

An Attorney's Duty to Effectively Communicate With Clients Under the ADA

By Christopher W. Smith

A client with hearing loss contacts your office wanting to draft an estate plan. She relies on American Sign Language (ASL) for most of her communication. You freeze, what do you have to do? The answer is simple: you need to provide her with the aids or services that are required for you and her to have a normal attorney-client relationship. Under the Americans with Disabilities Act ("ADA"), that will likely include a qualified ASL interpreter at your expense.

Most ethics articles about serving individuals with disabilities focus on an attorney's obligations under the Rules of Professional Conduct. Less talked about is an attorney's obligations under the ADA. Attorneys are generally aware that the ADA has accessibility requirements for law office buildings,¹ and that law offices may have certain responsibilities towards current and potential employees with disabilities.²

But what often gets missed is an attorney's ADA obligations to ensure that individuals with disabilities have the same full and equal enjoyment of our services as everybody else. At its core, that means ensuring that clients can communicate with you in the same and equal manner as any other client. Effective communication with our clients is not only an ADA obligation, but is also at the core of ensuring that we "maintain a normal client-lawyer relationship" with our clients under the Rules of Professional Conduct.³ For this reason, our ADA obligations are not only a statutory requirement, but also arguably a professional responsibility obligation. It is essential that attorneys understand what the ADA requires.

Attorneys Are Subject To the Americans With Disabilities Act⁴

Virtually every estate planning and probate attorney is subject to the ADA. A private attorney's obligations under the ADA lie in Title

III, which provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."⁵ The definition of a public accommodation includes (among many other things) an "an office of an accountant or lawyer."⁶

Michigan attorneys are also a "place of public accommodation" under the Michigan Persons with Disabilities Act ("MPDA").⁷ Like the ADA, the MPDA similarly prohibits attorneys from denying an individual "the full and equal enjoyment" of legal services.⁸ Because the MPDA is essentially Michigan's version of the ADA for this article's purpose, the ADA will remain the focus. But it is important to remember that attorneys have statutory obligations under both federal and state law.

You are subject to the ADA and the MPDA, but what does that mean? Let's start with an easy one: no, you cannot deny someone your services just because he or she has a disability. Take the case of the deaf client contacting your office. Human nature might cause a slight pause to consider whether you want to take this client on. But the ADA states that an attorney cannot deny a client services (or provide that client with unequal services) on the basis of the client's disability, nor can you have systems in place to screen out these individuals.⁹

Duty to Provide No Cost Auxiliary Aids and Services

Now the client has retained you. What else does the ADA require you to do? Under the ADA, attorneys shall "take those steps that may be necessary to ensure that no individual

with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services”¹⁰ It is the attorney’s obligation to “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”¹¹ A client *cannot* be charged for these additional aids and services.¹² An attorney also must provide these services to a client’s companion (e.g., family member, friend, or associate) if doing so is an appropriate part of your representation.¹³

There are three considerations when determining the appropriate aid or service: (1) the method of communication used by the individual; (2) the nature, length, and complexity of the communication involved; and (3) the context in which the communication is taking place.¹⁴ Often this will be as simple as consulting with the individual client regarding what aid might be needed to ensure effective communication, and you should give great weight to the client’s preferences.¹⁵ But be careful. First, you cannot require the client to bring an accompanying adult to assist with effective communication.¹⁶ But even if the client offers or insists on bringing a family member or friend to help with the communication, this will often be inappropriate in estate planning or probate work. How can you ensure that the accompanying person is impartially relaying information to your client? Or how do you know that he or she understands or can communicate the complicated legal concepts that you are trying to convey? The assistance of someone outside of the client’s family and friends may be required to ensure the impartiality and effectiveness of your representation.¹⁷

A private attorney may have a legal defense to not providing an aid or services if the attorney can demonstrate that doing so “would fundamentally alter the nature” of the service or would result in an “undue burden, i.e., significant difficulty or expense.”¹⁸ In an estate planning or probate practice, rarely would an aid or service alter the

nature of the representation as nearly every aid or service would presumably be designed to enhance the representation.¹⁹ And even if a particular aid or service might cause an undue burden, the attorney is still required to provide a reasonable alternative aid or service.²⁰ Further, arguing an ADA exception does not necessarily absolve an attorney of his or her professional responsibility obligations.

The necessary aids and services will depend on the needs of the client and the nature of the legal services that you are providing. Regardless of the disability, the purpose of the aid or service is to ensure that the client receives the same legal services as someone without the disability. Just like a French interpreter would be useless to a client who speaks Spanish, an ASL sign language interpreter would do little good unless the client regularly utilizes ASL. While it would be impossible to discuss every potential fact scenario, there are specific thoughts that you should consider for clients with hearing or vision loss.

Deaf or Hard of Hearing Clients

If a client is deaf or hard of hearing, an attorney’s office must first accept Telecommunications Relay Service (TRS), Video Relay Service (VRS), or other adaptive calls to your office.²¹ While this should not be difficult, it is important for your staff to have a basic understanding of these types of services so that they are prepared to treat the call in the same manner as any other telephone call.²² Also, if your phone system has an automated-attendant system (e.g., voicemail), you should make sure that it is compatible with various auxiliary aids and services that deaf or hard of hearing clients might use.²³

The attorney should then interact with the potential client to come to some understanding as to what aids or services the client needs in order to have “equal communication access” as any other client. In a legal setting, handing notes back and forth will rarely be sufficient for effective communication except for the

occasional brief interaction.

A qualified sign-language interpreter will often be required.²⁴ Start out by asking the client if he or she has a preferred interpreter and then inquire whether that individual is sophisticated enough to interpret the matter at hand. Under the Deaf Persons' Interpreters Act, Michigan has codified the different requirements for qualified sign language interpreters.²⁵ According to the Michigan Department of Civil Rights, an attorney should seek a qualified interpreter eligible to work in a "Standard Level 3" setting with a Legal Endorsement.²⁶ If the client is deaf-blind, then a deaf-blind endorsement is also required. A qualified interpreter can be found using the Michigan Only Interpreter System that can be found at <https://w2.lara.state.mi.us/interpreter/>. If you live in a location where it would be difficult to get a qualified interpreter on site, discuss with your client the possibility of using a Video Remote Interpreting (VRI) service.²⁷

But some clients may not use sign language or might prefer another mode of communication. Real-time captioning (a.k.a., CART) might be a good (or even preferred) alternative. This computer-aided technology is similar to what court reporters now frequently use. Federal regulations also list some other possible alternatives to consider.²⁸

Obligations to Clients Who Are Blind or Have Vision Loss

The federal regulations offer another list of possible aids and services that might be suitable for a client who is blind or has significant vision loss.²⁹ Recent technology offers a lot of improved options for the blind or other individuals with vision loss to be able to communicate effectively. You can often assist these clients by merely providing electronic copies of any materials before and after meetings, which may allow the client to use electronic reading software, text magnification, or similar assistive device.³⁰ Documents in a word processor format (e.g., Microsoft Word) will typically work best, as scanned PDF documents

may be unreadable.³¹ However, your client might prefer someone who will read the material out loud, braille, or some combination of all of these options. Again, the key is working with your client to provide what the client needs.

Resources

If you need further information or have additional questions, there are a number of resources that are available to you:

- **ADA.gov.** Not only does ADA.gov have resources available on their website, but you can also call and speak confidentially with an ADA Specialist at (800) 514-0301.
- **Michigan Department of Civil Rights/Division on Deaf, DeafBlind, and Hard of Hearing.** In addition to the Michigan Department of Civil Rights being a good potential resource itself, the Division on Deaf, DeafBlind, and Hard of Hearing is within the department and can be reached at (313) 437-7035.
- **State Bar of Michigan Equal Access Initiative.** The equal access initiative offers a lot of resources and updates regarding the Bar's efforts to ensure that all individuals have access to the courts and legal services. More information can be found at: <https://www.michbar.org/programs/equalaccess>.
- **Michigan Protection and Advocacy Services.** MPAS is a private nonprofit organization that advocates for the legal rights of individuals with disabilities in Michigan. MPAS gets its funding through various appropriations and grants. You can reach them on their hotline at (800) 288-5923.

Yes, attorneys are legally subject to the ADA by offering our legal services to the public. But it would be short-sighted to view the ADA's requirements as a significant burden to your practice. Embracing the ADA simply involves making common sense adjustments to ensure

that everyone has access to a normal attorney-client relationship with you. And that's also a professional responsibility.

Notes

1. Under the ADA, businesses have certain obligations to make your building "accessible" to individuals with disabilities. While a full discussion of these obligations is well beyond the scope of this article, there are some general principles worth noting. ADA building requirements apply to newly constructed buildings and alterations to existing buildings made after January 26, 1992. Businesses are otherwise required to remove barriers that are "readily achievable" (i.e., "easily accomplishable and able to be carried out without much difficulty or expense"). What is considered "readily achievable" is subjective, but the government has provided a good checklist for businesses at: <https://www.ada.gov/racheck.pdf>. Importantly, if you do make alterations to comply with the ADA, talk to your accountant as you might be entitled to tax breaks.

2. Title I of the ADA (42 USC 1201 et seq.)

3. Michigan Rule of Professional Conduct 1.14.

4. In 2010, David Bulkowski and Donald Lawless wrote a great article on this topic for the Michigan Bar Journal. Their article inspired much of this article. David A. Bulkowski and Donald P. Lawless, *An Attorney's Obligation Under Title III of the Americans with Disabilities Act*, Michigan Bar Journal (August 2010), available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article1723.pdf> (Last Accessed March 5, 2018).

5. 42 USC 12182(a). An attorney for a government agency or who services receive government funding are obligated under Title II of the ADA or Section 504 of the Rehabilitation Act. 29 USC 12131(1) (ADA Title II); 29 USC 794(b) (Section 504). Someone covered under Title II arguably has an even greater obligation to honor the specific aid or service that an individual requests.

6. 42 USC 12181(7)(F).

7. MCL 37.1301(a).

8. MCL 37.1302(a).

9. 42 USC 12182(b)(1)(A); (b)(2)(A). See also MCL 37.1302 (MPDA).

10. 28 CFR 36.303(a).

11. 28 CFR 36.303(c)(1).

12. 28 C.F.R. § 36.301(c) ("A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices,

or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.").

13. 28 CFR 36.303(c)(1).

14. 28 CFR 36.303(c)(1)(ii).

15. *Id.*

16. 28 CFR 36.303(c)(2).

17. See, e.g., 28 CFR 36.303(c)(1)(ii).

18. 28 CFR 36.303(a).

19. This point was made in David A. Bulkowski and Donald P. Lawless, *An Attorney's Obligation Under Title III of the Americans with Disabilities Act*, Michigan Bar Journal (August 2010), available at <https://www.michbar.org/file/barjournal/article/documents/pdf4article1723.pdf> (Last Accessed March 5, 2018).

20. 28 CFR 36.303(h).

21. 28 CFR 36.303(d).

22. *Id.*

23. 28 CFR 36.303(d)(1).

24. 28 CFR 36.303(b)(1).

25. MCL 3.93.501 et seq.

26. See Michigan Department of Civil Rights, Division on Deaf, Deafblind and Hard of Hearing, Fact Sheet for Legal Providers, located at: http://www.michigan.gov/mdcr/0,4613,7-138-28545_77069-388960--,00.html (Last Accessed March 5, 2018).

27. 28 CFR 36.303(b)(1).

28. CFR 36.303(b)(1) ("Qualified interpreters on-site or through video remote interpreting (VRI) services; note-takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.").

29. 28 CFR 36.303(b)(2) ("Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.").

30. For a good summary of various options to assist clients, see Trevor Finneman and Michelle Uzeta, *Serving Clients with Disabilities: An Accessibility Guide for Law Firms*, ABA Law Practice Today (July 2013), available at

https://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/july13/serving-clients-with-disabilities.html (Last Accessed July 2013).

31. *Id.*



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