

Attorneys, Deaf Clients, and the Americans with Disabilities Act

Attorneys have responsibilities to provide deaf clients with sign language interpreters and other accommodations that they may need to communicate.

A lawyer who fails to communicate effectively with a client is not meeting his or her duty of competent and zealous representation under the Canons of Ethics. Furthermore, attorneys have a statutory duty to provide effective communication to deaf clients under the Americans with Disabilities Act (ADA), which went into effect on January 26, 1991. Title III of the ADA, 42 U.S.C. §§12181 - 12183, provides people with disabilities the right to equal access to public accommodations. Both Title III of the ADA, and the U.S. Department of Justice regulation pursuant to Title III, 28 C.F.R. Part 36, specifically include the offices of lawyers in the definition of public accommodations. 42 U.S.C. §12181; 28 C.F.R. §36.104.

Under Title III, public accommodations are required to provide auxiliary aids and services to ensure effective communication with deaf and hard of hearing people: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. §36.303(c).

Lipreading and writing notes back and forth are seldom effective methods of communication with sign language users. An attorney who relies on these methods cannot be assured of communicating effectively or accurately with his or her client.

A comprehensive list of auxiliary aids and services required by the ADA is set forth in this regulation, and includes, for deaf and hard of hearing individuals: "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, telecommunication devices for deaf persons (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 28 C.F.R. 36.303(b)(1).

The term qualified interpreter is defined in the regulation to mean " . . . an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary." 28 C.F.R. 36.104.

The Department of Justice states in its Analysis: "It is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for

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effective communication." 56 Fed.Reg. at 35567 (emphasis added).

The Department of Justice has also noted in its Analysis: "The Department wishes to emphasize that public accommodations must take steps necessary to ensure that an individual with a disability will not be excluded, denied services, segregated or otherwise treated differently from other individuals because of the use of inappropriate or ineffective auxiliary aids. In those situations requiring an interpreter, the public accommodations must secure the services of a qualified interpreter, unless an undue burden would result." 56 Fed. Reg. at 35567 (emphasis added).

The responsibility to provide effective communications with clients applies to attorneys regardless of the fee arrangements with the client, and regardless of whether a case is being handled for a flat rate, hourly rate, contingency, pro bono, as part of a legal insurance package or other arrangement. A public accommodation may avoid provision of an auxiliary aid or service only if it can demonstrate that providing the aid or service would fundamentally alter the nature of the service, or would constitute an undue burden or expense. If the public accommodation is able to demonstrate that there is a fundamental alteration or an undue burden in the provision of a particular auxiliary aid it must nevertheless be prepared to provide an alternative auxiliary aid, where one exists.
28 C.F.R. §36.303(f).

Whether or not providing a particular auxiliary aid would constitute an "undue burden" is difficult to ascertain. Undue burden is defined as significant difficulty or expense when considered in light of a variety of factors including the nature and cost of the auxiliary aid or service and the overall financial and other resources of the business. 28 C.F.R. §36.104. The undue burden standard is applied on a case-by-case basis. Undue burden is not measured by the amount of income the lawyer or other private business is receiving from a deaf client, patient or customer. Instead, undue burden is measured by the financial impact on the entity as a whole. Therefore, it is possible for a lawyer to be responsible for providing auxiliary aids even for pro bono clients, if the cost of the aid would not be an undue burden on the operation of the firm. Furthermore, it may be necessary for a lawyer to provide an interpreter when communicating with non-clients (e.g., estate beneficiaries, witnesses, an audience for a legal seminar).

The Department of Justice does not permit an attorney or other place of public accommodation to charge a person with a disability for the cost of the auxiliary aid provided. Therefore, billing the deaf client for interpreter services as a "client cost" is not permissible: "A public accommodation may not impose a surcharge on a particular individual with a disability . . . to cover the costs of measures, such as

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the provision of auxiliary aids . . . that are required to provide that individual . . . with the nondiscriminatory treatment required by the Act or this part. " 28 C.F.R. 36.301(c).

Congress has amended the Internal Revenue Code to provide tax incentives for businesses that incur expenses in increasing accessibility for people with disabilities. The "Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals" (Title 26, I.R.C. Section 190) allows a deduction for barrier removal expenses not to exceed \$1500 for any taxable year. The "Disabled Access Tax Credit" (Title 26, I.R.C. Section 44) is available to small businesses. It provides a tax credit of 50 per cent of eligible access expenditures that exceed \$250 but do not exceed \$10,250 made for the purpose of complying with the ADA. For more information on these tax provisions, contact the IRS, Office of the Chief Counsel, PO Box 7604, Ben Franklin Station, Washington DC 20044, (202) 622-3110.

It is clear from the Act, the Regulation and its Analysis, that important communications such as those with an attorney will require provision of a qualified sign language interpreter to ensure effective communication with the deaf individual. This cost cannot be passed on to the client.

This material was prepared by the National Association of the Deaf Law Center. It is intended solely as informal guidance. This material is not legal advice. For technical assistance and additional information about how laws against discrimination apply to you, contact the NAD Law Center, a local attorney, or an enforcement agency.