

20th Anniversary of the Americans with Disabilities Act

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Elana Nightingale Dawson

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LAWYERS' RESPONSIBILITIES UNDER TITLE III OF THE ADA: ENSURING COMMUNICATION ACCESS FOR THE DEAF AND HARD OF HEARING

Elana Nightingale Dawson*

Title III of the Americans with Disabilities Act requires that public accommodations provide the auxiliary aid or service necessary to ensure effective communication with the deaf and hard of hearing. Lawyers' offices are among the many locations and services covered by Title III. Unfortunately, many lawyers are unaware of this fact. Furthermore, as currently designed, the ADA creates little opportunity for the rights afforded by Title III to be successfully enforced against lawyers. This reality is particularly problematic for the deaf and hard of hearing community. The auxiliary aid or service necessary to accommodate a deaf or hard of hearing client often requires an out-of-pocket expense on the part of her attorney. In a world where lawyers are accustomed to passing on client-related costs to the client, the idea of absorbing such costs is antithetical. This Article looks at the history and implementation of Title III to explain why its effectiveness has been limited within the legal profession. It also explores the realities facing deaf and hard of hearing people seeking legal representation. Finally, this Article proposes a detailed three-pronged approach to free Title III from its current state of paralysis. First, lawyers must know their obligations to deaf and hard of hearing clients. Second, financial resources must be set aside to pay for the auxiliary aid or service required. Third, both Congress and the Court must take action to change the current remedies available under Title III. Progress must be made on all of these fronts in order for Title III to be the tool Congress intended.

* Candidate for Juris Doctor Degree, Northwestern University School of Law, 2011. The author thanks Howard Rosenblum, Debra Lefler, Colleen McNamara, and Danielle Levine for their helpful comments on earlier drafts. The author would also like to thank Joshua Reece and the editors of the *Valparaiso University Law Review* for their invaluable editorial contributions. The views expressed, and any misstatements, are solely those of the author.

I. INTRODUCTION

Nearly ten million Americans are hard of hearing and almost one million are functionally deaf.¹ The Americans with Disabilities Act (“ADA”) is designed not only to cover the approximately eleven million deaf and hard of hearing Americans, but also the almost fifty million Americans with recognizable disabilities.² As Senator Larry E. Craig pointed out, “[t]he ADA is truly vast in its scope.”³ The ADA’s coverage of public accommodations, as provided for in Title III of the Act, reaches even farther than the analogous portion of the Civil Rights Act of 1964 (“CRA”),⁴ which prohibits racial discrimination in public accommodations. Professional offices, such as those of a lawyer, are one such entity that is specifically named in the ADA but not in the CRA.⁵

Despite its broad aspirations, Title III does not adequately protect the rights of deaf and hard of hearing people who seek legal services. A person who is deaf or hard of hearing may need an interpreter, note-taker, or other accommodation in order to fully benefit from a lawyer’s services. But these accommodations can be expensive, which makes lawyers reluctant to provide them at their own cost. Additionally, lawyers have no incentive to comply with Title III’s requirements because they are unlikely to suffer any consequences from not complying with the law. Title III’s coverage of a lawyer’s office creates a catch-22 for deaf and hard of hearing people who encounter an inaccessible attorney. Title III only allows for injunctive relief in private actions.⁶ The deaf or hard of hearing person must sue their own attorney in order to force the attorney to comply with Title III. If they find a new attorney, they no longer have standing to sue the non-compliant attorney. Needless to say, suing one’s own attorney is not the best way to foster an attorney-client relationship.

¹ Ross E. Mitchell, *How Many Deaf People Are There in the United States? Estimates from the Survey of Income and Program Participation*, 11 J. DEAF STUD. & DEAF EDUC. 112, 112 (2006).

² See JUDITH WALDROP & SHARON M. STERN, U.S. CENSUS BUREAU, *DISABILITY STATUS: 2000 1* (2003) (“Census 2000 counted 49.7 million people with some type of long lasting condition or disability.”). The number of people covered under the ADA has likely increased significantly in light of the recently adopted amendments to the ADA that expand the definition of disability. See ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (rejecting various Supreme Court decisions that limited the definition of disability under the ADA).

³ Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 IDAHO L. REV. 205, 212 (1999).

⁴ 42 U.S.C. § 2000(a) (2006).

⁵ *Id.* § 12181(7)(F).

⁶ *Id.* § 12188(a)(1)–(2).

Because most ADA scholarship focuses on the ADA's employment discrimination provision, Title I, many solutions to ADA-related problems are framed from an employment discrimination perspective.⁷ Numerous commentators have assumed that these solutions will resolve the challenges faced under all Titles of the ADA.⁸ Professor Michael Waterstone challenges this assumption, arguing that Title II and Title III's success has been limited as the result of their enforcement mechanisms.⁹ This Article takes Waterstone's argument one step further. Just as Title I arguments do not always translate neatly into Title II and Title III contexts, accommodations required for one disabled population will not always sufficiently accommodate other disabled populations. Furthermore, within Title III, different public accommodations present different challenges to ADA enforcement. Title III covers a broad array of entities, from hotels to hospitals to grocery stores, thus limiting the success of the one-size-fits-all approach to regulations and remedies utilized by Title III.¹⁰

This Article begins to fill the gap in ADA scholarship by focusing on one place of public accommodation and its accessibility to one disabled population.¹¹ Like much of the ADA, Title III has a lot of promise, but without change, it will never accomplish its ultimate goals. Title III's shortcomings become very clear when looking at how Title III works in reality, as opposed to how it looks on paper. This Article argues that Title III is ineffective in regulating lawyers and thus leaves the deaf and hard of hearing unrepresented and potentially discriminated against even further. Title III has not resulted in the voluntary compliance Congress hoped for,¹² as evidenced by the difficulties that deaf and hard of hearing individuals face when attempting to obtain counsel.¹³

⁷ Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1809 (2005).

⁸ *Id.* at 1809-10.

⁹ *Id.* at 1810.

¹⁰ See *infra* Part III (explaining why Title III is a "servant to many masters" and examining the entities it covers).

¹¹ See *infra* notes 37-39 and accompanying text (introducing the statutory definition of "place of public accommodation" and explaining that a lawyer fits within this definition).

¹² NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION OF THE AMERICANS WITH DISABILITIES ACT: CHALLENGES, BEST PRACTICES, AND NEW OPPORTUNITIES FOR SUCCESS 179-85 (2007) [hereinafter NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION] (discussing the "[r]easons for [w]idespread [n]oncompliance with Title III"); see also 136 CONG. REC. 17,376 (1990) (statement of Sen. Robert Dole) (exemplifying congressional expectation that the ADA remedies would result in less discrimination when stating that "[t]he tough but fair enforcement remedies of ADA, which parallel the Civil Rights Act of 1964, are time-tested incentives for compliance and disincentives for discrimination").

¹³ NAD Advocacy Statement: *Communication Access Funds for Legal Services*, NAT'L ASS'N OF THE DEAF, <http://www.nad.org/issues/justice/lawyers-and-legal-services/>

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First, Part II discusses the history of the ADA's passage and briefly summarizes the final version of Title III. In doing so, it shows how the ADA's history contributed to the current failure of Title III to effectively serve the deaf and hard of hearing population attempting to obtain legal counsel. Then, Part III explains how and why Title III has fallen short of its main goal—"to provide clear, strong, consistent, enforceable standards addressing discrimination [by public accommodations] against individuals with disabilities."¹⁴ Next, Part IV proposes a three-part solution that will begin to free Title III from its current state of paralysis. And finally, Part V concludes by explaining how the implementation of the proposed three-part solution and continued focus on the challenges facing the deaf and hard of hearing trying to obtain counsel can help to move Title III exponentially closer to the life-changing legislation it was intended to be.

II. HOW WE GOT HERE: THE ADA & TITLE III

On July 26, 1990, then-President George H. W. Bush signed the ADA into law, declaring: "Let the shameful wall of exclusion finally come tumbling down."¹⁵ The enactment of the ADA marked the beginning of a new era for the disability civil rights movement. The ADA's goal was to provide social and economic equality for the disabled, leading some Senators to call it the "Emancipation Proclamation for all persons with disabilities."¹⁶

The ADA's road to passage was not entirely smooth. While it was still moving through Congress, Senator Tom Harkin introduced a revised version of the ADA. Included in Senator Harkin's ADA draft were two important changes to Title III. First, the definition of public accommodations was broadened to include "all privately operated establishments 'that are used by the general public as customers, clients,

communication-access-funds (last visited Oct. 18, 2010) [hereinafter *NAD Advocacy Statement*] ("People who are deaf continue to encounter significant communication barriers when attempting to obtain private legal services and representation...") (footnote omitted).

¹⁴ 42 U.S.C. § 12101(b)(2) (2006).

¹⁵ PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* xxxiv (2004).

¹⁶ 136 CONG. REC. 17,369 (1990) (statement of Sen. Tom Harkin) ("The ADA is, indeed, the 20th century Emancipation Proclamation for all persons with disabilities."); see also 135 CONG. REC. 19,888 (1989) (statement of Sen. Edward Kennedy) (describing the ADA in similar terms, when he said, "In a sense, this legislation is an emancipation proclamation for the disabled, and America will be better.").

or visitors; or that are potential places of employment.”¹⁷ Second, compensatory damages were made available as a remedy in private actions, with relief modeled after the relief available under the Fair Housing Act (“FHA”).¹⁸

Senator Harkin’s changes, however, brought about concern and opposition. Most notably, the Bush Administration stated that it would only agree to expansive coverage of private and public entities under Title III if remedies were limited to injunctive relief for private actions, the same remedy available under the CRA.¹⁹ In order to ensure continued bipartisan support while maintaining Title III’s broader reach, legislators reached a compromise²⁰ – Title III remedies for private actions would mirror those available under section 2000a-3 of the CRA.²¹

Senator Edward Kennedy noted his concern with a remedial scheme that only allowed for injunctive relief in private actions, stating “we have seen in the past that where we do not provide an adequate remedy we do not get compliance.”²² According to Senator Kennedy, both the then-President and Attorney General promised to support making the remedies stronger if they were not effective.²³ In defense of the new remedies, Senator Bob Dole asserted that “[t]he tough but fair enforcement remedies of [the] ADA, which parallel the Civil Rights Act of 1964, are time-tested incentives for compliance and disincentives for discrimination.”²⁴

Congressional proponents of using the CRA remedial approach for the ADA believed it would be adequate simply because of its success in

¹⁷ RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 33* (2005) [hereinafter COLKER, *DISABILITY PENDULUM*] (quoting S. 933, 101st Cong. § 401(2)(A)(i) (1989)).

¹⁸ *Id.*

¹⁹ Craig, *supra* note 3, at 215–16.

²⁰ COLKER, *DISABILITY PENDULUM*, *supra* note 17, at 173; *see also* 135 CONG. REC. 19,803 (1989) (statement of Sen. Tom Harkin) (referring to the “cutback [of] the remedies included in the original bill in exchange for a broad scope of coverage under the public accommodations title of the bill” as a “fragile compromise”).

²¹ The Civil Rights Act provides remedies as follows:

[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited . . . , a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved.

42 U.S.C. § 2000a-3(a) (2006).

²² 135 CONG. REC. 19,841 (1989).

²³ *See id.* (statement of Sen. Edward Kennedy) (referencing the need in 1988 to revisit the 1968 Fair Housing Act because inadequate remedies resulted in a lack of compliance).

²⁴ 136 CONG. REC. 17,376 (1990) (statement of Sen. Robert Dole).

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the CRA.²⁵ Those who initially advocated for stronger remedies, such as those available under the FHA, acquiesced to the compromise on remedies in the interest of getting the entire ADA, including broad public accommodation coverage under Title III, passed.²⁶ Then-Attorney General Richard Thornburgh did, however, note that reevaluation of the ADA over time would be necessary in order to determine whether it was effective as initially passed.²⁷

While ultimately receiving bipartisan support, the final version of the ADA was “the result of extensive scrutiny, debate, and compromise involving Members of Congress, the administration, and the business and disability communities.”²⁸ Because of the compromises and negotiations necessary to get the Act through Congress, “straightforwardness and clarity ultimately gave way to political reality, requiring some disingenuousness.”²⁹ The result, suggests Professor Bonnie Poitras Tucker, was “a law that many courts view as sending conflicting messages.”³⁰

The ADA version finally passed by Congress had three main focuses: disability-based discrimination by employers,³¹ the government,³² and public accommodations.³³ Disability-based discrimination by employers, prohibited by Title I, is the most litigated Title of the ADA and, not surprisingly, has received the most scholarly attention.³⁴ Some scholars have referred to Title I as being “[a]t the heart of the promise of the ADA.”³⁵ The scarcity of scholarship focusing on Title II and Title III, however, does not suggest that these Titles have achieved complete success. Instead, the overwhelming focus on the ADA’s employment provisions has simply placed that provision more firmly on the public’s consciousness.

Title III requires public accommodations to take the steps necessary to ensure access for people with disabilities.³⁶ A public accommodation,

²⁵ COLKER, *DISABILITY PENDULUM*, *supra* note 17, at 174.

²⁶ *Id.* at 172–74.

²⁷ *Id.* at 174.

²⁸ 136 CONG. REC. 17,366 (1990) (statement of Sen. Tom Harkin).

²⁹ Bonnie Poitras Tucker, *The ADA’s Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 340 (2001).

³⁰ *Id.*

³¹ 42 U.S.C. §§ 12112–12117 (2006).

³² *Id.* §§ 12131–12165.

³³ *Id.* §§ 12181–12189.

³⁴ Waterstone, *Untold Story*, *supra* note 7, at 1809.

³⁵ BLANCK, *supra* note 15, at 2–28.

³⁶ When prohibiting discrimination, Title III states that such prohibited action includes a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or

under Title III, is any private entity included in one of the twelve listed categories whose operations affect commerce.³⁷ The "office of an accountant or lawyer" is included in the definition.³⁸ Therefore, lawyers must provide auxiliary aids or services to any deaf or hard of hearing client, unless doing so would prove an undue burden.³⁹ An auxiliary aid or service is required when it is "necessary to ensure effective communication with individuals with disabilities."⁴⁰ Like any public accommodation, lawyers cannot pass along the cost of an auxiliary aid or service to the disabled person.⁴¹

Auxiliary aids and services include a wide variety of accommodations. Appropriate auxiliary aids and services for the deaf and hard of hearing usually include "[q]ualified interpreters, notetakers, [and] computer-aided transcription services."⁴² The Title III regulations define a qualified interpreter as "an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary."⁴³ The definition of the term "[q]ualified interpreter" is important because people often

otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

⁴² U.S.C. § 12182(b)(2)(A)(iii).

³⁷ *Id.* § 12181(7)(A)-(F).

³⁸ *Id.* § 12181(7)(F).

³⁹ *Id.* § 12182(b)(2)(A)(iii).

⁴⁰ 28 C.F.R. § 36.303(c) (2009).

⁴¹ *Id.* § 36.301(c).

⁴² *Id.* § 36.303(b)(1). In full, the regulation states the following:

The term "auxiliary aids and services" includes—

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Id. § 36.303(b).

⁴³ *Id.* § 36.104.

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misunderstand the important role that an interpreter plays, leading them to think that friends or family members are appropriate interpreters.⁴⁴

Lawyers must provide these auxiliary aids or services unless they can demonstrate that the required accommodation will cause them an undue burden or will fundamentally alter the goods or services offered by the attorney. However, the provision of communication access ordinarily does not give rise to a fundamental alteration defense.⁴⁵ The only defense available to an otherwise successful Title III claim is a showing that the required accommodation or modification will result in an undue burden on the lawyer. Moreover, a public accommodation cannot claim that an accommodation is an undue burden simply because the public accommodation is small, such as a solo practitioner.⁴⁶ “Undue burden,” in the context of Title III, has been defined as a “significant difficulty or expense.”⁴⁷ Even if a lawyer has a legitimate undue burden defense, they are still obligated to provide an alternate option for accessibility.⁴⁸ Various factors determine whether an accommodation

⁴⁴ 28 C.F.R. pt. 36, App. B, at 684-85 (2005) (describing the qualifications of family and friends as interpreters). The appendix states:

Public comment also revealed that public accommodations have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret “effectively, accurately, and impartially.”

Id.

⁴⁵ The fundamental alteration exception to Title III’s requirements usually arises in the context of a policy modification or significant programmatic change. See, e.g., Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 475 (1991) (Under Title III’s fundamental alteration exception, courts have not required alterations in the following situations: “if they would endanger a program’s viability; ‘massive’ or ‘extremely expensive’ changes are not required; modifications involving a ‘major restructuring’ of an enterprise or that ‘jeopardize the effectiveness’ of a program are not required; modifications are not required if they would so alter an enterprise as to create, in effect, a new program.” (footnotes omitted)).

⁴⁶ Compare 42 U.S.C. § 12181(7) (2006) (defining the term “public accommodation” in Title III without referencing size of any entity prohibited from discriminating based on disability), with *id.* § 12111(5)(A) (defining “employer” in Title I so as to exempt employers with fifteen or fewer employees from liability for disability discrimination).

⁴⁷ 28 C.F.R. § 36.104.

⁴⁸ *Id.* § 36.303(f). The regulation states:

If provision of a particular auxiliary aid or service by a public accommodation would result in . . . an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result

qualifies as an undue burden, including the type of auxiliary aid needed and the lawyer's overall financial resources.⁴⁹ If an attorney invokes the undue burden defense, the alleged undue burden must be measured against the financial health of the lawyer's (or firm's) entire practice—not in light of the income earned from the disabled client.⁵⁰ An undue burden does not exist simply because an attorney might lose money on a disabled client due to the cost of an auxiliary aid or service required by Title III.⁵¹

If, however, a lawyer has no undue burden defense and is found liable for a Title III violation, he is unlikely to be punished for this violation because of the compromise Congress made limiting the penalties for Title III violations.⁵² Under Title III, if one pursues a private cause of action, it must be for "preventive relief, including an application

in . . . such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.

Id.

⁴⁹ *Id.* § 36.104. The regulation delineates undue burden factors as follows:

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include—

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Id.

⁵⁰ See Eric Maxfield, *Sign Language Interpreters: Who Pays?*, COLO. LAW., Apr. 2004, at 29, 32 (noting that an attorney must provide an interpreter in a *pro bono* case "unless such provision would cause an undue burden," and that "whether a client is paying or represented *pro bono* is irrelevant"); see also 28 C.F.R. § 36.104 (outlining the undue burden factors).

⁵¹ See Victoria Chase & Kate Reznick, *Business Law: Serving the Deaf Client*, PHILA. LAW., Summer 2004, <http://www.philadelphiabar.org/page/TPLSummer04DealClient?appNum=2> (last visited Jan. 15, 2011).

⁵² See *supra* text accompanying notes 19–21 (explaining the remedies compromise reached in order to retain support for Title III).

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for a permanent or temporary injunction, restraining order, or other order.”⁵³ A deaf or hard of hearing client suing his or her attorney for injunctive relief is trying to obtain a court order (injunction) forcing the attorney to provide the auxiliary aid or service, or a reasonable alternative, necessary for effective communication.⁵⁴ While Title I and Title II allow for monetary damages in private actions,⁵⁵ Title III only allows monetary damages in claims brought by the Attorney General.⁵⁶ When the Attorney General pursues a Title III claim, compensatory damages are capped at \$50,000 for the first violation and \$100,000 for any subsequent violations.⁵⁷ Punitive damages are never recoverable under Title III.⁵⁸

The Department of Justice (“DOJ”) is the government agency responsible for Title III complaint investigation.⁵⁹ The DOJ also undertakes compliance review of entities covered by Title III.⁶⁰ The DOJ does not investigate every complaint they receive. Instead, the DOJ has complete discretion over whether to investigate complaints and will do so only “[w]here the Department has reason to believe that there may be a violation.”⁶¹ The DOJ will only bring a civil action when it believes there is a pattern or practice of discrimination or where the discrimination “raises an issue of general public importance.”⁶² When the DOJ is involved in a claim, they have dramatically higher pro-plaintiff results (49.9%) than in cases that lack DOJ involvement (27.8%).⁶³ However, the DOJ appears to be decreasing the number of complaints it investigates.⁶⁴

III. TITLE III TODAY

Title III is a servant to many masters. In addition to regulating a wide variety of public accommodations, it also aims to make public

⁵³ 42 U.S.C. § 2000a-3(a) (2006).

⁵⁴ *See id.* (describing a civil action under Title III).

⁵⁵ *Id.* §§ 12117(a), 12133.

⁵⁶ *Id.* § 12188(b)(2)(B); DEP’T OF JUSTICE, AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL, COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES III-8.4000 (1993), available at <http://www.ada.gov/taman3.html> [hereinafter DOJ TITLE III MANUAL].

⁵⁷ 42 U.S.C. § 12188(b)(2)(C).

⁵⁸ *Id.* § 12188(b)(4).

⁵⁹ DOJ TITLE III MANUAL, *supra* note 56, at III-8.3000.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at III-8.1000.

⁶³ NAT’L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 168 (quoting Waterstone, *Untold Story*, *supra* note 7, at 1874).

⁶⁴ *Id.*

accommodations accessible to the entire disabled population. The statutory design necessary to compel McDonald's to provide a ramp for its wheelchair bound customers will not necessarily compel an attorney to provide a sign language interpreter for his deaf client. The following section discusses how Title III is designed. This section also demonstrates why Title III's ability to regulate lawyers' offices has been necessarily limited.

A. *Accommodation Mandate and the Cost of Compliance*

The crux of Title III is its "accommodation mandate."⁶⁵ An accommodation mandate exists when a party is required to "take special steps in response to the distinctive needs of particular, identifiable demographic groups."⁶⁶ Title III's accommodation mandate requires public accommodations to make "reasonable modifications" to their policies, practices and procedures as well as taking "such steps as may be necessary to ensure that no individual with a disability is excluded, [or] denied services."⁶⁷ Critiques of the ADA's accommodation mandates, which question whether an accommodation mandate is the appropriate way to create accessibility, focus almost exclusively on Title I.⁶⁸ Critics of Title I contend that accommodations requiring ongoing financial commitment are economically inefficient and thus economically flawed.⁶⁹ Economic inefficiency occurs when a market participant is forced to do something he or she does not view as profitable or beneficial.⁷⁰ Under Title I, the market participant is the employer. If employers believe that disabled workers require costly accommodations in order to perform their jobs effectively, we would expect employers to choose to hire nondisabled employees, absent regulations to the contrary.⁷¹ Title I's accommodation mandate is also seen as shifting the burden of paying for accommodations from the government to private entities.⁷² Some scholars have questioned whether it makes sense to place the cost for providing accommodations on employers.⁷³ Some also

⁶⁵ Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 223 (2000).

⁶⁶ *Id.* at 231.

⁶⁷ 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (2006).

⁶⁸ *See id.* § 12112(b)(5) (requiring employers, under Title I's accommodation mandate, to provide reasonable accommodations to an identifiable demographic group—the disabled).

⁶⁹ Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 83-84 (2003).

⁷⁰ *Id.* at 120.

⁷¹ *Id.*

⁷² BLANCK, *supra* note 15, at 2-29.

⁷³ *See* Waterstone, *Untold Story*, *supra* note 7, at 1848 ("[C]ommentators have argued that the accommodation mandate is economically flawed (or at least of limited utility) in the

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worry that the cost of accommodating a disabled worker discourages employers from hiring disabled workers in the first place, despite the ADA's clear prohibition against disability-based discrimination.⁷⁴

Many of the critiques of Title I's accommodation mandate also pertain to Title III. However, Title III's accommodation mandates have gotten little scholarly attention. Professor Michael Waterstone suggests that this is because Title III's mandate is not as theoretically troubling as the mandate of Title I.⁷⁵ Accommodation requests under Title III "are often less personal and can apply to a range of customers."⁷⁶ As of 2005, there were very few Title III cases decided on the grounds that the accommodation presented an undue burden to the defendant, suggesting that most Title III accommodations require a reasonable one-time expense.⁷⁷ *PGA Tour, Inc. v. Martin* further supports the belief that the modifications required under Title III impose minimal, if any, costs on the public accommodation.⁷⁸ In *PGA Tour, Casey Martin*, who had a circulatory disorder, requested the use of a golf cart during a PGA tournament, despite the tournament's rule against golf cart use.⁷⁹ When the Supreme Court sided with Martin, the PGA Tour simply had to make an exception to their rule.⁸⁰ Likewise, most of Title III's more visible successes are the result of one-time expenditures: elevators and ramps in new buildings, wheelchair accessible tables at Starbucks, and ATM machines with Braille.

Missing from this analysis is the fact that accommodations under Title III typically take two forms: physical access and communication access. Physical access encompasses those items that people usually associate with the ADA—ramps, curb cuts, and elevators.⁸¹ Most physical access accommodations require a one-time outlay of funds and,

employment sphere."); see also Stein, *supra* note 69, at 144–78 (discussing the level of efficiency achieved by requiring employers to provide varying levels of accommodations).

⁷⁴ Jolls, *supra* note 65, at 275–76.

⁷⁵ Waterstone, *Untold Story*, *supra* note 7, at 1852.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1852–53.

⁷⁸ 532 U.S. 661 (2001).

⁷⁹ *Id.* at 668–69.

⁸⁰ *Id.* at 690.

⁸¹ Most Title II and Title III scholarship does not distinguish between physical access and communication access requirements, focusing solely on the requirement that public accommodations remove physical barriers. See, e.g., Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006) (focusing on physical accommodation requirements under the ADA); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 474–78 (2007) [hereinafter Waterstone, *New Vision*] (discussing physical access cases involving public accommodations).

thereafter, require little if any expense.⁸² Communication access, on the other hand, often requires an ongoing financial commitment, which is more analogous to the types of expenses incurred by employers covered by Title I. As such, many of the Title I accommodation mandate critiques also apply to Title III.

Title III's accommodation mandate, like Title I's, can also be seen as shifting the cost of accommodations from the government to private entities, such as lawyers, particularly with respect to the deaf and hard of hearing. Most auxiliary aids and services provided pursuant to Title III must be financed each time the disabled consumer utilizes the public accommodation's services.⁸³ A deaf patient who uses sign language needs a sign language interpreter for every doctor's appointment. Moreover, the "less personal" element of Title III accommodations to which Waterstone refers disappears when a public accommodation must provide services to a deaf or hard of hearing patron.⁸⁴ Furthermore, an auxiliary aid for the deaf does not always benefit a "range of customers."⁸⁵ All things being equal, a lawyer is just as likely to refuse to take on a deaf or hard of hearing client as an employer is to refuse to hire them. The economics are the same—when one choice requires an additional, ongoing expense, there is no reason to expect a person to voluntarily make the more expensive choice.

Title III's accommodation mandate, when considered alongside its weak remedial scheme, disincentivizes voluntary compliance by attorneys who have deaf or hard of hearing clients. Voluntary compliance is influenced by two things: the cost of compliance and the risk of noncompliance. The higher the cost, the greater the risk must be in order to achieve voluntary compliance and vice versa. However, when the cost of complying with an accommodation mandate is high *and* there is very little risk associated with noncompliance, the public accommodation has very little incentive to abide by Title III.

Title III compliance by lawyers is expensive and the risks associated with noncompliance are low. Therefore, all things being equal, it will generally make less economic sense for a lawyer to take on a deaf or hard of hearing client instead of a hearing non-disabled client. Lawyers

⁸² See Bagenstos, *supra* note 81, at 7 (noting that, with respect to barrier removal and physical access, "[s]upporters of the ADA frequently contend that the statute's requirement of accessible public accommodations serves the interests of business by opening up a new market . . . [a]nd [that] the ADA's requirements in this context are not particularly costly").

⁸³ See 42 U.S.C. § 12102(1)(A) (2006) ("The term 'auxiliary aids and services' includes . . . qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments . . .").

⁸⁴ Waterstone, *Untold Story*, *supra* note 7, at 1852.

⁸⁵ *Id.*

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are also in a unique position which allows them to avoid disabled clients simply by saying they do not have time.⁸⁶ Moreover, because Title III does not allow for monetary damages in private suits, the potential cost of noncompliance is low.⁸⁷ Compensatory damages, however, are available when the DOJ pursues a claim. Yet, this does not happen frequently enough to realistically incentivize compliance.⁸⁸ Nor does the cost of litigating an ADA claim incentivize compliance. The only litigation cost risk a public accommodation bears is its own costs.⁸⁹ Title III's accommodation mandate has little chance of success without increased enforcement and a compensatory damages remedy.

B. *Government Enforcement of Title III*

According to a recent National Council on Disability report, "Title III is overwhelmingly *underenforced*."⁹⁰ Critics have called the DOJ's enforcement of Title III "overly cautious, reactive, and lacking any coherent and unifying national strategy."⁹¹ In fact, the DOJ "has devoted 'only a small cadre of lawyers' to disability rights enforcement, and those lawyers must shoulder responsibility for enforcing the ADA against state and local governments as well as against private businesses."⁹² As a result, the DOJ's Disability Rights Section makes "decisions . . . not to open for investigation a large proportion of [public accommodations] complaints received," which explains why there is a relatively low number of public accommodation enforcement actions.⁹³ Thus attorneys who refuse to provide auxiliary aids and services to deaf and hard of

⁸⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (2010) ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."). Therefore, a lawyer can avoid representing a client simply by saying they are too busy, in which case they are obligated, under Rules of Professional Conduct, to decline representation.

⁸⁷ See *supra* note 56 and accompanying text.

⁸⁸ See *infra* Part III.B.

⁸⁹ See *infra* Part III.C.

⁹⁰ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 12. The National Council on Disability is "an independent federal agency making recommendations to the President and Congress on issues affecting 54 million Americans with disabilities." Office of Civil Rights, *Disability Resources*, DEP'T OF THE INTERIOR, <http://www.doi.gov/diversity/8able2.htm> (last visited Nov. 5, 2010). See generally Jonathan Young, *Living, Learning, and Earning Forums*, NAT'L COUNCIL ON DISABILITY, <http://www.ncd.gov/> (last visited Jan. 24, 2011) (describing the Council's objectives through the eyes of its Chairman).

⁹¹ Waterstone, *New Vision*, *supra* note 81, at 458–59.

⁹² Bagenstos, *supra* note 81, at 9.

⁹³ NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 38 (2000), available at http://www.ncd.gov/newsroom/publications/2000/promises_1.htm (alterations in original).

hearing clients have little fear of DOJ action—certainly not enough necessary to effect change.

There are two primary reasons for the DOJ's lack of effectiveness in the Title III enforcement arena. First, Congress has provided limited resources for DOJ enforcement of ADA violations.⁹⁴ Second, and more importantly, the ADA does not require the DOJ to pursue every Title III complaint it receives.⁹⁵ The DOJ need not pursue a Title III complaint unless it finds "a pattern or practice" of discrimination or "an issue of general public importance."⁹⁶ The lack of an enforcement mandate, coupled with the DOJ's limited resources, results in a "focus[]" on large, high profile commercial defendants, and [an] emphasi[s on] settlements and consent decrees over litigation."⁹⁷ A non-compliant attorney will rarely qualify as a high profile commercial defendant, making Title III complaints against them of little interest to the DOJ. Furthermore, the focus on settlements and consent decrees means businesses have very little public law to rely on when creating accessibility policies.⁹⁸

Only a few settlement agreements between the DOJ and attorneys who discriminated against their deaf or hard of hearing clients are publicly available.⁹⁹ However, anecdotal reports from deaf rights advocates indicate that the problem is widespread. Karen Aguilar, Associate Director of the Midwest Center for Law and the Deaf, reports significant difficulty when trying to match deaf and hard of hearing individuals with ADA-compliant lawyers.¹⁰⁰ When Howard Rosenblum, a deaf attorney in Chicago, passed the bar in 1992 he was immediately flooded with calls from deaf and hard of hearing individuals throughout Illinois.¹⁰¹ He often had to explain that he was too far away or that he

⁹⁴ Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 404-05 (2000) [hereinafter Colker, *ADA Title III*].

⁹⁵ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 11.

⁹⁶ *Id.* at 167-68 (citing 42 U.S.C. § 12188(b)(1)(B) (2006)) (internal quotations omitted).

⁹⁷ *Id.* at 168.

⁹⁸ Waterstone, *Untold Story*, *supra* note 7, at 1874.

⁹⁹ *E.g.*, Settlement Agreement By the United States of America, Clifford B. Hearn, Jr., and Clifford B. Hearn, Jr., P.A., Dep't of Just. No. 202-15-37 (2008), <http://www.ada.gov/hearn.htm>; Settlement Agreement Between the United States of America and Joseph David Camacho, Esq., Albuquerque, New Mexico Under the Americans with Disabilities Act, Dep't of Just. No. 202-4937 (2007), <http://www.ada.gov/albuquerque.htm> [hereinafter Camacho Settlement Agreement]; Settlement Agreement Between the United States of America and Gregg Tirone, Esq., Dep't of Justice No. 202-53-20 (2004), <http://www.ada.gov/tirone.htm> [hereinafter Tirone Settlement Agreement].

¹⁰⁰ Telephone Interview with Karen Aguilar, Assoc. Dir., Midwest Ctr. for Law & the Deaf (Oct. 1, 2009) [hereinafter Aguilar Interview].

¹⁰¹ E-mail from Howard Rosenblum, Founder & Chair, Midwest Ctr. on L. & the Deaf, to author (Sept. 30, 2009, 12:33 CST) (on file with author).

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did not specialize in the area of law in which the caller needed assistance. The influx of interested potential clients demonstrated to Rosenblum the difficulties that the deaf and hard of hearing community experience when attempting to obtain legal representation.¹⁰² The following two cases illustrate how inaccessible the legal world is to the deaf and hard of hearing community.

Kathleen Culhane Rozanski, a deaf woman in Rochester, NY, needed to hire an attorney to handle her divorce. Ms. Rozanski communicates with sign language and also lipreads.¹⁰³ She retained attorney Gregg Tirone.¹⁰⁴ Her divorce involved a number of sensitive matters, including domestic violence, child custody, and issues involving a restraining order. According to Ms. Rozanski, “Mr. Tirone failed to provide a qualified sign language interpreter during several meetings.”¹⁰⁵ Mr. Tirone instead chose to communicate with Ms. Rozanski using “pen and paper, fax, lipreading, and by use of the National Relay Service when communicating by phone.”¹⁰⁶ At times Ms. Rozanski’s sister, who also has some hearing loss, helped interpret during meetings with Mr. Tirone.¹⁰⁷

Ms. Rozanski filed a complaint with the DOJ alleging that Mr. Tirone’s failure to provide a qualified sign language interpreter violated Title III.¹⁰⁸ Ms. Rozanski claimed that she did not always understand Mr. Tirone.¹⁰⁹ She also claimed that the methods he used for communicating resulted in higher charges to her because “use of these alternatives took longer than would have occurred had a qualified sign language interpreter been used.”¹¹⁰ Mr. Tirone responded to Ms. Rozanski’s allegations, claiming that he “represented Ms. Rozanski adequately and professionally, and that he effectively communicated with her.”¹¹¹ He also believed that Ms. Rozanski always understood him.¹¹²

¹⁰² *Id.*

¹⁰³ Tirone Settlement Agreement, *supra* note 99, ¶ 4.

¹⁰⁴ *Id.* ¶ 5.

¹⁰⁵ *Id.* ¶ 6.

¹⁰⁶ *Id.* ¶ 8.

¹⁰⁷ Elizabeth Stull, *Hearing the Legal Needs of the Deaf in New York*, DAILY RECORD (Rochester, NY), Feb. 6, 2009, available at http://findarticles.com/p/articles/mi_qn4180/is_20090206/ai_n31322102/.

¹⁰⁸ Tirone Settlement Agreement, *supra* 99, ¶¶ 3, 9.

¹⁰⁹ *Id.* ¶ 8.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

The DOJ investigated Ms. Rozanski's complaint and concluded that her allegations were meritorious.¹¹³ In light of this finding, Mr. Tirone entered into a settlement agreement with the United States Government.¹¹⁴ Under the terms of the Agreement, Mr. Tirone agreed to pay Ms. Rozanski \$2,200 and to forfeit any money she still owed him.¹¹⁵ Mr. Tirone acknowledged a single ADA violation and agreed to comply with the terms set forth in the settlement agreement with the United States.¹¹⁶ The DOJ's findings included a determination that it was inappropriate to use a family member as a sign language interpreter when the matter involved domestic violence.¹¹⁷ The Agreement's findings went on to state that Ms. Rozanski's sister was not qualified to interpret because she "had no specialized training in interpreting legal terms."¹¹⁸ Despite the DOJ's findings, Mr. Tirone continues to feel "like [he] zealously represented [his] client within the bounds of the law and procured a favorable result for her."¹¹⁹

Ms. Rozanski's experience does not stand alone. In April, 2002, Carolyn Tanaka's six-year-old son was admitted to the University of New Mexico Hospital for three days.¹²⁰ Ms. Tanaka is also deaf and uses American Sign Language to communicate. She alleged that the hospital, on numerous occasions, did not provide a qualified sign language interpreter as required by law.¹²¹ Ms. Tanaka retained lawyer Joseph Camacho of Albuquerque in order to pursue her legal claim against the hospital.¹²²

Ms. Tanaka repeatedly asked Mr. Camacho to provide a qualified interpreter for their meetings. But like the hospital, Ms. Tanaka's lawyer failed to provide the auxiliary aid or service necessary to communicate with his client, as required by law.¹²³ Mr. Camacho instead expected Ms. Tanaka's then nine-year-old son to "interpret" their meetings.¹²⁴ Ultimately, Mr. Camacho withdrew from Ms. Tanaka's case.¹²⁵

¹¹³ *Id.* ¶ 20.

¹¹⁴ *Id.* ¶ 1.

¹¹⁵ *Id.* ¶ 22.

¹¹⁶ *Id.* ¶¶ 21-30.

¹¹⁷ *Id.* ¶ 19.

¹¹⁸ *Id.*

¹¹⁹ Stull, *supra* note 107 (quoting Mr. Tirone).

¹²⁰ Camacho Settlement Agreement, *supra* note 99, ¶ 3.

¹²¹ *Id.*; see also Americans with Disabilities Act of 1990, 42 U.S.C. § 12181(7)(F) (2006) (defining public accommodation to include hospitals under Title III).

¹²² Camacho Settlement Agreement, *supra* note 99, ¶ 3.

¹²³ 42 U.S.C. § 12181(7)(F).

¹²⁴ Camacho Settlement Agreement, *supra* note 99, ¶ 3.

¹²⁵ *Id.*

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Ms. Tanaka contacted the National Association of the Deaf (“NAD”) about her problems with Mr. Camacho. The NAD filed a complaint with the DOJ, “alleging that Mr. Camacho refused to secure a qualified sign language interpreter when necessary to ensure effective communication with her.”¹²⁶ The complaint against Mr. Camacho included evidence of his Title III violation in the form of a letter from Mr. Camacho to Ms. Tanaka.¹²⁷ The letter included the following statement:

It is my understanding that you refuse to cooperate unless I provide you with an interpreter, which will cost me approximately eighty dollars an hour. I have never had to pay to converse with my own client. It would be different if you did not have anyone to translate for you. However, you have a very intelligent son who can do it for you. It appears that we are not able to work together. I believe that you should find another attorney as I am going to withdraw from this case.¹²⁸

Mr. Camacho’s withdrawal left Ms. Tanaka without representation in her suit against the hospital, resulting in the dismissal of her claim “due to her failure to respond to discovery.”¹²⁹ Mr. Camacho responded to Ms. Tanaka’s allegations by maintaining “that he was able to communicate effectively with [her] by means of written notes, e-mail, telephone relays and through the interpretation of [her] nine-year-old son.”¹³⁰ Mr. Camacho also submitted a list of pleadings he prepared on Ms. Tanaka’s behalf as evidence that he communicated effectively with her.¹³¹

The DOJ did not find Mr. Camacho’s response compelling. After an investigation, the DOJ concluded that the allegation that Mr. Camacho failed to provide Ms. Tanaka with effective communication had merit.¹³² Mr. Camacho subsequently entered into a settlement agreement with the United States government (“*Camacho* settlement agreement”).¹³³ As part of the agreement, Mr. Camacho agreed to pay Ms. Tanaka \$1,000.¹³⁴

¹²⁶ *Id.* ¶ 2.

¹²⁷ *Id.* ¶ 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 4.

¹³¹ *Id.*

¹³² *Id.* ¶ 10.

¹³³ *Id.* ¶ 8.

¹³⁴ *Id.* ¶¶ 15-16.

The *Camacho* settlement agreement is a perfect example of why the threat of DOJ action carries very little weight. Generally, alleged discrimination by an attorney against a deaf or hard of hearing person might be difficult to prove because an attorney can refuse a client by simply saying they are too busy. The *Camacho* case, however, can easily be categorized as a slam-dunk. Mr. Camacho would be hard-pressed to argue that he was unaware of his obligations under Title III because he was pursuing a Title III claim on behalf of his client, Ms. Tanaka.¹³⁵ Despite his assumed familiarity with Title III's requirements, Mr. Camacho still thought it appropriate to request that Ms. Tanaka's nine-year-old son interpret their attorney-client meetings.¹³⁶ Mr. Camacho seemed unconcerned with the fact that as a child, Ms. Tanaka's son was almost assuredly not familiar with the necessary legal terminology in order to adequately interpret his advice, never mind the fact that it was the child's hospital stay at issue in Ms. Tanaka's suit.¹³⁷ Under these circumstances, Ms. Tanaka's son was arguably the last person Mr. Camacho could claim as being both "qualified" and "impartial."¹³⁸

Although the DOJ found Ms. Tanaka's allegations against Mr. Camacho "meritorious," they offered Mr. Camacho an easy way out—pay \$1,000 and agree to abide by the ADA and no further litigation would result.¹³⁹ The settlement agreement even stated that Mr. Camacho's reason for accepting the agreement was to "resolve [the] matter without further litigation" and, in exchange, the DOJ agreed not to investigate Mr. Camacho further.¹⁴⁰ Mr. Camacho's punishment under the settlement agreement, however, does little to "compensate the deaf individual for the discrimination that she has suffered."¹⁴¹ Furthermore, the \$1,000 award is not likely to leave other attorneys in fear of possible Title III enforcement.

The DOJ saw the *Camacho* settlement agreement as a major victory. In fact, Assistant Attorney General Wan J. Kim praised Mr. Camacho for "working with [the Justice Department] and recognizing the importance

¹³⁵ *Id.* ¶ 3.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*; see also DOJ TITLE III MANUAL, *supra* note 56, III-4.3200 (explaining that when an interpreter is required, the public accommodation must provide a qualified interpreter who conveys communication impartially).

¹³⁹ *Camacho Settlement Agreement*, *supra* note 99, at ¶¶ 10-16.

¹⁴⁰ *Id.* ¶ 11.

¹⁴¹ Telephone Interview with Marc Charmatz, Senior Attorney, Nat'l Ass'n of the Deaf (Nov. 9, 2009) [hereinafter Charmatz Interview]. Mr. Charmatz worked with Tanaka on her claim by the DOJ against Camacho.

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of clear communication with clients.”¹⁴² The statements made by Mr. Camacho and included in the settlement agreement, however, hardly suggest an attorney who has recognized the importance of clear communication. Kim went on to say that the DOJ hoped “that this agreement [would] be a model for other attorneys and law firms.”¹⁴³

The DOJ’s decision to settle for miniscule monetary damages and a good faith promise sends a clear message to attorneys—even if they violate Title III’s accommodation mandate, they are not likely to face litigation or stiff fines. The DOJ’s current enforcement regime provides no incentives for an attorney to pay for an auxiliary aid or service for their deaf or hard of hearing client. Non-compliant behavior is rarely, if ever, going to result in a DOJ initiated action, let alone a financial award for the plaintiff that must be paid by the non-compliant attorney. Aggressive enforcement of Title III is necessary in order to achieve widespread compliance by lawyers.¹⁴⁴ The DOJ’s inaction merely reinforces the status quo—lack of compliance and unremedied violations.

C. *Why Title III Is Failing*

Title III is unique, both within the ADA and when compared to the CRA, upon which much of it is fashioned. Title III is the only ADA provision that does not provide a damage remedy for private litigants. Instead, those suing under Title III are entitled only to prospective relief, in the form of an injunction.¹⁴⁵ Congress lifted the remedies available under Title III directly from the CRA.¹⁴⁶ Just as Senator Kennedy feared, however, the differences between the CRA’s anti-discrimination mandate and Title III’s accommodation mandate make the CRA’s remedies ineffective for many potential Title III litigants.¹⁴⁷

Unlike the CRA, Title III requires that public accommodations take proactive steps to ensure equal access for people with disabilities. Entities covered by Title III must do more than simply allow access to a disabled person. Public accommodations must make “reasonable modifications” or provide “auxiliary aids and services” to ensure that

¹⁴² Press Release, Dep’t of Just., *Albuquerque, N.M. Law Office Agrees to Provide Effective Communication to Deaf and Hard of Hearing Clients* (Aug. 9, 2007), available at http://www.justice.gov/opa/pr/2007/August/07_crt_598.html.

¹⁴³ *Id.*

¹⁴⁴ Bagenstos, *supra* note 81, at 9 (“[W]idespread compliance with the ADA’s accessibility requirements is unlikely in the absence of a realistic threat of vigorous enforcement of those requirements.”).

¹⁴⁵ 42 U.S.C. § 12188(a) (2006) (referencing 42 U.S.C. § 2000a-3(a) (2006)).

¹⁴⁶ *Id.*

¹⁴⁷ See 135 CONG. REC. 19,888 (1989).

"no individual with a disability is . . . denied services."¹⁴⁸ Compliance with Title III often results in an expense to the covered entity, whereas CRA compliance can usually be achieved with a simple practice or policy change, such as the removal of a "whites only" sign.¹⁴⁹ Title III and the CRA also differ in their definition of public accommodation. It has been said that "the breadth of Title III's coverage was purchased at the cost of the strength of its remedies."¹⁵⁰ Title III expanded the definition of public accommodation from three categories to twelve. The trade-off, however, was that the compensatory damages remedy for private actions was removed from Title III.¹⁵¹ The discussion below illustrates why Title III's limited remedies increase the number of hurdles a potential Title III plaintiff must overcome.

1. Barriers to Private Actions Under Title III

Deaf and hard of hearing plaintiffs who attempt to pursue private causes of action under Title III face a number of justiciability barriers.¹⁵² Standing is one such barrier.¹⁵³ In order to be justiciable, a plaintiff's claim must satisfy the Constitution's case or controversy requirement.¹⁵⁴ The Court has explained that in order to satisfy this requirement "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."¹⁵⁵ Therefore, because the relief available to a Title III plaintiff is prospective, he must do more than simply show he was the victim of discriminatory treatment.¹⁵⁶ Instead, he "must meet the continuing violation doctrine . . . [by] show[ing] that there is a risk of the harm happening to him again [in the future]."¹⁵⁷

¹⁴⁸ 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii).

¹⁴⁹ COLKER, *DISABILITY PENDULUM*, *supra* note 17, at 184.

¹⁵⁰ BLANCK, *supra* note 15, § 17.1.

¹⁵¹ See *supra* text accompanying notes 15-35 (outlining the legislative history of Title III of the ADA).

¹⁵² See Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 943-44 (2010).

¹⁵³ *Id.* at 943; see also *infra* text accompanying notes 154-65 (explaining the development of standing doctrine pertinent to Title III analysis).

¹⁵⁴ U.S. CONST., art. III, § 2; see also David Rudovsky, Lecture, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1236 n.225 (2005) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 213-14 (2000); *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

¹⁵⁵ *Spear*, 520 U.S. at 162.

¹⁵⁶ Waterstone, *Untold Story*, *supra* note 7, at 1871.

¹⁵⁷ *Id.*; see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or

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Lack of standing often prevents Title III plaintiffs from bringing successful claims.¹⁵⁸ Standing became even harder for Title III plaintiffs to claim after the Supreme Court's decision in *City of Los Angeles v. Lyons*.¹⁵⁹ *Lyons* raised the bar beyond the "personal stake" requirement, "impos[ing] a stricter test, demanding a strong likelihood of recurrence of unconstitutional conduct."¹⁶⁰ *Lyons* involved a civil rights action against the City of Los Angeles. The plaintiff alleged that, during the course of a traffic stop, he was illegally choked by a police officer.¹⁶¹ The Court, quoting *O'Shea v. Littleton*,¹⁶² said that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. . . if unaccompanied by any continuing, present adverse effects."¹⁶³ The Court held that even if the plaintiff was illegally choked, he did not have standing to sue because he could not "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."¹⁶⁴

Under the *Lyons* "real and immediate threat" test, a person who is denied a Title III-mandated accommodation must show that they plan to return to the same public accommodation again in the future.¹⁶⁵ Given this paradigm, if a lawyer fails to comply with Title III, their disabled client can only bring a Title III claim if the client demonstrates that the non-compliant lawyer will continue to represent them. One can imagine the worst-case scenario—a deaf person, in order to enforce her rights, must sue her own attorney while expecting the attorney to simultaneously advocate on her behalf.

Mootness also presents a barrier for Title III litigants. A case is mooted when the complained of conduct has ceased.¹⁶⁶ If a non-compliant lawyer then complies with Title III at any point prior to trial,

actual injury resulting from the putatively illegal action" (quoting Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973))).

¹⁵⁸ Elizabeth Keadle Markey, *The ADA's Last Stand?: Standing and the Americans with Disabilities Act*, 71 *FORDHAM L. REV.* 185, 186 (2002).

¹⁵⁹ 461 U.S. 95, 111 (1983).

¹⁶⁰ Rudovsky, *supra* note 154, at 1236.

¹⁶¹ *Lyons*, 461 U.S. at 97-98.

¹⁶² 414 U.S. 488 (1974).

¹⁶³ *Lyons*, 461 U.S. at 102 (alteration in original) (emphasis added) (quoting *O'Shea*, 414 U.S. at 495-96).

¹⁶⁴ *Id.* at 105.

¹⁶⁵ *Id.*

¹⁶⁶ See *Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

the case against him is mooted because the complained-of-conduct has ceased. The defendant in a Title III case has total control over whether the litigation continues and, in light of the Court's 2001 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, they do not even face the risk of an attorney's fee award prior to completion of litigation.¹⁶⁷

There is an exception available under the capable-of-repetition doctrine for claims found to be moot or that otherwise lack standing.¹⁶⁸ The doctrine applies when the following two prong test has been satisfied: (1) the allegedly illegal action does not last long enough to allow for litigation to complete before it ceases; and (2) the complainant is reasonably likely to be subject to the complained of action again.¹⁶⁹ The Court has declined to extend this doctrine to civil rights cases involving requests for injunctive relief.¹⁷⁰ This is unsurprising in light of the *Lyons* Court's statement that "the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."¹⁷¹ The Court's stringent view of the doctrine precludes its use by most Title III ADA plaintiffs.¹⁷²

A Title III plaintiff attempting to invoke the capable-of-repetition doctrine to sue her former attorney will rarely, if ever, be able to satisfy the doctrine's two prongs. The first prong—that the allegedly illegal action does not last long enough to allow for litigation to complete before it ceases—seems achievable. Once the deaf or hard of hearing person finds that an attorney is inaccessible, the need to obtain new counsel immediately necessarily limits the "challenged action" to a brief period of time.¹⁷³ The second prong—the complainant is reasonably likely to be subject to the complained of action again—is far more problematic. A deaf or hard of hearing person, once denied auxiliary aids or services by an attorney, is not likely to try and secure legal services from the same attorney in the future. It is irrelevant that another deaf or hard of hearing person might seek the inaccessible attorney's services and face

¹⁶⁷ 532 U.S. 598, 609–10 (2001).

¹⁶⁸ See *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (discussing "the established exception to mootness for disputes capable of repetition, yet evading review").

¹⁶⁹ *Id.* (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

¹⁷⁰ *COLKER, DISABILITY PENDULUM*, *supra* note 17, at 185.

¹⁷¹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

¹⁷² *COLKER, DISABILITY PENDULUM*, *supra* note 17, at 185.

¹⁷³ *Id.*; see also *Markey*, *supra* note 158 (stating that theoretically the challenged action would be seen as ending at the same point a court would otherwise find the complaint to be moot—when a potential plaintiff has secured counsel from another attorney).

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similar discriminatory treatment. The potential plaintiff in question would almost assuredly fail to satisfy the capable-of-repetition doctrine's second prong.

Howard Rosenblum, the Founder and Chair of the Midwest Center on Law and the Deaf, believes that many deaf and hard of hearing people do not have standing to sue the inaccessible lawyers they encounter because they obtain new counsel. According to Rosenblum, these types of situations have probably "happened countless times but we will never know because [the] deaf [or hard of hearing] people were enjoined from suing."¹⁷⁴ In light of this, private actions against attorneys for failure to comply with Title III rarely, if ever, occur.¹⁷⁵ Consequently, absent an expansion of the capable-of-review doctrine for Title III claims, injunctive relief is likely to remain a weak and largely ineffective remedy.

2. The Dismantling of the Attorney's Fee Award Provision

Congress intended for citizens to have "a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain."¹⁷⁶ Most Title III plaintiffs are represented by solo practitioners who depend on the award of attorney's fees.¹⁷⁷ Because the recovery of attorney's fees is often a private attorney's only incentive to take on a Title III case, any limit on attorney fee recovery is devastating for future private action enforcement. Traditionally attorney's fees have been recoverable in private ADA actions brought under Titles I, II, or III. Because compensatory damages are not available under Title III, "statutory attorneys' fees are likely to be the exclusive source of compensation for [plaintiffs'] lawyers."¹⁷⁸ Congress has expressly recognized the difficulty faced by attorneys who pursue litigation under civil rights statutes. The Senate Report on The Civil Rights Attorney's Fees Awards Act of 1976,¹⁷⁹ stated that

¹⁷⁴ E-mail from Howard Rosenblum, Founder & Chair, Midwest Ctr. on L. & the Deaf, to author (Jan. 4, 2010, 00:31 CST) (on file with author).

¹⁷⁵ A Westlaw search for state and federal cases under Title III of the ADA resulted in no cases against an attorney by a deaf or hard of hearing client. Waterstone, *Untold Story*, *supra* note 7, at 1853 (citing research by Colker). In fact, there were only 82 Title III appellate cases through 2004, as compared to 197 Title II appellate cases and, through 2001, 720 Title I cases. *Id.*

¹⁷⁶ S. REP. NO. 94-1011, at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910.

¹⁷⁷ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 168.

¹⁷⁸ *Id.*

¹⁷⁸ Bagenstos, *supra* note 81, at 10.

¹⁷⁹ Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976).

[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals . . . to seek judicial relief.¹⁸⁰

The Senate Report referred to what it called "fee shifting provisions" under which a court can order a defendant to pay the attorney's fees of a successful plaintiff. Fee shifting provisions are integral to the enforcement of civil rights legislation.¹⁸¹

In 2001, *Buckhannon* effectively gutted the ADA's attorney's fee award provision, further hampering the efforts of Title III plaintiffs.¹⁸² In *Buckhannon*, a corporation that operated the Buckhannon Board and Care Home filed suit against West Virginia claiming that a state statutory requirement violated the FHA and the ADA.¹⁸³ The state legislature responded by eliminating the statute and the case was subsequently dismissed as moot.¹⁸⁴ *Buckhannon* claimed that attorney's fees should be awarded under a "catalyst theory," which the Court understood as "posit[ing] that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."¹⁸⁵

Rejecting *Buckhannon's* claim, the Court held that in order for attorney's fees to be awarded in an ADA case, "a party [must] secure either a judgment on the merits or a court-ordered consent decree."¹⁸⁶ As a result, if a defendant changes their practices and becomes ADA-compliant on the eve of a trial, the opposing party's counsel will be barred from any potential fee recovery.¹⁸⁷

Buckhannon's impact is twofold. First, it is difficult to see why any attorney would view a Title III client as attractive when the statute eliminates the possibility of a monetary award and voluntary compliance by the defendant can foreclose recovery of attorney's fees. Second,

¹⁸⁰ S. REP. 94-1011, at 3 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

¹⁸¹ *Id.* at 4.

¹⁸² *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609-10 (2001).

¹⁸³ *Id.* at 600-01.

¹⁸⁴ *Id.* at 601.

¹⁸⁵ *Id.*

¹⁸⁶ COLKER, *DISABILITY PENDULUM*, *supra* note 17, at 170.

¹⁸⁷ *Id.* at 171.

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Buckhannon effectively encourages public accommodations, including attorneys, to remain non-compliant with Title III.¹⁸⁸ A lawyer can wait for a claim to be filed and then, at any given point prior to a judicial ruling, become compliant. Litigation costs are the lawyer's only incentive to comply with Title III sooner rather than later. The lawyer, therefore, can avoid any additional cost above and beyond the cost of compliance while society, in turn, will see a decrease in voluntary compliance because lawyers now have little incentive to comply before litigation is initiated.¹⁸⁹ For the ADA and civil rights statutes, *Buckhannon* left "the infrastructure still standing but kill[ed] the heart of [the] statutes."¹⁹⁰

Buckhannon is also inconsistent with Congress's stated desire to see the "broadest and most effective remedies" provided for civil rights-type legislation.¹⁹¹ The drafters of the ADA recognized the importance of a fee shifting paradigm in facilitating meaningful civil rights litigation—a paradigm even more crucial when the relevant legislation does not allow for recovery of monetary damages. As a result, section 12205 of the ADA states that a court or agency "may allow the prevailing party . . . a reasonable attorney's fee."¹⁹² After *Buckhannon*, few attorneys can afford to take on Title III cases because of the significant risk that no attorney's fee will be awarded.¹⁹³

D. Awareness

Most lawyers are likely unaware that they must comply with the ADA and by extension, most lawyers likely believe that they can pass along the cost of a sign language interpreter to their clients. While a study proving these assumptions is beyond the scope of this Article, there is plenty of reason to believe that they are true. The *Maine Bar Journal* similarly asserted "[i]t is likely that few attorneys have considered the fact that law offices are covered entities under the Americans with Disabilities Act."¹⁹⁴ Attorneys generally expect to pass client-specific costs on to the client. In California, for example, absent a written agreement, "court costs and direct client costs are recoverable

¹⁸⁸ Bagenstos, *supra* note 81, at 12.

¹⁸⁹ *Id.*

¹⁹⁰ Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1131 (2007).

¹⁹¹ S. REP. NO. 94-1011, at 3 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5910.

¹⁹² 42 U.S.C. § 12205 (2006) (emphasis added).

¹⁹³ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12 at 168-69.

¹⁹⁴ Beth Gallie & Deirdre M. Smith, *Representing Deaf Clients: What Every Lawyer Should Know*, 15 ME. B.J. 128, 128 (2000).

from [the] client.”¹⁹⁵ Here, “court costs” can include things such as “travel expense, per diem, copying, facsimile, telephone, messenger, mailing, excess secretarial services, paralegal services, investigators, process servers, expert fees, [and] medical records.”¹⁹⁶ The Comments to Rule 1.5 of the American Bar Association’s (“ABA’s”) Model Rules of Professional Conduct also state that “[a] lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges.”¹⁹⁷ Given this paradigm, it is easy to see why absorbing the cost of a client-specific auxiliary aid or service is largely counterintuitive for most legal professionals. Attorneys are likely to view the cost of auxiliary aids and services just as Rochester Attorney Gregg Tirone did, as cutting into the price of doing business.¹⁹⁸ If attorneys do not know about Title III’s mandate, they will continue passing along the cost of auxiliary aids and services to their clients so as not to cut into their profits.

The *Tirone* and *Camacho* cases are classic examples of attorneys’ lack of awareness of their obligations under Title III.¹⁹⁹ Moreover, even if attorneys have considered their responsibilities under the ADA, they may mistakenly believe that they are not covered if they have fifteen or fewer employees because of what they know to be true in the context of Title I employment accommodations.²⁰⁰ The moment a deaf or hard of hearing person walks into a lawyer’s office, the lawyer must be prepared to accommodate her needs—even if that means scheduling another time to meet so an auxiliary aid or service can be secured.²⁰¹

Lack of awareness extends beyond awareness of Title III’s requirements. Many businesses are unaware of the “extent to which disability is pervasive in the communities that businesses and other entities serve.”²⁰² In order to comply with Title III, for example, a lawyer

¹⁹⁵ Lindsay Kohut Slatter, *How to Defy Fate By Fee Agreement*, 537 LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES (PLI) 265, 271 (1995).

¹⁹⁶ *Id.*

¹⁹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. (2010).

¹⁹⁸ Stull, *supra* note 107.

¹⁹⁹ See *supra* notes 104–19 and accompanying text (describing the Tirone case); *supra* notes 120–41 and accompanying text (describing the Camacho case).

²⁰⁰ See 42 U.S.C. § 12111(5)(A) (2006) (defining the employer to include those with fifteen or more employees, which exempts small employers from the prohibitions of Title I of the ADA); see also Stull, *supra* note 107 (“Title III, however, specifically mentions law firms as places of public accommodation. Both the ADA and New York State’s Human Rights Law as well as attorney ethics codes state that law firms must provide clients with reasonable accommodations, unless doing so creates an undue burden.”).

²⁰¹ 42 U.S.C. § 12181(7)(F).

²⁰² NAT’L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 63.

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must not only understand her financial obligations under Title III—she must also understand the unique needs of her disabled client. Not every deaf and hard of hearing client requires the same type of auxiliary aid or service. Attorneys also need to know that “[s]igning and interpreting are not the same thing.”²⁰³ A lawyer must be flexible and work with the client to determine what accommodation will best facilitate communication between the lawyer and the client.

IV. THE THREE-E APPROACH TO REVIVING TITLE III

If Title III is going to achieve its ultimate purpose, individualized attention must be given to the different types of public accommodations covered by the Act. The multitude of disabilities covered by the ADA must also be considered. A change that may benefit the deaf and hard of hearing community may inadvertently, and perhaps unexpectedly, be problematic for a different disabled community. Although addressing the various solutions needed to satisfy everyone at the ADA table is beyond the scope of this Article, the following proposal shows what can be done to serve *one* population in need of *one* type of service. It is intended that this will serve as the beginning of a continued dialogue about the specific needs of different populations and how those needs manifest themselves in different types of settings.

As shown in Part III, the challenges facing deaf and hard of hearing individuals attempting to find an accessible attorney are multifaceted. A multifaceted problem demands a multifaceted solution that attacks the problem from various angles. This Part argues that the problems identified in Part III can be addressed using the “Three-E Approach.” This approach focuses on three distinct areas—education, economics, and enforcement—all of which need attention if Title III is to be of use to the deaf and hard of hearing seeking legal assistance. First, lawyers must know their obligations to deaf and hard of hearing clients. Second, there must be financial resources available to pay for the auxiliary aid or service required. Third, both Congress and the Court must take action to change Title III’s current enforcement and remedial scheme. Progress must be made on all of these fronts if Title III is to be the tool Congress intended.

A. *Educating the Legal Community*

Lawyers must know of their obligations under the ADA in order to be compliant; therefore, education is key to obtaining increased Title III

²⁰³ Tirone Settlement Agreement, *supra* note 99, ¶ 16.

compliance by the legal profession. As a largely self-regulated industry,²⁰⁴ the legal profession must take responsibility for ensuring that its members are ADA-compliant. Generally speaking, state bar associations control who can practice law.²⁰⁵ State bars also establish local rules and regulations for the practice of law as well as licensing standards. Ethical rules are also promulgated by state bar associations. Most states model their ethical rules on the ABA's Model Rules of Professional Conduct ("MRPC").²⁰⁶

Theoretically, the MRPC already contains a provision requiring lawyers to provide communication access.²⁰⁷ The MRPC also requires that lawyers abide by the law, thereby reinforcing a lawyer's ethical obligation to be Title III compliant.²⁰⁸ In reality, however, until the ABA and state bar associations make ADA compliance a priority, the current MRPC provisions are no more effective than Title III itself. As "the national representative of the legal profession," the ABA is best positioned to ensure that American lawyers are satisfying their duties under both Title III and the MRPC.²⁰⁹ If the ABA implements the following changes, "[w]idespread [n]oncompliance with Title III"²¹⁰ within the legal profession likely will become a thing of the past. First, the ABA should amend the MRPC to include a Comment explicitly acknowledging a lawyer's communication access obligations under Title III. Second, state Continuing Legal Education ("CLE") course requirements should include a mandatory class on the ADA and lawyers' responsibilities under Title III.

Although each state has its own set of rules for professional conduct for lawyers, all but California have adopted the MRPC put forth by the ABA.²¹¹ The ABA also publishes Comments to the MRPC. All but eight states have adopted these Comments.²¹² Rule 1.4 of the MRPC regulates

²⁰⁴ MODEL RULES OF PROF'L CONDUCT pmb. (2010).

²⁰⁵ See generally NAT'L CONFERENCE OF B. EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2010 (Erica Moeser & Claire Huismann eds., 2010) (setting out the rules and practices of all U.S. jurisdictions for admission to the bar by examination and on motion).

²⁰⁶ *About the Model Rules*, ABA, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Oct. 19, 2010).

²⁰⁷ MODEL RULES OF PROF'L CONDUCT R. 1.4.

²⁰⁸ *Id.* at R. 8.4.

²⁰⁹ *About the American Bar Association*, ABA, http://www.abanet.org/about/?gnav=global_about_lead (last visited Nov. 2, 2010).

²¹⁰ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 179.

²¹¹ See generally *Model Rules of Professional Conduct: Dates of Adoption*, ABA, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Jan. 15, 2011) (listing states that have adopted the ABA's Model Rules of Professional Conduct).

²¹² Only Louisiana, Minnesota, Montana, Nevada, New Jersey, Oregon, and South Dakota have not adopted the Model Rules. *Id.*

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communication within the client-lawyer relationship. According to the rule, a lawyer must, among other things, “reasonably consult with the client about the means by which the client’s objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; . . . [and] promptly comply with reasonable requests for information.”²¹³ In addition, “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²¹⁴

The first Comment to Rule 1.4 states that “[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”²¹⁵ The obligations an attorney has under Rule 1.4 align with Title III’s requirement that the attorney ensure effective communication with their deaf or hard of hearing client. Although some might think that Rule 1.4’s language is sufficient to make a Title III violation by a lawyer an ethical violation as well, this is not always seen as the case. For instance, Marc Charmatz, Senior Attorney for the NAD, reported Mr. Camacho’s failure to effectively communicate with Ms. Tanaka to the Disciplinary Board of New Mexico.²¹⁶ The New Mexico Rule of Professional Conduct regulating attorney-client communication is substantially similar to the MRPC’s Rule 1.4.²¹⁷ The Disciplinary Board, however, did not view Mr. Camacho’s Title III violation as being appropriate for disciplinary action, instead claiming that Ms. Tanaka had a “discrimination claim.”²¹⁸

Bar associations play a central role in regulating lawyers and therefore are equally responsible for pursuing Title III violations, which would also seemingly result in a Rule 1.4 violation. Despite violating both Title III of the ADA and Rule 1.4, however, lawyers like Mr. Camacho are often only punished for Title III violations. In Mr. Camacho’s case, the Disciplinary Board of New Mexico’s refusal to pursue the grievance against him ran counter to the Board’s stated purpose—“look[ing] into complaints about attorneys licensed to practice law in New Mexico to determine whether the attorneys have violated the Rules of Professional Conduct.”²¹⁹ The Association of the Bar of the City of New York serves as an excellent example of how bar associations

²¹³ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2)-(4).

²¹⁴ *Id.* at R. 1.4(b).

²¹⁵ *Id.* at R. 1.4 cmt.

²¹⁶ Charmatz Interview, *supra* note 141.

²¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.4; N.M. RULES OF PROF’L CONDUCT R. 16-104 (2009).

²¹⁸ Charmatz Interview, *supra* note 141.

²¹⁹ THE DISCIPLINARY BD. OF THE N.M. SUP. CT., <http://www.nmdisboard.org/index.htm> (last visited Mar. 10, 2010).

should handle the duality of an attorney's Title III violation.²²⁰ In Formal Opinion 1995-12, the Association concluded that, under the New York Lawyer's Code of Professional Responsibility, "[a] lawyer who undertakes to represent a client with whom effective direct lawyer-client communication can only be maintained through an interpreter must consider the need for interpreter services and when necessary take steps to secure the services of a qualified interpreter."²²¹

The ABA has also recognized attorneys' obligations to their deaf or hard of hearing client, stating that "[t]he most immediate concern for the lawyer is whether the client with a hearing impairment needs or requests an accommodation. . . . [L]awyers should ask clients what accommodations they need to communicate best."²²² The ABA further noted that an ethical violation occurs when a lawyer avoids an attorney-client relationship with a person requiring an auxiliary aid or service.²²³ It is hardly far-fetched to expect state disciplinary boards to pursue Title III violations as ethical violations given the ABA's acknowledgement that lawyers have both Title III and professional ethical obligations to deaf and hard of hearing clients.²²⁴

In order to ensure that state legal ethics boards do not forgo pursuing ethical violations simply because conduct is also illegal, the ABA should amend the Comments to Rule 1.4 to include the following provision:

An attorney who has a deaf or hard of hearing client must provide and pay for auxiliary aids and services, or an effective alternative as defined by Title III of the Americans with Disabilities Act, for in-person attorney-client meetings. Failure to comply with Title III of the

²²⁰ Ass'n of the Bar of the City of New York, Comm. on Prof'l & Judicial Ethics, Formal Op. 1995-12 (1995), available at <http://www.abcnyc.org/Ethics/eth1995-12.htm>.

²²¹ *Id.*

²²² JOHN PARRY, DISABILITY DISCRIMINATION LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND DISABILITY PROFESSIONALS 119 (2008). This reference manual was published by the ABA and is available on the ABA's Commission on Mental and Physical Disability Law's webpage at <http://www.abanet.org/disability/docs/client-lawyer.doc>.

²²³ *Id.* at 124. Parry states the following:

Regrettably, the tendency of some lawyers . . . to avoid such relationships [requiring auxiliary aids or services] in the first place or not actively solicit them . . . harms society, violates basic ethical standards of conduct for lawyers not to discriminate, is short-sighted in terms of building a clientele, and . . . may violate federal and state laws.

Id. (emphasis added).

²²⁴ See *id.* at 119.

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Americans with Disabilities Act in representing a deaf or hard of hearing client is a violation of Rule 1.4.²²⁵

With the addition of this Comment, state disciplinary boards could not claim that an attorney's violation of Title III is outside of their purview. Although an attorney may assert a Title III undue burden defense, a disciplinary board's ultimate determination should not focus on whether a Title III violation occurred but rather whether the lawyer satisfied her ethical obligations. Because the text of Rule 1.4 would not change, a lawyer must still "reasonably consult with the client about the means by which the client's objectives are to be accomplished."²²⁶ A failure to reasonably consult with a client, regardless of the reason, remains a violation of Rule 1.4. Undue burden is not an available defense to ethical rule violations. Once an allegation has been made, it is up to a disciplinary board to decide whether an undue burden defense can be appropriately considered. This Comment needs to be implemented alongside the creation of Communication Access Funds, discussed subsequently, so that all attorneys, regardless of their individual financial situation, have the resources to afford auxiliary aids or services as necessary.

The Comment will provide discrimination victims an additional avenue by which to achieve redress. The more options victims have for recourse, the greater the threat of enforcement. The potential for increased enforcement will incentivize attorneys to be proactive in their obligations under Title III, rather than reactive. Ideally, when an attorney has a potential deaf or hard of hearing client, he or she would immediately begin a discussion of what auxiliary aid or service is necessary for the potential client. The adoption of this Comment will serve to draw more attention to obligations that are often overlooked.

The adoption of this Comment will also allow for testing on Title III's requirements of recent law school graduates, who typically have to pass bar and ethical examinations before practicing law.²²⁷ Although each state bar examination is different, forty-seven states require that students pass the Multistate Professional Responsibility Exam ("MPRE") in order to practice. By incorporating Title III into the MRPC, soon-to-be attorneys should have at least some knowledge of what Title III requires before they begin to practice. This is only one small step towards

²²⁵ This provision is proposed by the author.

²²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2010).

²²⁷ See NAT'L CONFERENCE OF B. EXAM'RS, *supra* note 205, at 28-31 (outlining bar and ethical examination requirements for all fifty states).

educating the bar. It is not realistic to expect that the MPRE alone will ensure complete Title III knowledge among new attorneys.

Lawyers in forty-two states are also required to take Mandatory Continuing Legal Education ("MCLE") courses throughout their career.²²⁸ All states that mandate MCLE completion require that some portion of the courses taken be in ethics.²²⁹ In order to ensure that current attorneys learn of their obligations under the ADA, state CLE commissions or boards should require attorneys to take a CLE ethics course in attorney compliance with the ADA within their first three years of practice. While it will be difficult to implement this requirement because it requires action on a state-by-state basis, this change should not prove impossible. The structure and requirements for MCLEs are already established—this proposed change simply asks states to require one additional topic-specific ethics course for attorneys within their state.

B. *Economics*

In order to lower the cost of compliance for attorneys, state-based Communication Access Funds ("CAFs"), as proposed by the NAD, should be created to pay for costs of accommodation.²³⁰ Attacking the Title III noncompliance problem from an economic perspective requires a decrease in the cost of compliance. This is especially crucial because, according to Professor Michele LaVigne, "most deaf people are using small firm or solo practice attorneys for things like divorce, small claims, etc.; [and thus] the potential lawyers don't have much money."²³¹ Depending on the nature and length of representation, the cost for a certified interpreter can range widely as interpreters are usually billed on a per-hour basis.²³² While a lawyer or law firm could claim that Title III's

²²⁸ See ABA Ctr. for Continuing Legal Educ., *MCLE Frequently Asked Questions*, ABA, <http://www.abanet.org/cle/mclefaq.html#over> (last visited Oct. 19, 2010) (showing that the range of hours required for ethics and professionalism classes varies by state, typically ranging from one to three hours per year).

²²⁹ *Id.*

²³⁰ NAD *Advocacy Statement*, *supra* note 13.

²³¹ E-mail from Michele LaVigne, Clinical Professor, Univ. of Wis. Law Sch., to author (Sept. 24, 2009, 07:27 CST) (on file with author).

²³² The cost of a sign language interpreter, which is typically charged per hour, varies significantly from state to state. See, e.g., *Contractors Providing Sign Language Interpreter Services*, WASH. STATE DEP'T OF HEALTH & HUMAN SERVS., <http://www.dshs.wa.gov/hrsa/odhh/intercon.shtml> (last visited Nov. 25, 2009) (Level V interpreters cost \$55 per hour with a one-hour minimum); *Fee Schedule and Payment Policy*, NEB. SUP. CT. INTERPRETER (2010), <http://www.supremecourt.ne.gov/rules/misc/interpreter-payment.pdf> (certified interpreters cost \$50 per hour with a two-hour minimum); Mass. Comm'n for the Deaf & Hard of Hearing, *MCD01 Rates for FY'10 and FY'11*, COMMONWEALTH OF MASS.: EXEC. OFFICE OF HEALTH & HUMAN SERVS., <http://www.mass.gov/Eoehhs2/docs/mcdhh/>

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requirements present an undue burden,²³³ the burden is measured against the entire financial health of the firm and not the profitability of the individual client.²³⁴ The Code of Federal Regulations identifies numerous factors that are to be considered when determining whether an accommodation is readily achievable, and thus does not constitute an undue burden, including: the cost of the accommodation, the lawyer's overall financial resources, and the lawyer or law firm's number of employees.²³⁵

The NAD proposed the creation of CAFs in order to address the cost-of-compliance problem.²³⁶ The NAD, in an advocacy statement supporting the creation of CAFs, stated that "[p]eople who are deaf continue to encounter significant communication barriers when attempting to obtain private legal services and representation, despite the mandate of the [ADA]."²³⁷ In response to this problem, the NAD's proposed solution would "ease the financial responsibility attorneys and law firms bear in order to meet their obligations under the ADA to ensure effective communication with people who are deaf."²³⁸

Under the NAD's proposal, CAFs would be created on a state-by-state level by state bar and/or licensing agencies.²³⁹ The CAFs would be funded by nominal fees paid by all bar members in the given state. These funds would then finance the provision of auxiliary aids and services when a deaf or hard of hearing individual is receiving legal representation.²⁴⁰ Funds similar to the CAFs already exist in three states.²⁴¹ In addition, Maine has a Legal Interpreting Fund that attorneys are allowed to use for client meetings and depositions.²⁴² The creation of these funds would eliminate any potential "undue burden" claim by an attorney, who might otherwise find the cost of securing auxiliary aids and services overly burdensome.²⁴³

sign_language_interpreter_rates.pdf (last visited Nov. 25, 2009) (interpreters costs range from \$30-\$67 per hour).

²³³ See 28 C.F.R. § 36.104 (2009) (defining "[u]ndue burden" as "significant difficulty or expense," and outlining the factors to determine whether an undue burden exists or whether accommodation is "readily achievable," which is also defined in the regulation).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ NAD *Advocacy Statement*, *supra* note 13.

²³⁷ *Id.* (footnote omitted).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ See *id.* (indicating that New York, Colorado, and Pennsylvania already have funds established).

²⁴² Gallie & Smith, *supra* note 194, at 130.

²⁴³ *Id.*

In addition to the creation of CAFs, the DOJ should publicize the tax credits available to attorneys who do pay for auxiliary aids and services under Title III. Under the Internal Revenue Code, a small business can claim a tax credit for expenditures made to provide access to disabled individuals.²⁴⁴ The tax credit "shall be an amount equal to 50 percent of so much of the eligible access expenditures for the taxable year as exceed \$250 but do not exceed \$10,250."²⁴⁵ Although this law alone is unlikely to increase compliance significantly, increased awareness of the tax credit can only help improve the current state of compliance because the tax credit is an equitable sharing of the costs of compliance.²⁴⁶

Attorneys must see compliance with Title III as the norm, rather than as an extra step. Instead of thinking about the cost of an interpreter as a client-generated cost, attorneys and firms should have a line item in their annual budget for accessibility. Providing an auxiliary aid or service is an overhead cost, similar to rent, utilities, and office supplies that cannot be recovered from clients.²⁴⁷ Making one's legal practice accessible by providing an auxiliary aid or service to a deaf or hard of hearing client is part of the cost of doing business and should be treated as such.

C. *Increasing Title III Enforcement*

Title III enforcement must be increased if widespread compliance by attorneys is to be realized. Professor Waterstone accurately asserts that "[l]itigation, or the threat of litigation, is a means to an end—narrowing the gap between what laws formally state should happen and what actually does happen."²⁴⁸ This rationale follows the "deterrence model," which "suggests that people obey the law when the perceived costs and probability of punishment outweigh the cost of compliance."²⁴⁹ Without the real threat of litigation, whether initiated by the DOJ or via private action, attorneys have little incentive to comply with Title III because the probability of punishment does not outweigh the price of compliance.²⁵⁰

²⁴⁴ 26 U.S.C. § 44(b)(1)(a)-(b) (2006). A small business is defined as having less than \$1,000,000 of gross receipts in the previous taxable year; or having employed less than thirty full-time employees during the previous taxable year. *Id.*

²⁴⁵ *Id.* § 44(a).

²⁴⁶ 135 CONG. REC. 19,841 (1989).

²⁴⁷ See Molly Kilmer Flood, *Cost Recovery: What's Fair Game?*, 15 PROF. LAW., no. 2, 2004 at 27, 27.

²⁴⁸ Waterstone, *New Vision*, *supra* note 81, at 479.

²⁴⁹ Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 495 (2006).

²⁵⁰ *Id.*

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Studies have also suggested that litigation achieves “greater accessibility than a nonlitigious collaborative approach.”²⁵¹

The ADA was designed to provide two avenues for enforcement of a person’s rights under Title III. Congress created a private right of action for citizens who face inaccessible public accommodations and charged the DOJ with responsibility for investigating and pursuing Title III complaints. Both of these avenues are largely unavailable, however, to deaf and hard of hearing individuals whose rights are violated by an attorney. Legislative action must be taken if the original avenues for enforcement are to be reopened. Congress must take the following three steps in order to revive the now impotent Title III into the tool Congress intended to create when it passed the ADA.

1. Mandatory Government Enforcement

The DOJ must aggressively pursue Title III complaints if the rights afforded by Title III are to have any meaning. The ADA would not be the first civil rights legislation that Congress has revisited in order to ensure achievement of its goals. For example, Congress amended the Fair Housing Act²⁵² in 1988 after concluding that the Act, as it was originally designed, was not proving to be effective. The amendment requires “enforcement by the Attorney General [AG] when the Secretary of Housing and Urban Development [HUD] ‘determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur’ and a complainant chooses judicial rather than administrative relief.”²⁵³ Although enforcement of the FHA is still subject to the HUD Secretary’s determinations, the mandatory enforcement scheme did improve the system by which private parties and the Attorney General bring civil actions.²⁵⁴ Professor Ruth Colker has suggested that adopting this required enforcement scheme “would create a significant improvement in ADA compliance.”²⁵⁵

When Congress passed the ADA, they chose to adopt the CRA’s enforcement and remedial scheme in Title III and hoped that it would prove successful. We now have ample evidence that the “time-tested

²⁵¹ NAT’L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 12.

²⁵² Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2006).

²⁵³ Colker, *ADA Title III*, *supra* note 94, at 378–79 (quoting Pub. L. 100-430, § 8(2), 102 Stat. 1619, 1619, 1628(1988) (codified as amended at 42 U.S.C. § 3610(g)(2)(A) (1994)) (inserting section 810(g)(2)(A))). *But cf.* DOJ TITLE III MANUAL, *supra* note 56, at III-8.1000(2) (discussing claims only pursued at the Attorney General’s discretion and only when there is “reasonable cause to believe that there is a pattern or practice of discrimination, or discrimination that raises an issue of general public importance”).

²⁵⁴ H.R. REP. NO. 100-711, at 33 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194.

²⁵⁵ Colker, *ADA Title III*, *supra* note 94, at 412.

incentives for compliance and disincentives for discrimination"²⁵⁶ that were successful for the CRA did not succeed, with equal force, in the ADA. Voluntary Title III compliance has not been achieved,²⁵⁷ making mandatory government enforcement a necessity. Just as it did with the FHA, Congress should revisit the ADA and enhance the statutory government enforcement provisions.

Under an amended ADA, the DOJ would be required to conduct at least an initial investigation of every individual Title III complaint. Congress would also need to allocate more financial and human resources to the DOJ for Title III enforcement. In 2007, the National Council on Disabilities, in a comprehensive report on the implementation of the ADA, noted that the "DOJ should devote substantially more resources and time to investigation of Title III complaints, especially those regarding small businesses, in light of widespread noncompliance by these covered entities."²⁵⁸ Noncompliance by lawyers at small firms and solo practices will likely continue absent a legislative mandate that the DOJ take every claim seriously by at least conducting a preliminary investigation. Lawyers must know that there is a threat of DOJ action for noncompliance, otherwise they have little incentive to comply in the first place.

The argument for additional resources is likely to be met with some resistance, especially in light of the recent financial crisis. Even though resources are tight, Congress created a statutorily vested right and now has the responsibility to ensure that the right is not being violated. Title III vests the deaf and hard of hearing community with the right to accessible legal counsel. Congress, therefore, has an obligation to revisit Title III's enforcement scheme in order to ensure that the rights afforded by Title III exist in reality, rather than in theory. Furthermore, DOJ enforcement must be increased alongside the adoption of a compensatory damages remedy for private action. A compensatory damages remedy will encourage more private actions, and thus take some of the pressure off the DOJ.

2. The Importance of Monetary Damages

If the rights conferred by Title III are to have any meaning, they "must be defended from intrusion or violation," which often requires the

²⁵⁶ 136 CONG. REC. 17,376 (1990) (statement of Sen. Robert Dole).

²⁵⁷ NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 169 ("[T]here is general acknowledgement that many public accommodations are not in compliance with Title III and are not, in fact, accessible.").

²⁵⁸ *Id.* at 17.

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willingness of an individual to pursue a private action.²⁵⁹ Twenty years of experience with Title III have proven what Senator Harkin knew from the start: “without the existence of damages as a remedy, you would not get widespread voluntary compliance or negotiated settlements, short of litigation.”²⁶⁰

The remedies available under Title III should be amended so that monetary damages awards are available in private actions.²⁶¹ Monetary damages should take the form of both compensatory and punitive damages. Damages are a “well-established remedy” for wrongful conduct.²⁶² Senator Harkin recognized the need for a compensatory damages remedy in Title III when he proposed a revised version of the ADA which allowed for compensatory damages.²⁶³ Although he acquiesced to the removal of compensatory damages from the final version of the ADA in order to gain support for a broader definition of public accommodation, it was not without the understanding that the issue may need to be revisited in the future.²⁶⁴ That time is now.

Compensatory damages are already available in actions brought by the DOJ; therefore, it is not a stretch to also allow compensatory damages in private Title III actions.²⁶⁵ Furthermore, compensatory damages are already available under the other two major components of the ADA: Title I²⁶⁶ and Title II.²⁶⁷ A deaf or hard of hearing person who encounters an inaccessible attorney has two means of recourse: file a complaint with the DOJ or find another attorney willing to sue the inaccessible attorney. Compensatory damages in private actions play an important role in both of these options. First, it will relieve the DOJ of the burden of being the only avenue by which an aggrieved party can receive any monetary

²⁵⁹ Waterstone, *New Vision*, *supra* note 81, at 441.

²⁶⁰ COLKER, *DISABILITY PENDULUM*, *supra* note 17, at 181 (quoting *Americans with Disability Act of 1989, Hearings on S. 933 Before the Subcomm. on the Handicapped of the S. Labor & Human Resources Comm.*, 101st Cong. 209 (1989) (statement of Sen. Tom Harkin)).

²⁶¹ See Waterstone, *Untold Story*, *supra* note 7, at 1870 (“[S]erious consideration needs to be given to revisiting [Title III’s] remedial structure.”); see also NAT’L COUNCIL ON DISABILITY, *IMPLEMENTATION*, *supra* note 12, at 202–03. See generally Courtney Abbott Hill, Note, *Enabling the ADA: Why Monetary Damages Should be a Remedy Under Title III of the Americans with Disabilities Act*, 59 SYRACUSE L. REV. 101 (2008) (advocating for the addition of monetary damages to Title III’s remedial scheme).

²⁶² Rudovsky, *supra* note 154, at 1213.

²⁶³ See *supra* text accompanying note 18.

²⁶⁴ See *supra* text accompanying notes 26–27.

²⁶⁵ 42 U.S.C. § 12188(b)(2)(C) (2006) (providing for compensatory damages “not exceeding \$50,000 for a first violation; and not exceeding \$100,000 for any subsequent violation” in Title III actions brought by the DOJ (statutory numbering omitted)).

²⁶⁶ *Id.* § 12117(a).

²⁶⁷ *Id.* § 12133.

compensation.²⁶⁸ Second, the availability of monetary damages will incentivize attorneys to take on Title III plaintiffs who, in the face of increasingly limited attorney's fees awards, are otherwise unattractive clients.

Punitive damages, although likely to be awarded in only a small number of cases, are nevertheless necessary as they "will provide more of an incentive for private individuals to litigate their claims and for private attorneys to take more Title III cases."²⁶⁹ Increasing the perceived cost of noncompliance will create an additional incentive for compliance. Amending federal civil rights legislation to increase the amount of punitive damages available is not new territory. Congress recognized the need to revisit monetary damages provisions in civil rights legislation when it amended the FHA. The FHA Amendments removed the punitive damage cap of \$1,000 that existed under the original FHA. The House Judiciary Committee Report found "that the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law."²⁷⁰ There is ample evidence suggesting that the same lack of deterrence and disincentives exist under the current version of Title III.²⁷¹

The availability of monetary damages under Title III also eliminates the justiciability problems faced by many Title III plaintiffs.²⁷² Under the current law, "[c]ourts have repeatedly concluded that they lacked jurisdiction to hear ADA Title III cases, because plaintiffs' individual instances of discrimination did not create standing to seek injunctive relief."²⁷³ Courts will no longer face the lack of jurisdiction dilemma that results from Title III's current injunctive-relief-only remedial scheme. Once monetary damages are available, deaf and hard of hearing plaintiffs will not have to choose between suing their attorney and foregoing their rights because they have hired a new attorney. Additionally, plaintiffs will no longer run the risk that a defendant will moot their claim by coming into compliance on the eve of trial. While a claim for injunctive relief will be mooted if the complained-of behavior ceases, a claim for monetary damages will survive despite a defendant's late-in-the-game compliance.

²⁶⁸ *Id.* § 12188.

²⁶⁹ Hill, *supra* note 261, at 120.

²⁷⁰ H.R. REP. No. 100-711, at 40 (1988), reprinted in 1988 U.S.C.A.N. 2173, 2201.

²⁷¹ See NAT'L COUNCIL ON DISABILITY, IMPLEMENTATION, *supra* note 12, at 179-86 (discussing "[r]easons for "[w]idespread [n]oncompliance with Title III").

²⁷² See COLKER, DISABILITY PENDULUM, *supra* note 17, at 184.

²⁷³ Colker, *ADA Title III*, *supra* note 94, at 395.

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3. Reviving the Catalyst Theory by Redefining Prevailing Parties

Lastly, in response to the Court's decision in *Buckhannon*, Congress should pass legislation explicitly defining prevailing parties. Congress should reject the Court's view that prevailing parties, for the purpose of attorney's fee awards, only exist in situations where a "judicially sanctioned change [has occurred] in the legal relationship of the parties."²⁷⁴ Instead, Congress should add to Title III a definition of prevailing party that allows for an attorney's fee award under the catalyst theory. The catalyst theory requires that courts apply the "three thresholds" test advocated by Justice Ginsburg in her *Buckhannon* dissent.²⁷⁵ Congress should amend Title III, as follows, to reflect the "three thresholds" test definition:

A *prevailing party* is a party that crosses the following thresholds:

- (1) "the claim [is] colorable rather than groundless;"
- (2) "the lawsuit [is] a substantial rather than an insubstantial cause of the defendant's change in conduct;"
- (3) "the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense."²⁷⁶

A redefinition of prevailing parties to align with the catalyst theory will ensure that "aggrieved individuals [are] not left to worry, and wrongdoers [are] not led to believe, that strategic maneuvers by defendants might succeed in averting a fee award."²⁷⁷ Congress's explicit rejection of the Court's decision in *Buckhannon* will confirm what Justice Ginsburg asserted in her dissent: that "the 'catalyst rule,' as applied by the clear majority of Federal Circuits, is a key component of the fee-shifting statutes Congress adopted to advance enforcement of

²⁷⁴ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

²⁷⁵ *Id.* at 628 (Ginsburg, J., dissenting).

²⁷⁶ *Id.* at 610 (majority decision). The *Buckhannon* majority rejected the catalyst theory, and thus the application of the "three thresholds" test which it requires, because they felt the test was "not a formula for 'ready administrability.'" *Id.* (quoting *Burlington v. Dague*, 505 U.S. 557, 566 (1992)). However, as the *Buckhannon* dissent points out, the catalyst rule and the implementing standards (the "three thresholds" test), were "developed over decades and in legions of federal-court decisions." *Id.* at 628 (Ginsburg, J., dissenting). In fact, before the Court's decision in *Buckhannon*, the catalyst rule was being applied "by the clear majority of Federal Circuits." *Id.* at 623.

²⁷⁷ *Id.* at 636 n.10.

civil rights."²⁷⁸ A monetary damages provision ensures that the private right of action provided for by Title III is not completely undermined, aggrieved parties are able to pursue private actions, and disability-based discrimination is further eradicated.²⁷⁹

V. CONCLUSION

Title III of the Americans with Disabilities Act showed great promise when it was enacted and has resulted in some significant change. However, the ADA has also been regarded as being "a symbolic stab at protecting the rights of persons with disabilities and attempting to end discrimination."²⁸⁰ Many of the rights afforded by Title III remain illusory because people are unable to enforce them. As a practical matter, many deaf people are unable to retain lawyers for critical legal matters including criminal law proceedings, family law issues, probate, and employment law matters.

There must be change in order to achieve what Congress initially envisioned—compliance by public accommodations *including* the offices of lawyers.²⁸¹ With a coordinated effort, however, change is not only possible but achievable. Three key things must occur. First, lawyers must be better educated about their obligations under Title III of the ADA. Second, state-based Communication Access Funds must be created to ensure that attorneys are able to fund the provision of the auxiliary aids and services required under Title III. Lastly, Congress must make legislative changes to strengthen Title III's enforcement both by the government and through private actions. These changes will move us significantly closer to a day where deaf and hard of hearing individuals will find accessible counsel the norm rather than the exception.

These changes, however, should mark the beginning—not the end—of the effort to make Title III's goals a reality. Deaf and hard of hearing individuals will still face challenges. Most people do not know the law well enough to realize that an attorney might be wrong when they claim not to be regulated by Title III. An attorney can still refuse to represent a

²⁷⁸ *Id.* at 623.

²⁷⁹ See Waterstone, *New Vision*, *supra* note 81, at 444 (arguing that *Buckhannon* created a "judicially imposed limitation [which] has undermined the ability of the private attorney general to bring cases for injunctive relief").

²⁸⁰ JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 144 (2003). Title III, as enacted, does not have the teeth necessary to compel compliance. See *id.* at 130–31.

²⁸¹ See 42 U.S.C. § 12181(7)(F) (2006) (setting forth an attorney's office as a public accommodation).

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client without providing a reason. These challenges cannot be resolved in one fell swoop. Instead, changing the landscape of legal accessibility requires systematic and deliberate steps towards complete Title III compliance.