

An Attorney's Obligations

under Title III of the Americans with Disabilities Act

By David A. Bulkowski and Donald P. Lawless

July 26, 2010, marked the 20th anniversary of the signing of the Americans with Disabilities Act (ADA). Two decades of training, education, and compliance efforts still leave our communities and country shy of the first two lofty goals stated in the purpose section of the act:

- (1) "[T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;"¹
- (2) "[T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]"²

As this anniversary is celebrated, the opportunity should be taken to review one's own compliance with the law, both its letter and spirit, to include persons with disabilities in all aspects of our commercial life. The basic anti-discriminatory requirement of Title III of the ADA states:

No 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.³

Law offices are singled out in the definition of a "place of public accommodation:"⁴

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

- (F) ...office of an accountant or lawyer...or other service establishment.⁵

Therefore, attorneys need to provide services in an accessible fashion for persons with disabilities and do their part for the "elimination of discrimination against individuals with disabilities."⁶

This article summarizes an attorney's duty to clients under Title III of the ADA. For an analysis of an attorney's duties under the Michigan Rules of Professional Conduct to clients with disabilities, see a previous *Michigan Bar Journal* article titled "Representing the Incompetent or Disabled Client."⁷



The “Straightforward” Requirement

Most attorneys likely know that the ADA requires their *physical* office to be accessible for persons with disabilities. Ramps, reserved parking, and accessible restrooms are commonplace and very rarely missing from newer commercial spaces, whether leased or owned. Few, if any, building professionals would not know that all buildings constructed or remodeled since the effective date of the ADA—and earlier for Michigan businesses because of the requirements of the Michigan Barrier Free Design Act (MBFDA) as found within the Michigan Construction Code—must comply with the ADA and the MBFDA.⁸

Questions may arise regarding whether this applies if a law firm occupies a century-old building and no renovations have occurred since the 1960s. The short answer is that there is an ongoing duty to remove barriers when *readily achievable*, that is, the removal can be “carried out without much difficulty or expense.”⁹ This, of course, must be addressed case by case, and the law lays out several factors to consider; chief among them are the cost and nature of the actions recommended and the finan-

Fast Facts

Private attorneys’ practices are covered by Title III of the ADA, and basic physical access to office space is required through new construction, remodeling, or barrier removal when it is readily achievable; at no time is an existing facility’s barriers ever “grandfathered.”

A lawyer must undertake reasonable modifications of policies, practices, or procedures to make his or her services accessible to the client unless the lawyer can demonstrate that making such modifications would fundamentally alter the ability to provide sound legal advice.

Accommodation strategies for mentally impaired clients can be fairly straightforward; a case-by-case analysis must be undertaken to ensure adequate legal representation is possible and that the client is receiving the needed legal services.

cial resources of the law practice.¹⁰ In all of these considerations, at no time is an existing facility’s barriers ever “grandfathered.” Rather, the duty to remove barriers always remains and will be required to be acted on when barrier removal becomes readily achievable. At this point in the development of the law, a presumption exists that building entrances, restrooms, and offices will be basically accessible. Additionally, both the attorney and his or her landlord (in the case of leased office space) are obligated to meet these standards of accessibility.¹¹ Allocation of this joint responsibility will be determined by the attorney’s lease with his or her landlord.¹²

Specific attention to accessibility features is required when office renovations are undertaken. Cosmetic updates like paint and carpet generally do not result in greater accessibility requirements beyond those that are readily achievable, although carpeting must meet standards for wheelchair usability. Alterations that include any changes or rearrangement of the usability of the space are required to be made to ensure that the altered portions of the facility are readily accessible to individuals with disabilities to the maximum extent feasible.¹³ Beyond the space being renovated, obligations can also arise to make accessible the path of travel to the altered area, including the restrooms that service it.¹⁴

Finally, even if actual construction to remove a barrier is not required, the attorney must make his or her services available to persons with disabilities through alternative means. For example, an offsite meeting with a prospective client needs to be arranged if the office cannot be accessed.

After Physical Access, Access to the Services

Once physical barriers are removed, the next set of issues concerns access to the services. This category includes potential barriers for persons with hearing and visual impairments. The basic requirement of nondiscrimination remains in play, and the need to provide additional assistance enters into the conversation.¹⁵

The Department of Justice's Title III regulations give the basic guidance that communication with persons with hearing and visual impairments must be effective, and when describing examples of the types of auxiliary aids and services a place of public accommodation needs to provide, the department summed it up as "effective methods of making aurally delivered materials available to individuals with hearing impairments"¹⁶ and "effective methods of making visually delivered materials available to individuals with visual impairments."¹⁷

There are a number of reported consent agreements on this topic in which the attorney agreed to provide qualified interpreters. "Attorneys have responsibilities to provide deaf clients with sign language interpreters and other accommodations that they may need to communicate."¹⁸ In Michigan, this requirement is more defined by the recently enacted Michigan Deaf Persons' Interpreters Act.¹⁹ One critical improvement in this law is that "qualified interpreter" is defined as one who is certified through the National Registry of Interpreters for the Deaf or through the Michigan Division on Deaf and Hard of Hearing.²⁰ In addition, clearer requirements guide when an interpreter needs to be provided and who pays for the services.

The ADA does provide two possible outs: if the client or prospective client seeks an auxiliary aid or service that (1) would "fundamentally alter" the nature of the legal services or (2) would create "an undue burden" for the firm.²¹ With both of these exceptions, however, the burden is significant and rests with the attorney to demonstrate. In the first instance, since the nature of the practice of law is a one-on-one relationship, any accommodation would most likely be aimed at enhancing that relationship rather than changing it. As for the second, an "undue burden" is defined as "significant difficulty or expense," which is determined on a case-by-case basis taking into account the attorney's financial resources, among other items.²² Even if the proposed accommodation were found to create an undue burden, the attorney is required to continue the dialogue with the client to secure an accommodation that would not create such a burden. Finally, when considering accommodations, there is no duty for an attorney to

provide any accommodation of a personal nature, such as assistance in the restroom.²³

Accommodating Disabilities of the Mind

The ADA Amendments Act of 2008, which went into effect January 1, 2009, confirms the intent of Congress—the "appropriately broad" coverage provided to individuals with disabilities, including of the mind.²⁴ Although the definition of covered disability remains the same under the amended ADA, Congress made clear that determining whether an individual has an impairment that "substantially limits a major life activity...should not demand extensive analysis."²⁵

Specific changes to the definition of a covered disability provide greater coverage to individuals with mental impairments. The ADA now includes a non-exhaustive list of "major life activities" that directly relate to disabilities of the mind, including seeing, hearing, speaking, learning, reading, concentrating, thinking, and communicating.²⁶ Additionally, the mitigating effects of medication, assisted devices, or even learned behaviors will now no longer undermine coverage of the ADA. And if an impairment is episodic or in remission, an individual still has a covered disability if it substantially limits a major life activity when active.²⁷ Finally, an individual "meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."²⁸

By combining this expanded coverage of protected disabled status with the protection already provided to individuals who have a history of a disability, more individuals with disabilities of the mind are in a position to demand accommodation under the law from their attorneys.

Generally, an attorney must undertake reasonable modifications of policies, practices, or procedures to make his or her services accessible to the client unless the attorney can demonstrate

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that making such modifications would fundamentally alter the ability to provide sound legal advice.²⁹ Not only is an attorney prohibited from discriminating against a client because of a covered mental impairment, he or she cannot discriminate against a client who has a relationship or association with a disabled individual.³⁰ Likewise, an attorney cannot retaliate against a client for asserting rights under the ADA or engaging in a protected procedure.³¹

Only when a client becomes a direct threat to himself or others can an attorney disqualify a mentally impaired client under the ADA out of concern of significant risk to the health or safety of the client or others. The direct threat standard is difficult to meet and requires a showing of significant risk that cannot be eliminated by a modification of policies, practices, procedures, or the provision of auxiliary aids or services.³² This showing requires an individualized assessment that typically is supported by an independent medical assessment. Behavioral conditions caused by the current illegal use of drugs are not protected under the ADA.³³

Fortunately, most attorneys—especially criminal defense attorneys—have experience working and communicating with challenging clients. Because of the stigmas attached, many clients will be reluctant to disclose mental disabilities. This reality may be especially true for young adults who may be reluctant to admit that they have a learning disability or a form of autism. Observed client behaviors can prompt an attorney to follow up with his or her client. Some examples of client behaviors that may indicate a mental impairment include:

- Difficulty remembering times and dates or other simple information like addresses and phone numbers
- Repetitive motion such as rocking, pinching, or rubbing a point on the body, and lack of eye contact
- Unusually compliant or trusting nature

These are just possible examples not intended to present any stereotypes. Nevertheless, the attorney needs to be sensitive to further investigating a client's background, with consent, to understand where any functional limitation of the client will interfere with effective representation.³⁴ Accommodation strategies for mentally impaired clients can be fairly straightforward and include:³⁵

- Presenting information in a concrete, literal manner
- Repeating advice on multiple occasions
- Reducing communications to writing more frequently than in the usual attorney-client relationship
- Requesting that the client repeat back information that is communicated and articulate understanding of the reason for recommendations and decisions
- Using a trusted third party to facilitate communication
- Working with the client in an environment with few sensory distractions
- Allowing the client more time to hear, process, and respond
- Avoiding use of slang and open-ended questions



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An Accessible Website

Another growing aspect of an attorney's practice that can be overlooked in an accessibility review is the accessibility of his or her website. Electronic communications are often the first connection for a person seeking legal counsel. The days of simply opening the Yellow Pages and making calls to find an attorney seem to be over. Therefore, a website must be accessible to persons with various disabilities, not only to avoid potential complaints, but also to ensure that potential clients are not lost because of lack of a welcoming and accessible website. The American Bar Association's Legal Technology Resource Center at <http://www.abanet.org/tech/ltrc/fyidocs/webaccessibility.html> includes resources explaining what is required and steps to take to ensure that basic accessibility requirements are met.

Recently, a group of blind and visually impaired individuals used a parallel requirement for accessibility found in section 508 of the Rehabilitation Act of 1973, as amended, to file a complaint against the Social Security Administration, alleging that its website was inaccessible. The complaint demonstrates that consumers need access to means of electronic communications and those means, including websites, must be made accessible. It may not be long before Title III entities, such as stores with an online presence, face a lawsuit or a complaint filed with the Department of Justice. Such retail outlets frequently have online-only specials and offers; without accessibility to the online options, an individual could initially claim unequal treatment under the ADA.

Available Resources

Many resources are available to help attorneys meet the accessibility requirements of the ADA to ensure they are providing the same level of quality legal services to persons with disabilities as to their other clients. These resources include:

- State Bar of Michigan Equal Access Initiative, which has many disability-related resources including links to various editions of the *Disabilities Project Newsletter* at <http://michbar.org/programs/equalaccess.cfm>.
- Michigan centers for independent living, or CILs. A list of Michigan CILs and the counties each serves is available at the Disability Network/Michigan website at www.dnmichigan.org/.
- Michigan Protection and Advocacy Service, Inc., which provides information and advocacy to protect the legal rights of individuals with disabilities. Contact the Lansing office at (800) 288-5923 or (517) 487-1755 or visit www.mpas.org.
- The Great Lakes ADA Center in Chicago at <http://www.adagreatlakes.org/>. This site offers comprehensive links to the law and technical assistance publications.
- The Department of Justice's ADA portal at www.ada.gov, which provides comprehensive resources for the ADA including a list of publications at <http://www.ada.gov/publicat.htm> with such titles as *The ADA Guide for Small Businesses* (<http://www.ada.gov/smbustxt.htm>).

Conclusion

The State Bar of Michigan has a long history of working toward equal access to the justice system. In this year of the 20th anniversary of the ADA, let us work together to celebrate the progress we have achieved and double our efforts to eliminate the barriers that still remain in our individual practices. ■



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FOOTNOTES

1. 42 USC 12101(b)(1).
2. 42 USC 12101(b)(2).
3. 42 USC 12182(a).
4. 42 USC 12181(7).
5. *Id.*
6. 42 USC 12101(b)(1).
7. Byerley, *Representing the Incompetent or Disabled Client*, 77 Mich B J 1320 (December 1998).
8. MCL 125.1351, *et seq.* While the MBFDA contains a variance procedure, obtaining an MBFDA variance does not impact any greater compliance requirement under Title III of the ADA.
9. 42 USC 12181(9).
10. *Id.*
11. 28 CFR 36.201.
12. *Id.*
13. 28 CFR 36.402.
14. 28 CFR 36.403.
15. 28 CFR 36.303.
16. 28 CFR 36.303(b)(1).
17. 28 CFR 36.303(b)(2).
18. National Association for the Deaf Law Center, *Attorneys, Deaf Clients, and the Americans with Disabilities Act* (March 2005) <http://www.uad.org/utahresources/ada_attorneys_by_nad.htm>. All websites cited in this article were accessed July 13, 2010.
19. MCL 393.501 *et seq.*
20. MCL 393.502(f).
21. 28 CFR 36.303(a).
22. 28 CFR 36.104.
23. 28 CFR 36.306.
24. 42 USC 12101(a), 12102.
25. 42 USC 12101(b)(5).
26. 42 USC 12102.
27. *Id.*
28. *Id.*
29. 28 CFR 36.202, 36.203, 36.302.
30. 28 CFR 36.205.
31. 28 CFR 36.204.
32. 28 CFR 36.208.
33. 28 CFR 36.209.
34. Dagher-Margosian, *Representing the Cognitively Disabled Client in a Criminal Case*, State Bar of Michigan Disabilities Project Newsletter (March 2006) at 9-10, available at <http://www.michbar.org/programs/Disabilities_news_6.html>.
35. See McNally, *Autism in the Courts*, State Bar of Michigan Disabilities Project Newsletter (December 2005), available at <http://www.michbar.org/programs/Disabilities_news_5.html>; see also *Conflicts Involving Counsel and Adult Clients with Cognitive Disabilities*, State Bar of Michigan Disabilities Project Newsletter (June 2009), available at <http://www.michbar.org/programs/Disabilities_news_18-2.html>.