

AN ATTORNEY'S OBLIGATION TO PROVIDE EFFECTIVE COMMUNICATION WHEN REPRESENTING A DEAF OR HARD OF HEARING CLIENT

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Using the Relay (TRS and VRS)

- **Telecommunications Relay Service**

<http://www.fcc.gov/cgb/dro/trs.html>

- for people using TTYs, text-based

- **Video Relay Service**

<http://www.fcc.gov/cgb/consumerfacts/videorelay.html>

- for people relying on sign language

Agenda



- Texas Disciplinary Rules of Professional Conduct
- Ethical Concerns
- Statutes Requiring Effective Communication
- Hearing Loss as a Disability
- What is Effective Communication?
- Auxiliary Aids and Services
- Issues in Providing Auxiliary Aids and Services
- Possible Solutions
- Other Points to Keep in Mind When Representing a Deaf or Hard of Hearing Client
- Questions

Texas Disciplinary Rules of Professional Conduct

- Preamble: A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.
- Preamble: The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.

Texas Disciplinary Rules of Professional Conduct

□ Rule 1.03 Communication:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Ethical Concerns



- In order to represent your client to the best of your ability, you must be able to communicate with your client.
- When it comes to a deaf or hard of hearing client, communication can obviously be a problem so an attorney has the ethical duty (as well as a legal obligation) to find a way to facilitate effective communication.
- To avoid ethical and/or legal breaches, an understanding of your legal obligations is required

The Americans with Disabilities Act



- Under Title III, no individual may be discriminated against on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.
 - 42 U.S.C. § 12182(a).
 - Applies to all places of public accommodations, including lawyers' offices. 42 U.S.C. § 12181(7)(F).

The Americans with Disabilities Act

- General prohibitions include the denial of participation in the benefit of a public accommodation and the provision of an unequal benefit. 42 U.S.C. 12182(b)(1)(A)(i)-(iii).
- Specific prohibitions:
 - the imposition of “eligibility criteria” that tends to screen out clients with a disability;
 - the failure to provide “reasonable modifications in policies, practices, or procedures”; and
 - the failure to “take such steps as 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.”

42 U.S.C. § 12182(b)(2)(A)(i)-(iii)

Hearing Loss as a Disability



- The disability from a hearing loss is most evident, not from the inability to hear sounds per se, but in the communication barrier.
- There are many causes of hearing loss, but this is not so important as recognizing that there are many degrees of hearing loss which affects, among other factors, an individual's ability to communicate.
- Thus, the communication needs of people with hearing losses will vary widely from one another.

What is Effective Communication?

- Consider: **If** the law stated that sign language interpreters must be provided for there to be effective communication, the results could be nonsense. If such interpreters were provided for a non-signing deaf individual, has effective communication truly been achieved? Under such a stringent definition, it supposedly has.
- The DOJ defines “effective communication” to be communication that is “as effective as communication with others.” See 36.303 at <http://www.ada.gov/reg3a.html>. There is no formal definition in the law per se for effective communication, but it should be interpreted as flexibly as possible to take into account the different communication needs of people with hearing losses.
- Effective communication has been achieved when two parties (or more) can understand one another.

Auxiliary Aids and Services

- **Sec.36.303 Auxiliary aids and services.**

- **(a) General.** A public accommodation 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, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.
- **(b) Examples.** The term "auxiliary aids and services" includes --
 - **(1)** 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, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
 - **(2)** Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
 - **(3)** Acquisition or modification of equipment or devices; and
 - **(4)** Other similar services and actions.

28 CFR Part 36 (ADA Title III Regulations)

Issues With Providing Auxiliary Aids and Services



- ❑ The ADA is unfunded; businesses are expected to budget for ADA expenses, such as the provision of auxiliary aids and services, as part of the privilege of doing business.
- ❑ Determining the appropriate auxiliary aid or service to be provided
- ❑ Determining whether the auxiliary aid or service is going to result in effective communication

How to Determine Whether Effective Communication Has Been Achieved

- The mere provision of an auxiliary aid or service may not be enough!
- Interactive process: discuss with the deaf or hh person what their communication needs are. These people are in the best position to know what will work. In the end, it is up to you to decide what auxiliary aid or service you will provide, BUT it must result in effective communication.
- Affirmative defenses (undue burden, fundamental alteration)

Possible Solutions



- In-kind services
- Volunteers (caveat: be careful about qualifications)
- Interpreter program interns (caveat: qualifications)
- ADA charge on all customers (not just on the deaf and hard of hearing customers)
- IRS tax incentives
(<http://www.ada.gov/taxincent.htm>)
- Pooled funds

Implications of Failure to Provide Effective Communication



- Possible exposure to liability: Title III does not permit compensatory damages although such damages can be recovered in enforcement actions initiated by the US Attorney General. 28 C.F.R. § 36.504.
- Chapter 121 of the Texas Human Resources Code

Other Considerations



- When representing a deaf or hard of hearing client, consider whether the opposing party may have failed to ensure effective communication and how that may impact the case. While the ADA is usually not the ideal cause of action to bring about any other remedy except for injunctive relief (e.g., court order to provide an interpreter), it can augment your other arguments in the case.