

Assisting People with Cognitive or Psychological Disabilities

Is it time to consider innovations and lay advocates if we are to provide real access to the justice system?

By Kathleen N. Harris

When a person in a wheelchair enters a courtroom, it is not difficult to determine the type of accommodation needed. It may be a ramp to enter the court building, an elevator to go upstairs, or room to maneuver in the courtroom. A person with a hearing impairment may need one of a variety of hearing devices in order to participate in the court process. In fact, the State Court Administrators' Office has supplied courts with a form that can be submitted by individuals with disabilities to request such accommodations. (MC 70, 10/97, Request for Accommodations)

But if the person has a cognitive or psychological disability, appropriate accommodations may not be easily apparent. In addition, the person with such a disability may not even understand their right to request an accommodation. A person with mental retardation may not understand what a hearing is about or what their rights are. A person with schizophrenia may be too disoriented to grasp what is being said. It is necessary to find creative accommodations for people with these disabilities, and flexible ways to make and honor such requests.

The State Bar of Michigan's Open Justice Commission Disabilities Committee submitted a report in April, 2001 that addresses such issues. First, the committee cited Title II of the Americans with Disabilities Act, applicable to courts, and the requirement that "public entities shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would funda-

mentally alter the nature of the service, program or activity." CFR 35.130(b)(7).

The disabilities committee also conducted their own surveys and research about individuals with these types of disabilities. They reported that in most court processes, and particularly in criminal court, screening needs to be done to determine whether someone has a disability. If so, an attorney who understands disability issues is the best accommodation that can be provided. Other accommodations could include a slower process and open-ended questioning by the judge to be sure the individual understands the process and charges, or allowing support from others during a hearing for the purpose of explaining or interpreting what is happening.

However, when the court process is one in which attorneys are often not involved, such as landlord-tenant court, or in which no attorney or representative is allowed, such as small claims court, the individual with a cognitive or psychological disability is at even more of a disadvantage. In these cases, the disabilities committee report claims that only the assistance of another person can provide equal access to the court process.

The disabilities committee surveyed professionals who work with individuals with cognitive or psychological disabilities who become involved in court processes. In an elder-law program, it was found that older people sometimes have a small claims issue but cannot easily understand or follow the court process. As a result, they sometimes choose not to pursue their claim when they discover that they cannot bring their spouse or friend with them to help them through the process.

A program for people with developmental and psychiatric disabilities found that

individuals are in danger of being evicted in landlord-tenant court unless creative accommodations are requested and granted. These are people in supported living situations that may have mental retardation or a chronic psychiatric illness. These individuals are able to live in their own homes only by appropriate support provided by community agencies. They do not understand the meaning of an accommodation under the Fair Housing Amendments Act, their right to ask for one, or how to ask. Consequently, it is virtually impossible for them to take advantage of the act's accommodation requirements on their own.

In one example, a man with mental retardation lived in an apartment, receiving daily visits from a support coordinator. With such help he went every day to his part-time job and functioned well. However, one day the toilet overflowed in his apartment. Since he had never run into this problem before, he didn't know what to do and simply tried to put towels in the bathroom to soak up the water. By the time it was discovered, the water had run into the apartment below, causing considerable damage.

The landlord started eviction proceedings because the tenant had not notified management of any problems with plumbing, as the lease required. The support coordinator developed a plan in which the tenant would be taught about all the potential plumbing and electrical problems that could go wrong. The tenant agreed that under such circumstances he would contact the support coordinator, at any time, so she could assist.

Without the assistance of the supports coordinator to devise and offer this accommodation to the court and have it accepted, the

man would surely have been evicted. Common accommodations for people with mental illness include calling for the intervention of support coordinators or other community mental health staff when a problem first arises. These accommodations require the support of community agencies helping individuals with disabilities to ensure that they can remain part of our larger community.

Asking for an advocate or assistant in administrative or court hearings as a form of accommodation is comparable to a hearing-impaired person asking for an augmented hearing device or a person in a wheelchair asking for a ramp. However, questions have arisen about whether such an advocate is really engaging in the unauthorized practice of law. In fact, the disabilities committee learned that at least one social worker from a community mental health program was advised by the State Bar of Michigan to stop appearing in landlord-tenant courts to request accommodations for individuals with cognitive and psychiatric disabilities. She reported that the

State Bar of Michigan suggested she could be found to be practicing law without a license if she persisted in helping her clients in court.

Certainly we must vigorously guard against the potential abuses of unauthorized practice of law. However, a distinction needs to be made between where a person's right to an accommodation for a disability ends and where the unauthorized practice of law begins.

The disabilities committee recommended in their report that the Open Justice Commission should "work with the Standing Committee on the Unauthorized Practice of Law to explore methods to provide advocacy accommodations for individuals with disabilities without the risk of an advocate being accused of practicing law without a license."

Victoria Kremski of the State Bar of Michigan staff and liaison to the State Bar Unauthorized Practice of Law Committee, invites such discussion but cautions that concerns will likely surface in at least two areas. First, whether such an accommodation process

will encourage some individuals to start up new "advocacy businesses." Second, whether using the term "advocate" may be misleading to the public—only attorneys may advocate another person's legal interest—and another term may need to be used. Hopefully, by working together creative solutions for these and other issues will be found.

Kremski reports that the Unauthorized Practice of Law Committee formulated a definition of the unauthorized practice of law and expects more discussion on the issue this year. Certainly, these issues should be included in the discussions and resolved if the promises of the ADA that guarantee equal access to the courts by individuals with disabilities are to have any meaning. ♦

Kathleen Harris practices disability law in Clarkston and consults with nonprofit organizations on disability issues. She is a member of the Disabilities Committee of the Open Justice Commission. She was previously Legal Services Director for Michigan Protection and Advocacy Service, Inc.

