requiring reasonable accommodations, as well as through the provision of vocational training and other measures to facilitate entry to the labor market.<sup>40</sup> The UNCRPD also requires states parties to combat social stereotypes and promote positive images of their respective disabled populations.<sup>41</sup>

In the case of the ADA, despite its laudable achievements the statute contains design and implementation shortcomings.<sup>42</sup> The legislation is unable to adequately protect Americans with disabilities in many aspects of their lives.<sup>43</sup> For example, even ADA proponents admit that the statute has not engendered noteworthy improvements in the employment sphere.<sup>44</sup>

Obtaining and keeping gainful work is contingent on connected factors such as the availability of healthcare, accessible transport, and vocational training.<sup>45</sup> Thus, employment-related anti-discrimination prohibitions are only effective when linked with equality measures (such as hiring preferences) that alter workplace hierarchies and cultures. However the disjuncture between first- and second-generation rights in the civil rights agenda manifests in anti-discrimination laws and policies that do not link socially contingent exclusion in diverse sectors with artificial exclusion from the workplace.<sup>46</sup>

To highlight the disconnect in American disability policy, consider the lack of extra-statutory support given the ADA’s employment mandate. Title I was intended as the most expedient method of bringing about social and economic equality for people with disabilities.<sup>47</sup> Nevertheless, it took nearly a decade to pass initiatives that allowed disabled persons receiving public assistance to

maintain their health care coverage while transitioning to employment.<sup>48</sup> During this period, and despite Senator Dole’s efforts,<sup>49</sup> no job training programs were promulgated on behalf of the disabled, although they were developed for other historically disadvantaged groups as part of the dramatic welfare reforms.<sup>50</sup> Indeed, to date, no federal job program exists on behalf of workers with disabilities. Consequently, while the ADA forbids employment discrimination the means by which disabled Americans can obtain and keep gainful employment have not been provided. As a result, the ADA cannot adequately ensure the inclusion of people with disabilities. Despite its many positive affects, the ADA, as a civil rights law, has not—and structurally cannot—bring about equality on its own. The UNCRPD, however, can go a much longer way toward ensuring these rights.

## Conclusion

The United States announced at the second Ad Hoc Committee session held in August 2003 (some five months before a draft convention was produced by a working group), that it would not enter into any future disability rights treaty.<sup>51</sup> The primary reason offered was that the ADA already placed it in the forefront of nations regarding the legal rights of people with disabilities.<sup>52</sup> Accordingly, from the third through the sixth Ad Hoc Committee sessions, the United States maintained a nominal presence at the negotiations, and offered sparse technical assistance to the states delegations despite its years of experience administering the ADA.

When it became clear that the UNCRPD’s adoption was likely, the United States assigned a State Department representative to the negotiations for the seventh through ninth Ad Hoc Committee sessions.<sup>53</sup> The United States endeavored to further bolster its image as a global cooperator by making exaggerated claims regarding its participation and support of the UNCRP during the Ad Hoc sessions following the General Assembly’s adoption of the treaty.<sup>54</sup> At the same time, it maintained its position against signature or ratification of any international disability rights convention on the ground that the ADA was sufficient to address the needs of disabled Americans.<sup>55</sup> Given the United States declaration of being at the forefront of disability law and policy, and the unquestionable extent to which the UNCRPD goes beyond the ADA’s boundaries, this stance is both puzzling and hypocritical.

The UNCRPD offers a valuable and uncontroversial way for the United States to reassert its self-image as a leading human rights actor among the global community. By signing and ratifying the treaty, and lending its unique technical expertise towards its implementation, the United States can contribute to social justice at home and abroad.

## ENDNOTES

1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter UNCRPD]. The text is *available at*

- <http://www.un.org/esa/socdev/enable/rights/convtexte.htm>.
2. See *infra* Part I. This article references international treaties, as opposed to intra-national or regional ones, such as the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608 29th Sess., O.E.A. Doc., OEA/Ser. P AG/doc.3826/99 (June 7, 1999).
  3. For further analysis of the UNCRPD, see Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007). For a critique of the limits of American disability law and policy, see Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203 (2007).
  4. See SECOND ANNUAL REPORT ON THE IMPLEMENTATION OF USAID DISABILITY POLICY 2 (2000). For a sense of the varying levels of disability reported from country-to-country, see United Nations Department of Economics and Social Affairs, Statistics Division, available at <http://www.unstats.un.org/unsd/disability/default.asp>.
  5. GERARD QUINN et al., HUMAN RIGHTS AND DISABILITY 11 (2002).
  6. See International Bill of Human Rights, the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966) [hereinafter ICESCR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 161, U.N. Doc. A/44/49 (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, at 262, U.N. Doc. A/45/49 (1990).
  7. The Convention on the Rights of the Child (CRC) is an exception for it contains a specific article requiring States parties to recognize the rights of children with disabilities to enjoy “full and decent” lives and to participate in their communities. That obligation, however, is tempered by the relative financial constraints of States parties. Moreover, the CRC does not mandate that children with disabilities be treated or considered as equal to children without disabilities. *Id.* at Art. 23(1)–(3).
  8. The website maintained by the office of the United Nations High Commissioner for Human Rights contains detailed information on the operation of the respective human rights treaty bodies, and is available at <http://www.unhchr.ch>. The decisions of the three relevant monitoring committees can be accessed through the Netherlands Institute of Human Rights web page, available at <http://sim.law.uu.nl/sim/Dochoome.nsf>.
  9. An overview of the basic documentation is maintained by a special unit of the Division for Social Policy and Development from the United Nations Department of Economic and Social Affairs, and is available at <http://www.un.org/esa/socdev/enable>.
  10. G.A. Res. 77, U.N. GAOR, 36th Sess., Supp. No. 77, at 158, U.N. Doc. A/RES/36/77 (1981).
  11. G.A. Res. 53, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc. A/RES/37/53 (1982).
  12. G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, at 202, U.N. Doc. A/48/49 (1993).
  13. For an inside perspective on the role of the Special Rapporteur, see Bengt Lindqvist, *Standard Rules in the Disability Field: A United Nations Instrument, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS* 63 (Theresia Degener & Yolán Koster-Dreese eds., 1995).
  14. See LEANDRO DESPOUY, REPORT ON HUMAN RIGHTS AND DISABLED PERSONS paras. 280–81 (1993) (noting that “persons with disabilities are going to find themselves in a legal disadvantage in relation to other vulnerable groups” because “unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection.”).
  15. United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (2001).
  16. Background details, including the varying position papers submitted to the Ad Hoc Committee by governments and non-governmental organizations can be viewed at the United Nations Department of Economic and Social Affairs website, available at <http://www.un.org/esa/socdev/enable/rights/humanrights.htm>.
  17. U.N. Doc. A/57/357, at paras. 10–16.
  18. The number of signatories to the UNCRPD and the Optional Protocol, as well as general background information and media announcements pertinent to the treaty is updated regularly at the United Nations Department of Social and Economic Affairs website, available at <http://www.un.org/esa/socdev/enable/index.html>.
  19. See UNCRPD, *supra* note 1, at Art. 45 (“The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.”).
  20. See *id.* at Art. 24.
  21. See *id.* at Art. 27.
  22. See *id.* at Art. 29.
  23. See *id.* at Art. 12.
  24. See, e.g., *id.* at Art. 13 (access to justice); Art. 21 (freedom of expression and opinion); Art. 22 (privacy).
  25. See *id.* at Art. 19.
  26. See *id.* at Art. 20.
  27. See *id.* at Art. 26.

28. *See id.* at Art. 6.
29. *See id.* at Art. 7.
30. *See generally* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 136–322 (2d ed. 2000).
31. *See, e.g.*, ICCPR, *supra* note 6, at Art. 6, para. 1 (“Every human being has the inherent right to life.”); Art. 9, para. 1 (“Everyone has the right to liberty and security of person.”); Art. 12, paras. 1–4 (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”); Art. 18, para. 1 (“Everyone shall have the right to freedom of thought, conscience and religion.”).
32. ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 122 (1958) (declaiming that authentic liberty is simply the absence of “the deliberate interference of other human beings within the area in which I could otherwise act.”).
33. *See, e.g.*, ICESCR, *supra* note 6, at Art. 11, para. 1 (“States Parties ... recognize the right of everyone to an adequate standard of living”); BERLIN, *supra* note 32, at 123 (defining positive liberty as the result of self-reliance and the ability to direct one’s own agency).
34. Officially recognized by a 1986 United Nations General Assembly declaration, this framework combines civil and political rights, and economic, social, and cultural rights within a single instrument, and emphasizes the interrelationship and indivisibility of all the human rights. G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 183, U.N. Doc. A/RES/41/128 (1986). *See generally* Stephen P. Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137 (2004).
35. G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979).
36. *Id.* at Arts. 1–2 (requiring States “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”); *id.* at Art. 5 (mandating that States parties modify behavior patterns arising from stereotyped notions of either sex as inferior or superior). *See also* STEINER & ALSTON, *supra* note 30, at 197 (adding that “[t]he formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life”).
37. *See also generally* Michael Waterstone, *Civil Rights and the Administration of Elections – Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUSTICE 102 (2004) (noting the barriers creating relatively low disability voting rates).
38. 42 U.S.C. §12101 *et seq.* (2000).
39. *See generally* Brad R. Roth, *The CEDAW as a Collective Approach to Women’s Rights*, 24 MICH. J. INT’L L. 187, 203 (2002) (“[A] line between ‘direct’ and ‘indirect’ interferences with the range of chosen activity seems not only arbitrary, but potentially obfuscatory, absolving politics of responsibility for the greater part of the real impediments to chosen activity, and characterizing as ‘free’ a polity in which individuals are as effectively constrained, perhaps, as those in an ‘unfree’ polity.”).
40. *See* UNCRPD, *supra* note 1, at Art. 27.
41. *Id.* at Art. 8.
42. For a recent analysis of the ADA’s efficacy, see THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE ADA (National Council on Disability July 26, 2007), available at <[http://www.ncd.gov/newsroom/publications/2007/ada\\_impact\\_07-26-07.htm](http://www.ncd.gov/newsroom/publications/2007/ada_impact_07-26-07.htm)>.
43. *See, e.g.*, Cornell University Rehabilitation and Research Training Center on Disability Demographics and Statistics 2005 DISABILITY STATUS REPORTS (indicating that the 2005 employment rate among working age people with disabilities was 38 percent, and the poverty rate among the same group was 25 percent), available at <[http://www.ilr.cornell.edu/ped/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports\\_US.pdf?CFID=13754524&CFTOKEN=34477900](http://www.ilr.cornell.edu/ped/disabilitystatistics/StatusReports/2005-pdf/2005-StatusReports_US.pdf?CFID=13754524&CFTOKEN=34477900)>.
44. *See* THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds. 2003) (collected econometric studies and policy essays).
45. *See* Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671 (2000).
46. This point was noted a decade ago by Richard V. Burkhauser, *Post-ADA: Are People with Disabilities Expected to Work?*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 71 (1997).
47. *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003) (disability rights advocates sold the ADA to Congress in large measure as a means of increasing employment and thus decreasing public benefit dependence).
48. Information on the Ticket to Work and Work Incentives Improvement Act and the Workforce Investment Act, is available at <<http://disability.law.uiowa.edu/index.htm>>.
49. Bob Dole, *Are We Keeping America’s Promises to People with Disabilities?*, 79 IOWA L. REV. 927 (1994).
50. *Cf.* Noah D. Zatz, *From Welfare to What?*, 57 HASTINGS L. J. 1131 (2006) (questioning the salience of welfare to work initiatives in the absence of a clear understanding of what comprises “work”).
51. *See* NAT’L COUNCIL ON DISABILITY, UPDATE ON THE UN CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (2004), available at <<http://www.ncd.gov/newsroom/publications/2004/unconvention.htm>>.
52. AM. ASS’N OF PEOPLE WITH DISABILITIES BRIEFING REPORT FOR USICD ON THE UN AD HOC COMMITTEE MEETING (2003), available online at <<http://www.aapd-dc.org/News/disability/unadhocmeeting.html>> (reporting statement of Ralph Boyd, United States Assistant Attorney General for Civil Rights).
53. Press Release, United States Mission to the United Nations, Statement by Steven Hill, Office of the Legal Advisor, U.S. Department of State, Head of Delegation to the Eighth Ad Hoc Committee on a Comprehensive and Integral International

Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Aug. 14, 2006), available at [http://www.un.int/usa/06\\_204.htm](http://www.un.int/usa/06_204.htm).

54. Press Release, United States Mission to the United Nations, Explanation of Position by Ambassador Richard T. Miller, U.S.

Representative to the UN Economic and Social Council, on the Convention on the Rights of Persons with Disabilities, Agenda Item 67(b), in the General Assembly (Dec. 13, 2006), available at [http://www.un.int/usa/06\\_396.htm](http://www.un.int/usa/06_396.htm).

55. *Id.*

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#### DISABILITY LAWYERS DIRECTORY IS BEING UPDATED

Register now to be included in the state-by-state directory of lawyers who practice disability law by completing our form at <http://www.abanet.org/disability/disabilitydirectory/registerform.shtml>. Those already on the list **must** update your already posted information—which **must** include your **email** address—by contacting [cmpdl@abanet.org](mailto:cmpdl@abanet.org). Listings without email addresses **will be dropped**. Neither the American Bar Association nor the Commission on Mental and Physical Disability Law endorses any of the lawyers or legal service providers found in this directory.

#### ABA National Conference on Employment of Lawyers with Disabilities Report and Recommendation

The first National Conference on Employment of Lawyers with Disabilities was held in Washington, DC, on May 22-23, 2006. The Conference—Sponsored by American Bar Association (ABA) President Michael S. Greco, the ABA Commission on Mental and Physical Disability Law, and the Equal Employment Opportunity Commission (EEOC)—focused on ways to increase employment opportunities for lawyers with disabilities within both the private and public sector. Specific topics included why hiring lawyers with disabilities makes good business sense; what the law requires with regard to hiring lawyers with disabilities and accommodating them once they are hired; how law firms can identify, hire, and retain lawyers with disabilities; and what are the best practices of law firms in hiring lawyers with disabilities. Richard L. Thornburgh, former U.S. Attorney General and Governor of Pennsylvania and current Of Counsel to Kirkpatrick & Lockhart Nicholson Graham, LLP, was the keynote speaker. Cari M. Dominguez, Chair of the EEOC, and Judge David S. Tatel, U.S. Court of Appeals for District of Columbia Circuit, were featured speakers. To access the Conference Report and Recommendation, visit the Commission's website at <http://www.abanet.org/disability>. A CD discussing the technical aspects of hiring, retaining, and accommodating lawyers with disabilities is available for \$25.00. Contact Michael Stratton at (202) 662-1570, or [strattonm@staff.abanet.org](mailto:strattonm@staff.abanet.org).