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Accommodations for the Hearing Impaired in the Florida State Court System

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ACCOMMODATIONS FOR THE HEARING IMPAIRED IN THE FLORIDA STATE COURT SYSTEM

ARLETTE ABDALLAH*

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I. INTRODUCTION

On July 23, 2010, the United States Department of Justice celebrated the twentieth anniversary¹ of the Americans with Disabilities Act of 1990 (ADA).² Twenty years after its implementation, the ADA established enforceable standards aimed at eliminating discrimination against persons with disabilities.³ The driving force behind its implementation is that discrimination against those with disabilities continues to exist “in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”⁴ Among the disabilities covered by the ADA are hearing impairments, which are recognized under the category of “physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.”⁵

Following the enactment of the ADA, federal regulations were established to effectuate the ADA’s prohibition on public entities from discriminating against individuals with disabilities.⁶ A public entity is defined as “[a]ny state or local government” or an agency thereof.⁷ As public entities, state and local governments must “take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.”⁸

This article centers on the requirement for public entities to accommodate individuals who are hearing impaired. It focuses on the ways in which court administrations, operating as public entities, provide services in the courtroom for parties and other individuals who are hearing impaired, with a specific exploration of the Florida state court system.

The first part of this article will explain the federal regulations that effectuate the ADA as it applies to public accommodations for those with hearing impairments. The second part of this article will discuss the methods of aid that individuals may prefer based on their identification as Deaf, deaf, hard-of-hearing or late-deafened. With regard to these preferences, this ar-

1. *Department Celebrates 20th Anniversary of the ADA*, DISABILITY RIGHTS ONLINE NEWS (U.S. Dep’t of Justice, Washington, D.C.), Sept. 2010, at 1, <http://www.ada.gov/newsltr0910.pdf>.

2. 42 U.S.C. § 12101 (2006).

3. *Id.* § 12101(b)(1)–(2).

4. *Id.* § 12101(a)(2)–(3).

5. 28 C.F.R. § 35.104 (2009).

6. *Id.* § 35.101.

7. *Id.* § 35.104.

8. *Id.* § 35.160(a).

ticle will then explore the kinds of auxiliary aids and services that are provided for hearing-impaired parties, witnesses, and other court participants in Florida courts. The fourth part of this article will take a statutory examination of accommodations for hearing-impaired persons in Florida courts. In assessing the accommodations that Florida courts provide, this article will explore issues that concern accommodation requests, as well as compliance problems. To provide some perspective as to where the Florida state court system stands, the article takes an initial look at the way in which courts in Washington, D.C. approach accommodations under the ADA. Next, this article will review any limitations to the services that the state courts will provide. In addition, this article will identify issues that have risen from the requirement to accommodate hearing-impaired individuals in court. Finally, this article will summarily discuss the patterns of accommodation in the Florida state court system.

II. PUBLIC ACCOMMODATIONS FOR THE HEARING IMPAIRED

The ADA requires public accommodations to be made for individuals who are deaf, hard-of-hearing or otherwise hearing impaired.⁹

Public accommodations include places of lodging (for example, motels, hotels); places serving food and drink (for example, restaurants, bars); places of public entertainment (for example, movies, theaters, stadiums, concert halls); places of public gathering (for example, auditoriums, convention halls); sales or rental establishments (for example, stores); service establishments (such as gas stations, dry cleaners, banks, doctors' and lawyers' offices); transportation stations (for example, terminals, depots); places of public display or collection (for example, museums, libraries); places of recreation (for example, parks, zoos, amusement centers); private schools; social service centers (such as day care centers, food banks, homeless shelters, adoption agencies); and places of exercise or recreation (such as gyms, health spas, bowling alleys, golf courses).¹⁰

Federal regulations mandate that, as public entities, state and local governments must "make reasonable modifications in [their] policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . making the modifications would funda-

9. Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 28 (1997).

10. *Id.* at 28-29.

mentally alter the nature of the service, program, or activity.”¹¹ When it is necessary to provide a hearing-impaired individual with an “equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity,” state and local governments must supply the “appropriate auxiliary aids and services.”¹² Auxiliary aids and services are defined as “effective [means] of making aurally delivered [information] available to [hearing-impaired] individuals.”¹³

As they apply to those with hearing impairments, auxiliary aids and services include “[q]ualified interpreters, notetakers, 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), [and] videotext displays.”¹⁴ Qualified interpreters must be able to “interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.”¹⁵

As illustrated above, the ADA provides for remarkable accommodations for hearing-impaired persons.¹⁶ In many cases, however, these accommodations prove to be extensive and costly.¹⁷ Nevertheless, state and local government entities must bear the cost of providing these necessary accommodations.¹⁸ The government is therefore prohibited from imposing special charges on those with disabilities to compensate for the cost of providing these services.¹⁹

III. PREFERRED METHODS OF ACCOMMODATION

An individual with a disability is not required to accept a particular form of accommodation or service.²⁰ Rather, the mode of aid or service preferred by an individual may differ depending on whether the individual considers himself or herself “Deaf, deaf, late-deafened or hard-of-hearing.”²¹ In

11. 28 C.F.R. § 35.130(b)(7).

12. *Id.* § 35.160(b)(1).

13. *Id.* § 35.104.

14. *Id.*

15. *Id.*

16. Tucker, *supra* note 9, at 30.

17. *Id.*

18. *Id.*

19. *See* 28 C.F.R. § 35.130(f).

20. *See id.* § 35.130(e)(1).

21. AM. JUDGES FOUND. & THE NAT’L COURT REPORTERS FOUND., COMMUNICATION ACCESS REALTIME TRANSLATION (CART) IN THE COURTROOM: MODEL GUIDELINES 4 (2002),

approaching the issue of preferred methods of aid, it is essential to point out that there is not one mode of communication aid that can equally and effectively accommodate each hearing impaired participant.²²

Some deaf individuals use American Sign Language (ASL); others employ some form of Signed English; still others use Pidgin Signed English (PSE). A substantial minority of deaf individuals are exclusively oral. . . .

. . . Notably, some deaf individuals have minimal or nonexistent linguistic skills. These individuals are not fluent in any signed or voiced language. . . .

Hard-of-hearing defendants present problems of the same complexity. . . . Hearing aids only amplify; they do not clarify. Speechreading is an art, not a science. Hearing aids without speechreading or speechreading without a hearing aid usually are ineffective. Most hard-of-hearing individuals must use hearing aids and speechreading together in order to understand speech. They also may require either real-time captioning or broadcasting systems that beam directly to their hearing aids.²³

Adequate communication, therefore, requires appropriate accommodation for each participant's specific needs.²⁴ Thus, state and local governments bear the burden of paying for sign language interpreters or any other preferred auxiliary aid or service "where necessary to allow equal participation by persons with hearing impairments in state and local government programs and facilities, such as in a courtroom as a party, witness, juror, judge, attorney, or simply [an] observer."²⁵

A. *American Sign Language*

Those who identify themselves as members of the "Deaf" community use American Sign Language (ASL) as their primary method of communica-

available at <http://www.ncraonline.org/NR/rdonlyres/891C9BAD-1A28-4298-AB6B-D6569196ACAD/O/CARTModelGuildeines.pdf> [hereinafter CART MODEL GUIDELINES].

22. See Jamie McAlister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice if You Can't Talk to the Judge?*, 26 ARIZ. ST. L.J. 163, 167 (1994).

23. *Id.* at 167–68.

24. *Id.* at 168.

25. Tucker, *supra* note 9, at 28.

tion.²⁶ ASL is a “visual language that is not only a means of communication but also a repository of cultural knowledge and a symbol of social identity.”²⁷ Contrary to popular belief, ASL is not simply English on the hands.²⁸ Rather, it “possesses its own grammatical rules, syntax, . . . regional dialects and can convey abstract concepts.”²⁹

Generally, individuals who are Deaf and communicate through ASL can be effectively accommodated with “a qualified, nationally certified and legally trained ASL interpreter.”³⁰ Such interpreters are required to possess the linguistic and cultural knowledge to be able to express legal information.³¹ ASL interpreters in the courtroom must also be aware of and respect “attorney-client privilege concerns, disclosure of conflict of interests, [and] protocol requirements.”³²

It is noteworthy that a family member of the Deaf individual who requires accommodation is not an appropriate interpreter for that person.³³ This is because qualified interpreters must be able to “interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.”³⁴ Typically, family members cannot remain impartial, and do not have the legal training to interpret such specialized legal concepts in an effective manner.³⁵ Instead, as required by the Court Interpreters Act, the office of the clerk in each district court keeps a list of certified interpreters on file for use when such services are required.³⁶

B. *Signed English and Pidgin Signed English*

Outside of the “Deaf” community, which is known for its emphasis on ASL, some deaf or hard-of-hearing individuals communicate through what is known as Signed English.³⁷ Signed English is a system of communication

26. SHARON CASERTA, PROVIDING EFFECTIVE COMMUNICATION FOR CLIENTS WHO ARE DEAF, HARD OF HEARING, OR DEAF/BLIND 5 (2008), available at http://www.floridalegal.org/deaf/deaf_hard_of_hearing-handbook.pdf.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. CASERTA, *supra* note 26, at 16.

32. *Id.*

33. *Id.* at 13.

34. 28 C.F.R. § 35.104 (2009) (defining a qualified interpreter).

35. CASERTA, *supra* note 26, at 13.

36. 28 U.S.C. § 1827(c)(1) (2006); Court Interpreters Act, Pub. L. No. 95-539, § 2, 92 Stat. 2040, 2040 (1978).

37. CASERTA, *supra* note 26, at 6.

“that attempts . . . to replicate the English language manually.”³⁸ People who are deaf or hard-of-hearing may also communicate through another method of signing known as Pidgin Signed English (PSE).³⁹ PSE is a mixture of both ASL and Signed English.⁴⁰ To accommodate an individual who requires Signed English or PSE, an ASL interpreter or transliterator will suffice.⁴¹

C. *Hard-of-Hearing and Late-Deafened Individuals*

Some individuals who are hearing impaired communicate orally, and refer to themselves as “hard-of-hearing.”⁴² Typically, English is the primary language for those who are hard-of-hearing.⁴³ Therefore, instead of signing, such individuals may speak and lip-read.⁴⁴ Lip-reading, however, poses a challenge to effective communication.⁴⁵ This is because the “ability to communicate effectively . . . depend[s] on the environment, the speaker’s voice, the level of anxiety the situation imparts and other factors which the hard of hearing person cannot control.”⁴⁶

Similarly situated persons are those who are considered to be “late-deafened.”⁴⁷ A person is late-deafened if he or she loses “hearing any time after the development of speech and language; often it means after the age of adolescence.”⁴⁸ Accommodating individuals who are hard-of-hearing or late-deafened may require the use of such auxiliary aids and services as Assistive Listening Systems, Communication Access Real-time Translation (CART), or oral interpreters.⁴⁹

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (“A transliterator is one who does not sign in ASL, but conveys a message from spoken English into a manual code for English such as PSE or Signed English. This task contrasts with *interpreting* because interpreting requires working between two languages e.g. spoken English and ASL.”). CASERTA, *supra* note 26, at 6 n.11.

42. *Id.* at 6.

43. *Id.*

44. *Id.*

45. *Id.*

46. CASERTA, *supra* note 26, at 6–7.

47. *Id.* at 7.

48. *Id.*

49. *Id.*

IV. AUXILIARY AIDS AND SERVICES FOR THE HEARING IMPAIRED IN THE COURTROOM

As required by the ADA, the courts, as “state and local government entities [must] make their programs and services fully accessible to deaf and hard-of-hearing persons.”⁵⁰ State and local governments must “make reasonable modifications in [their] policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . making the modifications would fundamentally alter the nature of the service, program, or activity.”⁵¹ Reasonable modifications may include such allowances as granting an individual who is using an interpreter more time to respond.⁵² As illustrated above, it is a significant item that in order to achieve satisfactory communication, courts must take appropriate measures for each participant’s specific needs.⁵³

A. *The Court Interpreters Act*

The Court Interpreters Act mandates that courts provide certified court interpreters to enable hearing impaired individuals to comprehend court proceedings and to communicate during the proceedings.⁵⁴ Under the Court Interpreters Act, if the presiding judicial officer decides that a party or witness “suffers from a hearing impairment” in such a way that inhibits the individual’s “comprehension of the proceedings or communication with counsel or the presiding judicial officer, or . . . [in such a way that] inhibit[s] . . . [the individual’s] comprehension of questions and the presentation of . . . testimony,” then the presiding officer must provide a certified interpreter for that individual.⁵⁵ The Court Interpreters Act specifies that if the presiding officer determines that a person meets the above criteria by the “officer’s own motion or on the motion of a party or other participant in the proceed-

50. Tucker, *supra* note 9, at 28.

51. 28 C.F.R. § 35.130(b)(7) (2009).

52. *Communication Access in State & Local Courts*, NAT’L ASS’N OF THE DEAF (Apr. 2008), <http://www.nad.org/issues/justice/courts/communication-access-state-and-local-courts> [hereinafter *Communication Access*]. Another example of a reasonable modification may be if:

[O]ne or both litigants are deaf, the court may need to employ a screen to protect the privacy of a conversation between the litigant and his/her attorney during a proceeding. The screen serves to ensure that the other deaf litigant, as well as others present in the courtroom who know American Sign Language, do not “overhear” the attorney-client conversation.

Id.

53. See McAlister, *supra* note 22, at 168.

54. See 28 U.S.C. § 1827 (2006).

55. *Id.* § 1827(d)(1).

ing,” a sign language interpreter may be appointed “whether or not the proceeding is instituted by the United States.”⁵⁶ This applies to all proceedings, both criminal and civil.⁵⁷ The use of an interpreter, however, remains “within the sound discretion of the trial judge.”⁵⁸

As a general requirement, when interpreters are used in court, they must translate the proceedings continuously.⁵⁹ Nevertheless, as long as the party can comprehend the proceedings and communicate with counsel, the requirements of the Court Interpreters Act have been held to be satisfied, and there is no reversible error for a failure to provide a continuous translation.⁶⁰

The Court Interpreters Act also permits simultaneous and consecutive interpretation,⁶¹ allowing a single interpreter to translate simultaneously for several defendants.⁶² Simultaneous interpretation occurs when the language interpreter translates and speaks contemporaneously with the person or persons requiring the accommodation.⁶³ When a single interpreter is used in a multi-defendant lawsuit, however, the “court must ensure that *each* defendant is able to understand the proceedings.”⁶⁴ This may require the court to allow more time at trial for defense counsel to confer with a particular defendant who may desire to confer with counsel separately from the other defendants.⁶⁵

B. *Communication Access Realtime Translation*

Another auxiliary aid that is recognized by the ADA as providing effective communication is Communication Access Realtime Translation (CART).⁶⁶ “CART is a word-for-word speech-to-text interpreting service for

56. *Id.* § 1827(l).

57. *Id.* § 1827(j).

58. *United States v. Coronel-Quintana*, 752 F.2d 1284, 1291 (8th Cir. 1985) (citing 28 U.S.C. § 1827(d) (1982)).

59. *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990).

60. *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986) (per curiam) (“As long as the defendants’ ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the district court.”).

61. § 1827(k).

62. *See United States v. Sanchez*, 928 F.2d 1450, 1454 (6th Cir. 1991) (explaining that separate interpreters for multiple defendants in a single case are not required).

63. *Id.* at 1455 (quoting *United States v. Bennett*, 848 F.2d 1134, 1140 n.7 (11th Cir. 1988)).

64. *Id.*

65. *Id.*

66. CART MODEL GUIDELINES, *supra* note 21, at 4.

people who need communication access.”⁶⁷ In 2002, the American Judges Foundation and the National Court Reporters Foundation established model guidelines for the use of CART in the courtroom.⁶⁸

When CART is used in court, the text of the proceedings that the reporter types instantly appears on a computer screen in the courtroom.⁶⁹ CART automatically “converts stenographic notes into English text,” making it immediately available for viewing.⁷⁰ Unlike an official court reporter who “provides the official record of [the] proceedings, the CART provider/interpreter assumes an interpretive rather than an official role.”⁷¹ This means that along with recording the words that are being said, the CART provider/interpreter captures “the spirit of the proceedings and [any] environmental sounds.”⁷²

Although it is not recommended, a CART interpreter may serve as the official court reporter in a last resort situation.⁷³ In such cases, however, the record will “not include the spirit of the speaker or environmental sounds, or any off-the-official-record conversations.”⁷⁴ More often though, the CART provider/interpreter and the official court reporter “usually cannot be the same person, because the roles are different and because there are rules and ethical considerations that usually require different people to perform each of those jobs.”⁷⁵

CART is available to any court participant who may require it, including “a litigant, juror, judge, attorney [or] witness.”⁷⁶ Because CART is available to different kinds of court participants, the CART provider/interpreter will often be required to serve different functions.⁷⁷ For instance, “a CART provider/interpreter may accompany a consumer into the jury room or into confidential discussions with attorneys.”⁷⁸

67. *Id.*

68. *Id.* at 1, 4.

69. *Id.* at 4–5.

70. *Id.* at 4.

71. CART MODEL GUIDELINES, *supra* note 21, at 5.

72. *Id.* “For example, if anyone laughs in the courtroom or the proceedings are disrupted by sounds or other disturbances, CART providers/interpreters include this in their unofficial, onscreen text display.” *Id.*

73. *Id.*

74. *Id.*

75. Patricia Lyons, *Tips and Tricks for Working with Court Reporters*, ARIZ. ATT’Y, Nov. 2008, at 42, 44.

76. CART MODEL GUIDELINES, *supra* note 21, at 7.

77. *See id.*

78. *Id.*

C. Assistive Listening Systems

“Assistive Listening Systems [ALS] are . . . devices which can be used to improve and increase the sound and quality of conversations between parties.”⁷⁹ Examples of these devices are induction loops, FM systems, and Infrared devices.⁸⁰ Typically used to accommodate people who are hard-of-hearing or late-deafened, the effectiveness of ALS depends on the “client’s residual hearing, type of hearing aid used and personal preference.”⁸¹

V. ACCOMMODATING THE HEARING IMPAIRED IN FLORIDA COURTS

Courts must “provide [the necessary] auxiliary aids and services for all court or court related events . . . [such as] appearances, hearings, jury duty, [and] court sponsored clinics.”⁸²

A. Section 90.6063 of the Florida Statutes

Section 90.6063 lays out guidelines with regard to interpreting services for hearing impaired individuals in court.⁸³ The statute applies, not only to hearing impaired defendants, but also to witnesses, jurors, or other litigants who may be deaf.⁸⁴ Specifically, the statute instructs that:

In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person’s testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is seated.⁸⁵

When an interpreter is used, the statute requires that the interpreter be “certified by the National Registry of Interpreters for the Deaf or the Florida

79. CASERTA, *supra* note 26, at 24.

80. *Id.*

81. *Id.*

82. *Id.* at 25.

83. FLA. STAT. § 90.6063 (2010).

84. *Id.* § 90.6063(2).

85. *Id.*

Registry of Interpreters for the Deaf or an interpreter whose qualifications are otherwise determined by the appointing authority.”⁸⁶ To further ensure effective communication, a preliminary determination must be made that the interpreter can successfully communicate with the person requiring the accommodation before he or she is appointed.⁸⁷

B. *Section 901.245 of the Florida Statutes*

Florida Criminal Procedure explicitly provides for interpreter services for deaf individuals.⁸⁸ In a situation in which a deaf person “is arrested and taken into custody for an alleged violation of a criminal law, . . . the services of a qualified interpreter shall be sought prior to interrogating such deaf person.”⁸⁹ The *Florida Statutes* do allow for the interrogation to proceed in lieu of a qualified interpreter if one cannot be found.⁹⁰ In such a scenario, however, the interrogation and the deaf individual’s answers must be in writing.⁹¹

C. *Section 40.013 of the Florida Statutes*

With regard to jury service, *Florida Statutes* prohibit a person from being excused from jury duty on a civil trial “solely on the basis that the person is deaf or hearing impaired.”⁹² Though this statute protects hearing impaired

86. *Id.* § 90.6063(3)(b).

[The National Registry of Interpreters for the Deaf] is a national membership organization which provides information, referral, training for new and professional interpreters and, continued certification through NAD-RID’s National Testing System (NIC), along with self-regulation through a national Ethical Practices System (EPS). [The Florida Registry of Interpreters for the Deaf] is a local affiliate of the National Registry of Interpreters for the Deaf which primarily is a resource for interpreters, but also provides information and referral to consumers of interpreting services.

CASERTA, *supra* note 26, at 29.

87. FLA. STAT. § 90.6063(6).

88. *Id.* § 901.245.

89. *Id.*

90. *Id.*

91. *Id.*

92. FLA. STAT. § 40.013(5). Rather, courts must provide those who are summoned for jury duty with appropriate accommodations:

A Florida parent complained that a court failed to provide effective communication for her son, who is deaf and had requested real-time captioning when he was summoned for jury duty. The court agreed to provide real-time captioning when needed and revised its jury summons to include instructions for individuals with disabilities needing accommodations to call the ADA compliance officer. The court also instructed its information officers to refer individuals with disabilities who need assistance to the court’s ADA compliance officer, added captioning to the jury instruction video, produced a written copy of the juror oath, and agreed to review all efforts to improve effective communication on an ongoing basis.

individuals from being excluded from jury service, it does provide an exception to this prohibition.⁹³ If the judge finds “that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby,” a deaf or hearing impaired person may be excused from jury duty on a civil trial.⁹⁴

VI. ADA COMPLIANCE IN FLORIDA COURTS

In Florida, it is estimated that three million people have been diagnosed with hearing loss.⁹⁵ This figure makes Florida the second largest state in population of people with hearing impairments.⁹⁶ When a deaf or otherwise hearing impaired individual requires an accommodation in Florida courts, the court must not only “pay for the provision of auxiliary aids and services for qualified deaf and hard of hearing parties upon request,” but “[t]he court must give *primary consideration* to the person’s expressed choice of the auxiliary aid provided.”⁹⁷

A. Requests for Accommodations by Persons with Disabilities

The Florida State Court System demonstrates an overall awareness of and response to disability issues.⁹⁸ This awareness is illustrated by rule 2.540 of the *Florida Rules of Judicial Administration*.⁹⁹ Rule 2.540 serves to notify those with disabilities of their “right to request accommodations.”¹⁰⁰

ADA Mediation Highlights, Disability Rights Online News (U.S. Dep’t of Justice, Washington D.C.), Jan. 2010, at 6, <http://www.ada.gov/newsltr01110.pdf>.

93. See FLA. STAT. § 40.013(5).

94. *Id.*

95. CASERTA, *supra* note 26, at 4.

96. *Id.*

97. *Id.* at 25. For example, if a “client is an ASL user and prefers the use of a qualified interpreter to communicate effectively, the court may not provide a scribe in lieu of an interpreter if note taking would not be effective for the client.” *Id.* “Courts should not unilaterally limit the range and availability of auxiliary aids and services for deaf people and should give primary consideration to the deaf person’s request.” *Communication Access*, *supra* note 52.

98. SOUTHEAST FLA. CENT. ON AGING OF FLA. INT’L UNIV. & FLA. SUPREME COURT COMM’N ON FAIRNESS, JURY SERVICE ACCESSIBILITY FOR OLDER PERSONS AND PERSONS WITH DISABILITIES IN FLORIDA 3 (1999), available at http://www.floridasupremecourt.org/pub_info/documents/juryreport.pdf [hereinafter JURY SERVICE ACCESSIBILITY].

99. See generally FLA. R. JUD. ADMIN. 2.540.

100. *In re* Amendments to Fla. Rule of Judicial Admin. 2.540, 41 So. 3d 881, 882 (Fla. 2010).

In 2010, the Florida Bar's Rules of Judicial Administration Committee (Committee) proposed several amendments to rule 2.540 "in order to better guide Florida courts . . . as to their rights and obligations under the [ADA]."¹⁰¹ After reviewing the Committee's proposals, the Supreme Court of Florida adopted extensive amendments.¹⁰² These amendments organize the rule into several subdivisions.¹⁰³ As amended, the rule now identifies the court's obligation to make accommodations available to "[q]ualified individuals with a disability" and incorporates definitions from the ADA.¹⁰⁴

Additionally, in order to encourage uniformity,¹⁰⁵ the rule drafts a statement to be included in all notices of court proceedings informing qualified individuals of their right to government-provided accommodations:

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least [seven] days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than [seven] days; if you are hearing or voice impaired, call 711.¹⁰⁶

In addition to requiring this standard notice, rule 2.540 now details the procedures for requesting accommodations,¹⁰⁷ as well as the court's process for responding to such requests.¹⁰⁸ In responding to requests for accommodation, the court must determine whether to grant a particular accommodation or "to provide . . . an appropriate alternative accommodation."¹⁰⁹ The court may only deny an accommodation request if "the court determines that the requested accommodation would create an undue financial or administrative burden on the court or would fundamentally alter the nature of the service, program, or activity."¹¹⁰

Finally, judicial circuits and appellate courts are now required to create and issue grievance procedures for resolving complaints.¹¹¹ This provision is

101. *Id.* at 881.

102. *Id.* at 882.

103. *Id.*

104. FLA. R. JUD. ADMIN. 2.540(a),(b).

105. *In re Amends. to Fla. Rule 2.540*, 41 So. 3d at 881.

106. FLA. R. JUD. ADMIN. 2.540(c)(1) (internal quotation marks omitted).

107. *Id.* at 2.540(d).

108. *Id.* at 2.540(e).

109. *Id.* at 2.540(e)(1).

110. *Id.* at 2.540(e)(3).

111. FLA. R. JUD. ADMIN. 2.540(f)(1).

significant in that it allows an individual to address a disability-based discrimination issue regarding “the provision of services, activities, programs, or benefits by the Florida State Courts System.”¹¹² When the grievance concerns an issue that could “affect the orderly administration of justice,” the presiding judge has the discretion to “stay the proceeding and seek expedited resolution of the grievance.”¹¹³

B. *Compliance Issues*

Indeed, there is an overall general awareness and responsiveness to disability issues among Florida courts.¹¹⁴ A study conducted in 1999 found that with regard to particular accommodations, however, some Florida courts were lacking.¹¹⁵ These specific accommodations included “providing qualified sign language interpreters or real-time reporters, and other requests for accommodations by persons with disabilities other than mobility impairments.”¹¹⁶ Some courts had indicated a lack of experience in these areas because these particular accommodations were not often requested.¹¹⁷ Others simply did not see the need for certain accommodations in their communities.¹¹⁸ However, without an interpreter, if a deaf person had been “summoned for jury duty, . . . the potential juror [would have] likely [been] . . . dismissed.”¹¹⁹

Among the data reported, the survey found that some of the sampled Florida courts had not “used any auxiliary aids or services [before].”¹²⁰ It further found that some of the courts did not have a “hearing-aid compatible telephone [or a] telecommunications device for the deaf.”¹²¹ The survey also found that some courts did not have “assistive-listening devices available in the jury deliberation room . . . or jury box.”¹²²

A report prepared in 2008 noted that while there have been accessibility improvements in Florida courthouses, some barriers remain.¹²³ For example,

112. *Id.*

113. *Id.* at 2.540(f)(2).

114. JURY SERVICE ACCESSIBILITY, *supra* note 98, at 3.

115. *Id.* at 1, 3–4.

116. *Id.* at 4.

117. *Id.*

118. *Id.*

119. *Communication Access, supra* note 52.

120. JURY SERVICE ACCESSIBILITY, *supra* note 98, at 5.

121. *Id.*

122. *Id.*

123. COURT ACCESSIBILITY SUBCOMM., STANDING COMM. ON FAIRNESS AND DIVERSITY, ACCESS TO THE FLORIDA COURTS: IDENTIFYING AND ELIMINATING ARCHITECTURAL BARRIERS 1

the report indicated, “Alarm systems do not always include signal appliances in separate spaces such as jury rooms, restrooms, and conference rooms.”¹²⁴ Additionally, there are often not many TDDs or TTYs available.¹²⁵

Today, in a dramatic turnaround, Florida courts appear to be committed to the awareness of disability issues in the state.¹²⁶ In most Florida courts, an assigned staff member serves as the ADA coordinator.¹²⁷ Because many of the Florida courts provide instruction on ADA compliance and have procedures in place to recognize situations where reasonable accommodations may be required, Florida courts seem to be conscious and receptive to their responsibilities under the ADA.¹²⁸ In fact, at the 2008 celebration of “the eighteenth anniversary of the ADA, the Agency for Persons with Disabilities honored the Florida State Courts System for its commitment to the ADA.”¹²⁹

VII. ACCOMMODATING THE HEARING IMPAIRED IN WASHINGTON D.C. COURTS

Washington D.C., like Florida, has made significant accommodations available in its courts for those with hearing impairments. In 2006, a status report was released concerning the District of Columbia courts and their implementation of improved court access recommendations.¹³⁰ This report specifically addresses court access for hearing impaired users.¹³¹ In recent years, the D.C. courts have purchased captioned video tapes for juror lounges and televisions with captioned decoding for deaf or hard-of-hearing court partici-

(2008), available at http://www.flcourts.org/gen_public/pubs/bin/accesstocourts2.pdf [hereinafter ARCHITECTURAL BARRIERS].

124. *Id.* at 8.

125. *Id.* “TTYs/TDDs are devices that the deaf, hard-of-hearing, and the deaf/blind community use to communicate though [sic] standard telephone lines. To speak directly to a TTY user, the receiver of the call also must have a TTY.” CASERTA, *supra* note 26, at 26.

126. See SUPREME COURT OF FLA., THE 2008–2009 FLORIDA STATE COURTS ANNUAL REPORT 36 (2009), available at http://www.flcourts.org/gen_public/pubs/bin/annual_report0809.pdf [hereinafter 2008–2009 ANNUAL REPORT].

127. JURY SERVICE ACCESSIBILITY, *supra* note 98, at 3.

128. *Id.*

129. 2008–2009 ANNUAL REPORT, *supra* note 126, at 36.

130. See generally STANDING COMM. ON FAIRNESS & ACCESS, STATUS REPORT: THE IMPROVING COURT ACCESS RECOMMENDATIONS (1997) (2006), http://www.dccourts.gov/dccourts/docs/ImprovingAccessRecommendation_2006-04.pdf [hereinafter STATUS REPORT].

131. See *id.* at 14–15.

pants.¹³² D.C. courts have “been providing realtime and CART services for many years.”¹³³ They also implement the use of ALS regularly.¹³⁴

It should be noted that the strides that D.C. courts have made in order to better comply with ADA standards may be due in part to the societal influence of Gallaudet University, “the world leader in liberal education and career development for deaf and hard of hearing undergraduate students,” located in Washington D.C.¹³⁵

VIII. LIMITATIONS

As discussed, in guaranteeing equality in communication, states and local governments must make communications with individuals with disabilities “as effective as communications with others.”¹³⁶ Indeed, under the ADA, states and local governments are required to ensure that discrimination based on disability does not affect “participation in programs, activities and services that screen out or tend to screen out persons with disabilities, unless [they] can establish that the requirements are necessary for the provision of the service, program, or activity.”¹³⁷ The elimination of any such eligibility criteria discourages “stereotypes or generalizations about individuals with disabilities” that may otherwise arise.¹³⁸

These ADA requirements, however, are not without limitation.¹³⁹ In the event that real risks are present in relation to these programs or activities, states and local governments may not be required to make particular accommodations available.¹⁴⁰ Rather, states and local governments may establish “legitimate safety requirements necessary for safe operation.”¹⁴¹ Additionally, states and local governments are not required to provide a certain accom-

132. *Id.* at 14.

133. *Id.* at 16.

134. *Id.* at 17 (recommending the courts make use of ALS which D.C. courts refer to as assistive listening devices (ALD)).

135. *About Gallaudet*, GALLAUDET UNIV., <http://aaweb.gallaudet.edu/About.xml> (last visited Nov. 14, 2010). Established in 1864, Gallaudet University specifically designs all of its programs and services to accommodate deaf and hard-of-hearing students. *Id.*

136. 28 C.F.R. § 35.160(a) (2009).

137. *Americans with Disabilities Acts Questions and Answers*, U.S. DEP’T OF JUSTICE (last updated Nov. 14, 2010), <http://www.ada.gov/q%26aeng02.htm> [hereinafter *Questions and Answers*].

138. *Id.*

139. *See id.*

140. *Id.*

141. *Id.*

modation if that “particular modification would fundamentally alter the nature of its service, program or activity.”¹⁴²

One important limitation to distinguish from the requirements that states and local governments are required to adhere to is that, while courts must make necessary auxiliary aids and services available for court related events, the government is not obligated to provide these services in certain contexts.¹⁴³ For example, the court itself is not required to provide accommodations for events such as “depositions or evaluations (psychological, etc.) as requested by counsel in relation to a court matter.”¹⁴⁴ In these situations, the individual giving the evaluation or the attorney requesting depositions must accommodate the hearing impaired person.¹⁴⁵

In addition, some courts have refused other impractical accommodations.¹⁴⁶ In response to the recommendation that front row seats of courtrooms be reserved for those with hearing impairments, the D.C. courts have responded that “[i]t is impracticable to routinely reserve space in public courtrooms for spectators. Seats can be reserved on a case-by-case basis, when necessary.”¹⁴⁷ Also attended “on a case-by-case basis,” is the recommendation that courtroom equipment and furniture steer clear of “the line of sight for persons who are hard of hearing or deaf who rely on lip reading.”¹⁴⁸

IX. ISSUES ARISING FROM THE REQUIREMENT TO ACCOMMODATE

Despite the requirement to provide accommodations for hearing impaired court participants, there are still issues that stand in the way of effective communication.¹⁴⁹ The National Association of the Deaf (NAD) has emphasized that “[w]hen a deaf or hard of hearing person does not understand what is going on in the courtroom, justice has not been served.”¹⁵⁰ In addition, an absence of effective communication in police encounters “may result in detention without the ability to call one’s lawyer.”¹⁵¹ In its devotion to protecting the rights of deaf and hard of hearing persons, NAD has gained

142. *Questions and Answers*, *supra* note 137.

143. CASERTA, *supra* note 26, at 25.

144. *Id.*

145. *Id.*

146. STATUS REPORT, *supra* note 130, at 15.

147. *Id.*

148. *Id.*

149. *See Communication Access*, *supra* note 52.

150. *Justice*, NAT’L ASS’N OF THE DEAF, <http://nad.org/issues/justice> (last visited Nov. 14, 2010).

151. *Id.*

“greater access in the legal system” for individuals who are hearing impaired.¹⁵²

Police officers now receive more training about the rights of deaf and hard of hearing individuals. Jails and prisons are implementing procedures to ensure that deaf and hard of hearing inmates have equal access to communication. Courts are providing qualified sign language interpreters and CART more regularly. The NAD continues to advocate for equality and to ensure that lawyers, the police, jails, and the courts comply with the Americans with Disabilities Act and the Rehabilitation Act.¹⁵³

Notwithstanding these advances, serious consequences continue to occur “from the lack of communication access for deaf people in the court system.”¹⁵⁴

A. Law Enforcement

As designated agencies, law enforcement agencies must provide accommodations for deaf and hard of hearing people so as to accomplish effective communication.¹⁵⁵ In 2001, a study analyzed “22 post-ADA state and federal criminal cases” nationwide that exemplified compliance issues.¹⁵⁶ The people who allegedly committed the crimes in these particular cases were hearing impaired individuals.¹⁵⁷ The study indicates that, at the time, the most common accommodation provided by law enforcement was “no accommodation at all.”¹⁵⁸ With regard to those who interacted with law enforcement with some form of assistance:

Court records indicate that 22.7% of suspects in these cases had to communicate through signing family members, friends, or law enforcement employees; 13.6% were interrogated by law enforcement using notewriting. Only 13.6% of the suspects were provided with professional interpreters at the time of arrest or during subsequent legal proceedings, and approximately 9.1% of suspects

152. *Id.*

153. *Id.*

154. *Communication Access, supra* note 52.

155. *See* 28 C.F.R. §§ 35.101, .190(b)(6) (2009).

156. Katrina R. Miller, *Access to Sign Language Interpreters in the Criminal Justice System*, 146 AM. ANNALS DEAF 328, 329 (2001).

157. *Id.*

158. *Id.*

in this group were unable to be accommodated and were later deemed incompetent by the court.¹⁵⁹

As a result of instances such as these, researchers blame inadequate accommodation on “a lack of knowledge of the communication issues facing persons with hearing loss.”¹⁶⁰

In response to the need for effective communication with the deaf and hard-of-hearing, the U.S. Department of Justice suggests a variety of communication ideas that may be practical in certain situations.¹⁶¹ Of course, the use of qualified sign language interpreters is the best communication method for someone who understands it.¹⁶² Additional suggestions include speaking while using visual aids and exchanging written notes.¹⁶³ It is important to recognize when exchanging written notes, however, that people “who use sign language [as their primary method of communication] may lack good English reading and writing skills.”¹⁶⁴

Some other helpful tips include making sure the environment is one that maximizes the potential for effective communication.¹⁶⁵ For example, a well-lit area with little background noise is ideal.¹⁶⁶ Also, “[o]nly one person should speak at a time.”¹⁶⁷ Finally, maintaining face-to-face contact when speaking and speaking slowly, using short, direct statements will facilitate comprehension.¹⁶⁸

In an effort to further clarify appropriate accommodations, the U.S. Department of Justice warns against the use of family members as interpreters.¹⁶⁹ The Department also touches on the previously discussed issue of lip-reading and indicates that lip-reading will not be successful in most situations.¹⁷⁰

159. *Id.*

160. McCay Vernon & Katrina Miller, *Obstacles Faced by Deaf People in the Criminal Justice System*, 150 AM. ANNALS DEAF 283, 290 (2005).

161. See U.S. DEP’T OF JUSTICE, COMMUNICATING WITH PEOPLE WHO ARE DEAF OR HARD OF HEARING: ADA GUIDE FOR LAW ENFORCEMENT OFFICERS 1 (2006), available at <http://www.ada.gov/lawenfcomm.pdf> [hereinafter U.S. DEP’T OF JUSTICE, ADA GUIDE].

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.*

166. U.S. DEP’T OF JUSTICE, ADA GUIDE, *supra* note 161, at 1.

167. *Id.*

168. *Id.*

169. *Id.* “Do not use family members or children as interpreters. They may lack the vocabulary or the impartiality needed to interpret effectively.” *Id.*

170. U.S. DEP’T OF JUSTICE, ADA GUIDE, *supra* note 161, at 1.

B. Videotape

With respect to police interviews, “[f]or a deaf suspect, videotape is the equivalent of audiotape for a hearing suspect.”¹⁷¹ For a hearing impaired suspect, videotape serves as a record of what occurred, and is essential in determining whether the interpreter conveyed the messages accurately and in such a way that the hearing impaired suspect could comprehend.¹⁷² Without videotape of police interviews with deaf or hard-of-hearing suspects, “everything that the deaf person sign[ed] is hearsay evidence; that is, it is what the interpreter says the deaf person said, not necessarily what was actually said.”¹⁷³

C. Lost in Translation

In addition to arrests of deaf individuals, even more communication barriers arise in “plea and sentencing hearings, suppression hearings, and jury trials.”¹⁷⁴ It has been found that a reading level of 7.4 is the typical reading grade level required to comprehend these hearings and trials.¹⁷⁵ As previously mentioned, those who communicate primarily through ASL may lack the reading and writing skills required to comprehend such situations.¹⁷⁶ Adding to this frustration, much of the legal terminology used at these hearings does not translate into ASL with equivalent signs.¹⁷⁷ Rather, when no sign for a particular concept exists, “it can be rendered in fingerspelling (a visual representation of English) or explained in detail by the interpreter, [using] a technique called *expansion* in the field of interpreting.”¹⁷⁸

Although these solutions can be helpful in getting the message across, it takes roughly “4 times longer to provide an accurate interpretation to sophisticated and educated deaf people who are fluent in sign language than it does to transmit the information in spoken English.”¹⁷⁹ In order to keep up with the oral presentation, the interpreter is bound to leave out some significant information.¹⁸⁰ Furthermore, if there is not enough time to do an *expansion*,

171. Vernon & Miller, *supra* note 160, at 287.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. U.S. DEP’T OF JUSTICE, ADA GUIDE, *supra* note 161, at 1.

177. Vernon & Miller, *supra* note 160, at 287.

178. *Id.*

179. *Id.* at 289.

180. *Id.*

and information is left out of the translation, the message will be “simply incomprehensible to the [D]eaf person.”¹⁸¹

Even when granted sufficient time to fingerspell or do *expansions* for concepts that do not translate, these solutions may not effectively aid a deaf individual with Primitive Personality Disorder (PPD).¹⁸² PPD has an effect on a “segment of the deaf population that is incompetent, or minimally competent,” regarding comprehension of the legal system.¹⁸³ It affects roughly “20%–30% of deaf people.”¹⁸⁴ Persons with this condition demonstrate “little or no knowledge of sign language,” read at a “grade level of 2.9 or lower,” have “little or no formal education,” have “little or no knowledge of . . . the U.S. Constitution, . . . or how to make change, pay taxes, follow recipes, plan a budget, or function on a job,” and have “a performance IQ of [seventy] or higher.”¹⁸⁵

Unfortunately, despite requirements for accommodation and the receptiveness to these requirements, the bulk of deaf individuals who are convicted of a criminal charge and sentenced have no understanding of the legal proceedings that led to their conviction.¹⁸⁶ The struggle with this complication has even led some to suggest that deaf defendants with PPD should be “declared incompetent to stand trial . . . until made competent.”¹⁸⁷

X. CONCLUSION

Aimed at eliminating discrimination against disabled persons,¹⁸⁸ the ADA “guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, [and] [s]tate and local government services.”¹⁸⁹ Federal regulations have enforced these requirements.¹⁹⁰ In so doing, federal regulations also specify, in detail, the various “auxiliary aids and services” that state and local governments may need to make available to hearing-impaired individuals.¹⁹¹

181. *Id.*

182. *See* Vernon & Miller, *supra* note 160, at 289.

183. *Id.* at 285.

184. *Id.* at 286.

185. *Id.* at 285 Table 1.

186. *Id.* at 289.

187. Vernon & Miller, *supra* note 160, at 289.

188. 42 U.S.C. § 12101(b)(1) (2006).

189. *Questions and Answers*, *supra* note 137.

190. *See* 28 C.F.R. § 35.101 (2009).

191. 28 C.F.R. § 35.160(b)(1).

The appropriate aid or service for a particular individual, however, will depend on that person's communication preference.¹⁹² Depending on whether the individual considers himself or herself "Deaf, deaf, late-deafened, or hard-of-hearing,"¹⁹³ the individual may require ASL, PSE, Assistive Listening Systems, or CART.¹⁹⁴ Equipped with these aids and services, courts are specifically required to provide accommodations for all court-related events.¹⁹⁵ Indeed, deaf defendants as well as witnesses, jurors, or other litigants who are hearing impaired are all entitled to accommodation.¹⁹⁶

The Florida state court system continues to demonstrate an overall awareness of and response to disability issues.¹⁹⁷ This is exhibited by Florida's adherence to ADA compliance and to court procedures that are aimed at recognizing situations where reasonable accommodations may be required.¹⁹⁸ Statutes address interpreting services for the deaf in criminal procedures¹⁹⁹ and protection against discrimination concerning jury duty.²⁰⁰ The Supreme Court of Florida has recently laid out in extensive detail the procedure for persons with a disability to request accommodation, how courts should respond to such requests, and the requirement to notify disabled individuals of their right to request accommodations.²⁰¹

In comparison, Washington, D.C. courts also exhibit a sensitivity and awareness to the barriers facing effective communication with the deaf and hard-of-hearing.²⁰² While Washington, D.C. courts demonstrate responsiveness to disability issues, limitations have been set regarding particular accommodations.²⁰³ General limitations based on safety concerns, however, are practical.²⁰⁴

Unfortunately, accommodation issues for the deaf and hard-of-hearing remain and continue to pose challenges for the courts to resolve.²⁰⁵ Due to a lack of understanding about the communication barriers affecting those with hearing impairments, law enforcement has struggled to effectively communi-

192. McAlister, *supra* note 22, at 167–68.

193. CART MODEL GUIDELINES, *supra* note 21, at 4.

194. See CASERTA, *supra* note 26, at 5–7.

195. *Id.* at 25.

196. FLA. STAT. § 90.6063(2) (2010).

197. See JURY SERVICE ACCESSIBILITY, *supra* note 98, at 3.

198. *Id.*

199. FLA. STAT. § 901.245.

200. FLA. STAT. §§ 40.013(5), 90.6063(2).

201. *In re* Amendments to Fla. Rule of Judicial Admin. 2.540, 41 So. 3d 881, 881–84 (Fla. 2010).

202. See generally STATUS REPORT, *supra* note 130.

203. See *id.* at 15.

204. See *Questions and Answers*, *supra* note 137.

205. *Communication Access*, *supra* note 52.

cate with deaf or hard-of-hearing suspects.²⁰⁶ Videotape conflicts have brought in the issue of hearsay evidence as to what a deaf person, and not the interpreter, actually communicated.²⁰⁷ In addition, sign language interpreters cannot always provide effective communication due to time restraints, and as a consequence, much information is lost in translation.²⁰⁸ The recognition of PPD and its significance as to the competency level of certain individuals has presented yet another barrier.²⁰⁹ Therefore, even with remarkable compliance with accommodation responsibilities by courts, there still remain obstacles in the way of effective communication with hearing-impaired individuals in the court system.

206. See generally Vernon & Miller, *supra* note 160.

207. *Id.* at 287.

208. *Id.* at 288–89.

209. *Id.* at 289.