This chapter was taken from Disability Discrimination Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Disability Professionals
By: John Parry, J.D. (April 2008 with ABA Publishing).

This article was written from the points of view of both the client and the lawyer, and focuses on such key questions as:
-How do you find a lawyer?
-What should you expect from a lawyer?
-How do the client and lawyer deal with issues related to accommodations?
-What are the most common disabilities and what types of legally significant impairments are likely to arise from those disabilities?
-What are the ethical obligations of lawyers towards persons with disabilities?

PART VI: EFFECTIVE REPRESENTATION OF CLIENTS WITH DISABILITIES AND THE CLIENT-LAWYER RELATIONSHIP

Effective representation of persons with disabilities in discrimination cases depends on three major elements: establishing a productive client-lawyer relationship; developing specialized skills and approaches for handling disability discrimination matters; and finding ways to pay for attorneys' fees and related litigation costs. Part VI examines these topics from the perspectives of the client, the lawyer, and the particular case at issue.

6.01 Introduction to the Client-Lawyer Relationship

A productive client-lawyer relationship is based on honesty, earned trust, and full disclosure. Finding the right lawyer and building a sound relationship is particularly challenging if the clients have a ***legally relevant disability*** and, thus, require or would benefit

from an accommodation to establish and maintain a productive client-lawyer relationship and/or their disability is or could be a significant factor or consideration in arriving at a legal solution to the problem for which they seek assistance. From the client's perspective, the most important considerations involve finding competent legal assistance in the first place and thereafter initiating and maintaining the client-lawyer relationship. Some concerns are shared by all potential clients, while others are disability specific.

From the lawyer's perspective, the most important consideration is how that representation should be handled if the client has a legally relevant disability. More specifically, the lawyer may need to modify the methods of communication and enhance his or her knowledge base to best represent a client with a disability. Moreover, lawyers need to be conversant with their ethical obligations in representing these clients, particularly those who may have what the Model Rules of Professional Conduct terms "diminished capacity."[1] Also, the nature of the case that has brought the client with a disability and the lawyer together is likely to affect the client-lawyer relationship. In addition to disability discrimination issues, which are covered here, clients with disabilities may have a variety of other civil or criminal matters that require a lawyer's attention.

6.02 The Client's Perspective

(a) Finding a Competent Lawyer

The available pool of lawyers may shrink substantially for a specific client's particular legal needs due to several factors. First, not every wrong has a practical legal solution. Where a solution exists, the lawyer may work for a firm or organization that does not handle that type of case, or has a fee structure beyond the client's ability to pay.

Second, clients may not know how to find a lawyer who is competent to handle their particular case. There is no reliable way to identify a competent lawyer. Often, the experience of someone who has used a particular lawyer or law firm is helpful, but any "word of mouth" referral carries its risks, especially if the nature of the current legal problem is different from that of the person giving the referral.

[1] MODEL RULES OF PROF'L CONDUCT R. 1.14 (2007).

Third, most organizations that provide lawyer referrals do not vouch for the competency of the persons on their referral lists not only because of liability concerns, but because judging competency is difficult, time-consuming, and oftentimes not particularly informed or accurate. The best nuggets of information that potential clients can expect to draw from referral lists—including a lawyer's areas of expertise, years of experience, any honors they may have received, and the law school they graduated from—are imprecise indicators of competence. The most common referral information is a "yellow pages" type of listing, which contains information that is selected by the lawyers and often is maintained sporadically.

Moreover, if the potential client has a legally relevant disability, a key consideration in measuring competence are indications that the potential lawyer or law firm has represented clients with disabilities before, and preferably the type of disability that the client possesses. This key information probably will be difficult, if not impossible, to locate. A potential client can check websites such as Martindale & Hubbell (www.martindale.com), local groups and organizations that specifically advocate on behalf of persons with disabilities,[2] and their state and/or local bar associations through an ABA website portal.[3] Ultimately, though, clients may not find a lawyer who meets all or even most of these competence criteria; at that point, they have to make the best decision possible based on the available information.

(b) Communicating with a Lawyer

From the start to the finish of a case, communications are likely to contribute most to the strengths and weaknesses of the client-lawyer relationship. This section focuses on how clients can help ensure effective communications with their lawyer.

(i) *Gather All Possible Information That May Help Your Case*

An essential component of good communications is having something significant to convey. A lawyer's primary responsibility is to assemble the facts and present them in the most advantageous manner possible. Accordingly, few things are more important to building a winning case than legal counsel having access to all the relevant information.

[2] *See* National Disability Rights Network, *The P&A/CAP System*, http://www.ndrn.org aboutus/PA_CAPext.htm, for a listing of protection and advocacy agencies for persons with disabilities in each state. Some P&A networks

As soon as potential clients recognize that they may have a legal problem, the most important step is to write down in a clear, accurate, and thorough way what has occurred and to gather all possible evidence related to their case. The more details, the better.

Clients should also document all contacts that they have made with the person or entity who is likely to be opposing them if litigation occurs, as well as all the potential people who can contribute information about that case. As will be detailed below, the necessary information and documentation likely will change depending on the nature of the case. However, having said that, clients should not exclude or ignore information unless they are confident, to the point of near certainty, that it is not legally relevant.

(ii) *Be Forthcoming with Your Lawyer from the Outset*

Because the quality of representation is directly related to the quality of the information that the lawyer possesses, it is always important, sometimes critically so, for clients to be completely forthcoming with their lawyer about the case. There are three particular inclinations that clients should avoid. First, clients should not assume that they know what information the lawyer will consider to be important and should always err on the side of being overly inclusive in their disclosures. Second, even information that appears to be embarrassing or detrimental should be disclosed if it might be relevant to the client's case, especially when the lawyer asks about such information. The attorney-client privilege ensures that virtually anything the client says to a lawyer—short of announcing your plans to commit a future crime—will not be communicated outside the law firm without the client's permission.[4]

Finally, clients should not try to convince their lawyer of the correctness of their positions, ignore information that makes them or their position look bad, or emphasize or distort information to make them or their position look good. Objectivity is key.

(iii) *Be Forthcoming About Any Legally Relevant Disability*

Being forthcoming with a lawyer includes disclosing any legally relevant disabilities. Clients should disclose that they have a disability as soon as they realize they need an accommodation to facilitate their meeting with a prospective lawyer. Typically, this would occur because the client has a physical impairment that (1) makes or might

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[3] *See* American Bar Association, *Consumers' Guide to Legal Help*, http://www.abanet.org/legalservices/findlegalhelp/home.cfm.
[4] MODEL RULES OF PROF'L CONDUCT R. 1.6.

make the prospective lawyer's office inaccessible; (2) affects communication, such as with hearing, processing information, and/or speaking; or (3) requires medication or other treatment that, at certain times, makes meeting or communicating with the lawyer difficult.

The lawyer or law firm may offer to provide the client what he or she has requested or offer to provide an alternative accommodation, or may decide not to provide any accommodation. If the lawyer or firm does not agree to provide the requested accommodation, clients will be placed in the difficult and often awkward position of deciding whether to insist upon an accommodation they want or to accept an alternative accommodation or no accommodation at all. Unfortunately, strenuously objecting or finding another lawyer may not be the best option. Factors clients should consider are whether they believe they could still have (or even want to have) a productive relationship with the lawyer, what the potential difficulty of finding another lawyer who better meets their needs will be, how certain they are that their position regarding accommodations is correct both legally and practically, and whether they have the willpower and resources to confront the lawyer or law firm in a serious way.

Second, even if they do not need an accommodation, clients should proactively disclose to their lawyer any disability they may have and the extent of their particular impairment(s), whenever the nature of their disability is not apparent and there is a reasonable possibility that the disability may be relevant to the client's case. Unlike an employment situation, in which the employer should not ask about an applicant's disability until after a job offer is made, a good lawyer will want to know as much as possible about any legally relevant disability from the beginning.

(c) Understanding Why a Lawyer May Not Want to Represent A Client

To understand why a prospective lawyer would not want to represent a client, it is useful to know whether that lawyer is being paid for his or her work and by whom and what criteria he or she is using to select cases. The United States subscribes to a free-market economy, and that approach prevails in a vast majority of circumstances. Most lawyers, except those working for a public agency or non-profit organization or acting in a *pro bono* capacity, expect to be compensated at rates that they are normally accustomed to receiving. Generally, lawyers receive money either directly from the client or from an

agency or organization that has employed them. However, ***pro bono*** lawyers, who collectively handle only a small percentage of cases, provide free legal services as part of their professional responsibility or personal commitment to give back to the communities where they live and work.

Most private lawyers or law firms operate using a system called ***billable hours*;** the client pays the lawyer or the law firm a set rate, plus expenses, for each hour that the lawyer—or those working with the lawyer—devote to the case. Billable hours create an economic incentive for attorneys to charge for every hour of work that can be identified. Other lawyers or law firms use a ***contingency fee*** arrangement, in which the amount one pays is based on a percentage of what the lawyer recovers for the client. The fewest hours that a lawyer spends to obtain the maximum award is, economically speaking, the best outcome possible for the lawyer. If the lawyer recovers nothing, the client pays nothing for the lawyer's time, although there may be certain specified expenses that must be paid. This contingency arrangement is used almost exclusively in situations in which a lawyer is suing to recover benefits or for damages. Also, sometimes lawyers will charge a set fee for relatively straightforward legal matters, such as certain financial transactions or a no-fault divorce, but typically in matters in which disability is a relevant factor, the rate will be in billable hours or contingency fee.

As a general rule, if clients can pay for the legal services that they require (assuming there is a legal solution for their particular problem), they have little trouble finding a lawyer to represent them. Unfortunately, many people do not have those resources. Moreover, the fixed hourly rate is not necessarily going to be an accurate indicator of the overall likely fee that will be charged. Except for very general estimates based on what the lawyer charges per hour and how much time and what expenses similar cases in the past have cost, the client has no reliable way to know in advance how much the lawyer is going to charge to represent them. Lawyers are going to differ in the amount of time it takes them to accomplish specific legal tasks based on such factors as their own efficiency and experience and the support they get from their firms. The facts of each case, the amount of information the client has already assembled, and the need for expert witnesses also will affect the overall fee.

For certain specific types of civil cases that may result in substantial financial awards —e.g., Social Security disability, Medicaid, malpractice, and negligence—clients do not need to pay a lawyer directly, but can promise to share a percentage of any award recovered. Often, the client will have to pay 30 percent or more of any award, as a contingency fee, but lawyers receive no payment if the case is lost. Due to this inherent risk, many lawyers will not enter a contingency fee arrangement unless they are convinced that there is a high likelihood that they will prevail and that the amount of the award will be substantial, which depending on the lawyer and the difficulty of the case, might be $5,000, $10,000, $20,000, or considerably more.

For certain types of civil legal problems, public agencies and non-profit organizations provide representation or advocacy for free, or on a sliding scale based on the client's economic situation, but eligibility guidelines tend to be very strict and the availability of such lawyers and advocates is quite limited. Generally, such representation is rights-driven—employment, education, housing, medical services, and access to buildings and programs are among the most common disability-related issues—and the entities providing such legal services typically focus on particular areas of the law. Moreover, of the potentially large number of cases in those areas, legal entities typically accept only a relatively small number of cases, choosing only those in which clients demonstrate financial need and/or those with the potential to positively affect a significant group of people beyond the named client alone.

For criminal cases involving felonies, public defenders or court-appointed lawyers are paid by the prosecuting jurisdiction to provide free representation to defendants who cannot afford a lawyer, which typically includes most defendants. Absent good cause, defendants in a criminal case usually have to accept the lawyer who is assigned to them, unless they have the financial resources to pay for their own defense, which is relatively rare.

In both civil and criminal matters, particularly certain appeals, clients may be able to secure *pro bono* representation in which lawyers or law firms donate their services, and oftentimes absorb some or all of the related expenses as well. Donated legal representation, however, is provided in only a small percentage of cases, often high

profile cases, or cases referred and selected by non-profit groups based on strict financial and/or substantive criteria.

While most of the available mechanisms for obtaining legal representation are not directly affected by disability considerations, two considerations are important to understand. First, there are a limited number of publicly-funded, non-profit programs that provide legal services specifically to persons with disabilities in civil cases. The most notable are part of the protection and advocacy systems that exist in every state, the District of Columbia, and various territories, which are funded to broadly protect disability rights. Even these, however, still only have the resources to serve a relatively small proportion of those individuals with disabilities whose rights have been violated. In addition, a number of smaller national groups, such as the Bazelon Center for Mental Health Law, the Center for Public Representation, and Disability Rights and Education Defense Fund, typically provide representation in carefully selected, particularly important disability rights cases. Also, indigent persons with disabilities may be eligible for representation through federally and state funded legal services programs.

Second, persons with disabilities tend to be poorer than non-disabled persons and to encounter more legal problems. It is more likely, statistically speaking, that prospective clients with disabilities in the civil system are going to meet the applicable financial eligibility criteria than other clients. Also, civil clients with disabilities are more likely to present problems whose legal solutions have system-wide implications. Similarly, criminal clients with disabilities, particularly those with mental disabilities, are going to need and qualify for free representation provided by public defenders or court-appointed counsel.

(d) Paying A Lawyer

In most civil and in some criminal cases an underlying tension for the client-lawyer relationship may be the payment of legal fees. Oftentimes, this tension can be avoided or minimized if the lawyer is candid about the true extent of the fees that are likely and clients are candid about the extent of their ability to pay. Any financial concerns that the client has should be revealed as early as possible. The fewer the surprises, the better. Yet, sometimes surprises are unavoidable or due to misguided

attempts to cushion the impact of something potentially unpleasant, and rarely based on deception.

Except where deception or mistake may be involved, in which case the client should challenge the fee, clients will be well-served if they pay their bills promptly or arrange, in advance, to pay their bills in an agreed-upon timeframe, particularly if they have a low-paying job or no job at all. Many lawyers will try to accommodate these situations. A perception by the lawyer that the client has no intention of paying according to the schedule can damage their relationship permanently.

6.03 The Lawyer's Perspective

In representing clients with legally relevant disabilities, the following topics are key:

- understanding the client's disability;
- communicating with clients;
- self-determination for clients;
- how lawyers and clients may view rights and remedies differently;
- ethical obligations in representing clients with disabilities; and
- legal duty to provide reasonable accommodations.

(a) Understanding the Client's Disability

Some lawyers may be reluctant to represent persons with disabilities due to inexperience, the stigma, fear, and stereotypes still associated with disability, and the perceived additional time and resources involved. However, taking the time to learn about persons with disabilities will help close this gap in understanding and, in turn, attract a new group of clients.

There are at least three basic levels to understanding what it means to have a client with a disability. The first level is information about the various types of disabilities a lawyer is likely to encounter. Lawyers should be able to find more information elsewhere for each disability. However, because there are so many specific conditions and a limited number of pages, the disabilities below are grouped into classes.

The second level, which is even more important and more elusive than the first, is the nature and extent of the disability, its symptoms, and impairments as it pertains to the

particular client that is being represented. Individuals may share the same general disability label, but their disabilities may be substantially different based on the particular form that the disability takes, specific characteristics and traits that pertain to the particular person who has the disability, and the environment in which that person lives.

The third level, which can be the most challenging, is translating a client's particular degree of impairment into reasonable accommodations that are individualized for that client and successful legal arguments and strategies to support that client's case.

(i) The Most Common Classes of Disabilities

The first time a lawyer meets with a client, basic information about the general nature of disabilities and likely accommodation needs is invaluable for assessing the legal relevance of a client's health condition. Ascertaining the exact nature of a client's disability, its symptoms or manifestations, and its progression and relating that information to the overall needs of the client's case comes afterwards. For the practicing attorney who is representing, or deciding whether to represent, a client with a disability, the most important classes of disabilities are those that are most likely to be legally relevant in that they require accommodations and/or have significant implications for the particular case. Typically, legal relevance suggests that the disability is relatively severe and permanent. Some clients may have more than one disability or a combination of disabilities, requiring the lawyer to view the totality of their impairments.

As a legal matter, law firms have no obligation to provide an accommodation if clients choose not to disclose their disabilities and their disabilities are not apparent to the lawyers. Yet, disabilities may become apparent during interactions with the client. For example, a lawyer may find that a client is having difficulty communicating. Lawyers are apt to learn a great deal more about a client and the case if they ask clients with disabilities what accommodations they need or prefer, rather than make the decision for the client. Typically, people with disabilities are able to tell a lawyer what the best way for them to receive information is. Like any clients, they have a right to make their own decisions, even when the lawyer does not agree with the correctness or wisdom of those decisions.

Disabilities are often categorized as apparent and non-apparent. Apparent disabilities may be observed, while non-apparent disabilities need to be disclosed by the client or in

records or documents provided to the lawyer. Sometimes, the line between them is not drawn clearly. For instance, a person may have a non-apparent cognitive impairment that then becomes apparent when he or she speaks.

Readily apparent disabilities include:

- Mobility impairments
- Visual impairments (not always)
- Hearing impairments (not always)
- Speech impairments
- Manual impairments
- Certain diseases

Non-apparent disabilities include:

- Mental illnesses
- Cognitive impairments
- Learning disabilities
- Substance abuse disorders
- Certain diseases

Mobility impairments can result from developmental disabilities (at birth, in infancy, or during childhood), musculoskeletal disabilities such as partial or total paralysis, spinal cord injuries, multiple sclerosis, Parkinson's disease, muscular dystrophy, cerebral palsy, amputations, head injuries, trauma from accidents, chronic illnesses that cause fatigue, and diseases that impair strength, speed, endurance, coordination and dexterity such as cardiac and respiratory diseases. They can be permanent, intermittent, or temporary and are often visible, but may be invisible such as in the case of head injury where fine motor control, balance, and orientation may be affected.[5] These impairments generally become legally relevant when they are severe enough to make mobility, with or without a transportation aid or device, extremely difficult or impossible. People who are

[5] *See* UNIVERSITY OF SOUTHERN QUEENSLAND, MOBILITY DISABILITY, *at* http://usq.edu.au/studentservices/disabilityresources/academicstaff/mobillearn.htm.

homebound and/or use wheelchairs, motorized scooters, specially-equipped vans, or crutches for extended periods typically have legally relevant impairments.

When meeting with these clients initially, the most pertinent consideration is the accessibility of the law office, including its parking facilities and restrooms, in light of the particular type of transportation aid or device the client uses. If the client uses a wheelchair, lawyers should reserve an easily accessible space in their offices and consider difficulties in terms of reach and for communication at eye level that may arise. In additions, lawyers can hold doors open, offer to carry objects, and ensure clear passageways. Moreover, in scheduling meetings, lawyers should account for the extra time clients with mobility impairments may need and the fatigue factor.[6] Getting to the office may be a significant concern for clients who are homebound, as well as for those who do not drive, where the law firm is not in close proximity to public transportation.

Visual impairments may be congenital (from birth) or develop later and may be genetic or due to environmental factors, nutritional deficiencies, diseases such as diabetes and multiple sclerosis, or injuries such as brain trauma. A person may be blind (complete loss of sight), legally blind (corrected vision is no better than 20/200), or visually impaired (various grades of vision, but corrected vision is no better than 20/70). Some visual impairments may fluctuate while others may remain constant. Depending on the exact nature of their impairment, clients may or may not need an accommodation when meeting a lawyer for the first time.

Because effective communication is key, lawyers should verbalize as much as possible, speak clearly and face the client when speaking so as not to muffle sound, use a normal voice level, and avoid using body language and gestures to communicate. Clients with severe visual impairments may take notes using a laptop computer, portable note-takers, a tape recorder, or a slate and stylus or a Perkins Brailler if they read Braille.[7] Visual impairments become most legally relevant when the lawyer wants the client to read and fully understand a document or portion of a document. Lawyers may provide a

[6] *Id.*
[7] *See* BALL STATE UNIVERSITY, DISABLED STUDENT DEVELOPMENT: RESOURCES, TIPS, AND SUGGESTED ACCOMMODATIONS FOR STUDENTS WHO ARE BLIND OF VISUALLY IMPAIRED, *at* http://www.bsu.edu/dsd/article/0,,14806--,00.html.

computer disk containing the document, or readers to help with documents that cannot be converted electronically. For clients with less severe impairments, lawyers may provide documents in large print, magnifying devices, electronic text and voice mail communiqués, good sources of light.[8] Again, getting to the law office may be a concern if the lawyer or firm is not close to public transportation.

Hearing impairments, like visual disabilities, may be congenital or develop later; may be genetic or due to environmental factors, nutritional deficiencies, diseases, or injuries; and may result in complete deafness or partial hearing loss. Because some people with hearing impairments wear hearing aids or have become proficient at reading lips and picking up on facial expressions, gestures, and other body language, their disability may not be apparent to the lawyer.

The most immediate concern for the lawyer is whether the client with a hearing impairment needs or requests an accommodation. Again, lawyers should ask clients what accommodations they need to communicate best. If the client feels comfortable without one, the lawyer should make every effort to speak clearly and distinctly, but not too softy or too loudly. Also, the lawyer should face the client when speaking so that he or she can easily read the lawyer's lips, expressions, and gestures and avoid sitting in front of bright lights, windows, or other sources of glare that make it difficult to read lips.[9]

Accommodations that may be provided include sign language interpreter services; captioning; note-takers; Communication Access Realtime Translation (CART) in which a captioner keys what is being said into a computer that projects the text onto a computer monitor or television for viewers; assistive listening devices that amplify sound and minimize background noise; video conferencing; speech recognition software; telecommunications devices for the deaf (TTYs) that allow deaf persons to communicate over the telephone by typing rather than speaking and reading rather than listening;

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[8] AMERICAN FOUNDATION FOR THE BLIND, ACCOMMODATIONS FOR WORKERS WITH VISION LOSS, *at* http://www.afb.org/Section.asp?SectionID=7&TopicID=116&SubTopicID=65. ID=7&TopicID=116&SubTopicID=65&Document

[9] CORNELL UNIVERSITY, ILR SCHOOL, EMPLOYMENT AND DISABILITY INSTITUTE, DISABILITY & HR: TIPS FOR HUMAN RESOURCE PROFESSIONALS, WORKING EFFECTIVELY WITH PERSONS WHO ARE HARD OF HEARING, LATE-DEAFENED, OR DEAF, *at* http://www.ilr.cornell.edu/edi/hr_tips/article_1.cfm?b_id=28.

amplified telephones; video relay service equipment and software; and instant messaging software.[10] Some of these high tech accommodations may be costly, particularly for solo practitioners and small firms. In deciding whether or not to provide these, lawyers should consider whether they or their firm has the necessary resources and wants to develop a practice that includes clients with hearing impairments.

Equally importantly, particularly for larger firms and depending on the total circumstances, some or all of these accommodations may be legally required under federal or state law. Also, the potential for negative publicity may outweigh the costs involved. Less costly alternatives include communicating in writing, using visual aids, speak a little more slowly than usual and not when the client is writing, hiring a note-taker, using assistive listening devices, conversing at a different pace or volume, or having the client bring a friend who knows sign language.[11]

Speech impairments may be developmental or be the result of a stroke, diseases such as cerebral palsy and amyotrophic lateral sclerosis, paralysis, a laryngectomy, brain injuries, or illnesses such as emphysema or cancer. They may occur alone or in combination with other disabilities such as hearing impairments. These impairments range from difficulty with articulation or voice strength, chronic hoarseness, stuttering or stammering, and difficulty evoking an appropriate word or term to being totally non-verbal.[12]

Unless the person has very limited speaking ability or is mute, lawyers may ameliorate some or all of the obstacles presented by a client's speech impairment by listening more attentively and acclimating themselves to whatever speech difficulties the client has. If the lawyer is still unable to understand much of what the client is saying, the lawyer should inform the client and discuss accommodations that the client may have used in the past to improve communications.. For clients who are totally unable to speak or have severe speech impairments, lawyers may provide them with a computer screen to type out questions and to provide any information that is requested, or a voice output computer or other speech generated technology.

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[10] CALIFORNIA STATE UNIVERSITY NORTHRIDGE, HORIZONS CAREER SERVICES, JOB ACCOMMODATIONS, *at* http://icc.csun.edu/tablejob.html.
[11] *Id.*

Manual impairments may result from trauma, arthritis, rheumatism, amputation, and physical conditions, or diseases. They range from partial impairments, where persons have some manual ability or dexterity to total impairments, where persons have no use of their or arms.[13] Unless manual impairments are accompanied by other impairments, the lawyer probably will not encounter an issue about the accessibility of the office meeting space. However, the client or prospective client may need a transcriber, as well as assistance holding, carrying, and signing documents; opening doors; using restrooms; and consuming any drinks or food that the law firm normally provides its clients with. Also, if the law office is not close to public transportation and the client does not drive, getting to the office may be a problem.

Diseases may be apparent or non-apparent and their duration may be temporary, lengthy, intermittent, chronic, or permanent. Depending on their severity and progression, diseases can cause many different symptoms and levels of impairment. With regard to specific reasonable accommodations for apparent diseases, the accommodations previously discussed for mobility, visual, hearing, speech, and manual impairments are pertinent; for non-apparent diseases, the discussion of accommodations for mental or cognitive disorders that follows may be applicable.

As a general rule, most diseases are treatable and, to a certain extent, the severity of their symptoms can be controlled. When a lawyer sees a client, his or her symptoms may be better or worse, depending on the disease's progression and the treatment the client is receiving. In situations where a client is experiencing severe symptoms, the lawyer may need to delay or reschedule a meeting or telephone call.

Mental illnesses are a broad class of conditions that include behavioral and emotional disorders affecting the brain. The most prominent trait related to what traditionally are considered to be mental illnesses is erratic or extreme types of behaviors or emotions, although cognitive functioning and communication skills also may be negatively

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[12] UNIVERSITY OF SOUTHERN QUEENSLAND, SPEECH IMPAIRMENT, *at* http://usq.edu.au/studentservices/disabilityresources/academicstaff/speechlearn.htm.
[13] *See* http://www.gtha.com/dsp_CheckList_KeyWords.cfm#M.

affected. These conditions typically are non-apparent, except when a person is having an episode, and may be temporary, lengthy, intermittent, chronic, or permanent and manifest a variety of symptoms, depending on the severity of the condition and how it is being treated. As with diseases—many mental illnesses are considered to be diseases by most experts—treatment often makes the client better, but sometimes may make the client's symptoms worse, such as when medications produce harmful or unpleasant side-effects.

Accommodations may involve rescheduling meetings at a time when the client is clear-headed or lucid enough to understand and communicate effectively. For example, clients who are taking psychiatric medications may not be able to meet early in the day, because it takes time for their medications to work and for any side-effects to subside. Also, when a person with a mental illness is having an episode or is otherwise unable to fully communicate with or understand the lawyer, special measures may be needed to represent those clients, consistent with the *Model Rules of Professional Conduct*, which is discussed later in this part.[14] Many other times, symptoms may be so well-controlled that, within the lawyer-client relationship, the client needs no accommodations or special considerations of any kind.

Cognitive disorders represent a broad but overlapping class of conditions that generally are considered to be mental disorders by the psychiatric profession, but are distinguishable from what are typically viewed as mental illnesses. These disorders include developmental conditions, such as mental retardation and autism that occur in childhood; brain diseases, such as Alzheimer's and other dementias that occur at various stages of life; and brain injuries that can occur at any time. The primary trait that all these conditions share is that they negatively affect the individual's capacity to think and/or to process information. Cognitive disorders are unlikely to improve with treatment, although rehabilitation and training may help individuals maximize those capacities that they retain. Similar to most mental illnesses, these disorders also may negatively affect behaviors and emotions.

Clients with cognitive disorders may require many of the same types of accommodations as persons with mental illnesses, but for the former, any reduced ability

[14] MODEL RULES OF PROF'L CONDUCT R. 1.14.

to understand or communicate is not as likely to vary as much over time. Again, if the person's ability to communicate and understand are substantially affected, the lawyer may have to take special measures in representing the client, consistent with the *Model Rules of Professional Conduct*.[15] In meeting with clients, lawyers should ensure that the environment is free from auditory and visual distractions. In addition, clients may bring a trusted friend, relative, or guardian to speak on their behalf and to assist the lawyer in compiling information and making decisions about the case.[16]

Learning disabilities include a host of diagnoses—specific learning disabilities, dyslexia, dyscalculia, dyspraxia, auditory/visual perceptual deficits, attention deficit disorder, and the like—that interfere with the way in which clients perceive and process information, particularly based on visual cues. They cause difficulties in listening, speaking, reading, writing, reasoning, doing mathematical calculations, coordination, and/or directing attention. Learning disabilities are a lifelong condition, although many individuals develop coping techniques through special education, tutoring, medication therapy, personal development, or adaptation of learning skills.[17] At the same time, clients' abilities to listen, as opposed to read, may be more acutely developed if they have had to rely on auditory cues when their visual cues fail. In a typical meeting between a lawyer and a client, learning disabilities may not present any significant obstacles to effective communication. These are more likely to arise, if at all, when the lawyer wants the client to review written documents, or when the client relates information to the lawyer based on written documents, or in writing. Effective communication may be facilitated if the lawyer, someone else in the law office, or someone the client knows reads the document to the client aloud. Other accommodations include converting print materials to audio; using cover overlays to help make the text easier to read; providing large print materials; double-spacing text on printed materials; providing type-written versus handwritten materials; scanning documents into a computer and using Optical Character Recognition (OCR), which reads the information aloud; using a reading pen, a portable device that

[15] *Id*.
[16] *See id.*; *see also* ABA Ethics Opinions, Formal Opinion No. 96-404.
[17] JOB ACCOMMODATION NETWORK, SUZANNE GOSDEN KITCHEN, ACCOMMODATION AND COMPLIANCE SERIES: EMPLOYEES WITH LEARNING DISABILITIES, *at* http://www.jan.wvu.edu/media/LD.html.

scans a word and provides auditory feedback; and providing voice output software, which highlights and reads aloud the information from a computer screen.

Substance abuse disorders can lead to a variety of physical problems (impaired reaction time and coordination, respiratory depression, strokes, malnutrition, organic brain damage, and damage to other organs), as well as psychological problems (loss of concentration, confusion, drowsiness, alterations in memory, impaired judgment, increased aggressiveness, depression, anxiety, and paranoia). These disorders can mimic many of the same behavioral and emotional symptoms as mental illnesses. In fact, substance abuse is a mental disorder that is part of a group of chronic diseases that include alcohol or drug dependence, resulting from and affected by genetic, psychosocial, and environmental factors.[18] The symptoms of these disorders may be manifested alone or combined with mental illnesses to produce a "dual diagnosis" or be. In either situation, there may be distortions in the client's thinking, including extreme denial that the condition even exists, which may negatively affect communications between the lawyer and that client.

(b) Communicating with Clients

Depending on the nature and extent of the client's impairment(s), communication may be affected in many different ways or not at all. Disabilities that affect speech, hearing, or cognitive processes are most likely to create potential communication barriers. Depending on what they are, these barriers will require different types of accommodations that may be as simple as speaking more distinctly and more slowly, listening more carefully, using a computer screen to share information, or scheduling a meeting later in the day. Sometimes, however, necessary accommodations will be more complicated and resource intensive, as in the case of auxiliary aids and services such as CART, sign language interpreters, special amplification devices, or screen reading programs.

The provision of accommodations should be viewed in light of the fact that effective communications between the client and the lawyer is essential to their

[18] American Psychiatric Assocation, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV), "Substance-Related Disorders" (1994).

relationship and building a strong case.[19] Regrettably, the tendency of some lawyers may be to avoid such relationships in the first place or not actively solicit them, but this tendency harms society, violates basic ethical standards of conduct for lawyers not to discriminate, is short-sighted in terms of building a clientele, and, as discussed below, may violate federal and state laws. Once lawyers begin to incorporate accommodations into their business practices, the financial and administrative costs of providing subsequent accommodations of the same type are likely to decrease dramatically. Moreover, as more lawyers provide these accommodations, new ways to do so are discovered, which may reduce the costs to all similarly situated lawyers.

(c) Self-Determination for Clients

Frequently, practicing lawyers have been trained to take charge of their clients' cases, aggressively. Undoubtedly, in many circumstances, a properly implemented take-charge attitude will have clear benefits in the hands of a well-trained lawyer. At the same time, good lawyers should listen to and be directed by their clients' expressed values and interests. In fact, lawyers have an ethical obligation, as set out in the *Model Rules of Professional Conduct*, to do their best to allow clients to ultimately decide what course of action the lawyer will pursue with regard to any client's case.[20]

This ethical obligation to promote self-determination may be particularly important for clients with disabilities, whose physical or mental impairments have made them vulnerable to paternalistic decision-making, in which service providers, including lawyers, have made decisions on their behalf, rather than encouraging them to decide for themselves. Drawing an analogy to the doctrine of informed consent, which requires an informed and voluntary decision by a competent person, the lawyer would be well-advised to make every effort to provide clients with all the information that they need to make a sound decision, and avoid creating circumstances in which clients may feel compelled to accept the lawyer's advice.[21] If the client's competency is in doubt, the lawyer should be guided by the *Model Rules of Professional Conduct* governing clients with diminished capacity, which are discussed later in this part.[22] Even if the client has

[19] MODEL RULES OF PROF'L CONDUCT R. 1.4.
[20] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) and comments 1-4\.
[21] MODEL RULES OF PROF'L CONDUCT R. 1.4.
[22] MODEL RULES OF PROF'L CONDUCT R. 1.14.

diminished capacity, lawyers have a duty to make every reasonable effort to maintain a normal client-lawyer relationship, in which the client is the ultimate decision-maker,.[23] The provision of accommodations may not only aid communications, but also allow the client to make better decisions.

(d) Lawyer Versus Client Perspectives: Rights and Money

Particularly in civil cases, in which rights and/or money are at issue, lawyers and clients may have different perspectives and interests about the wisdom of pursuing litigation. Good communications can help close that gap.

Many clients assume a right is involved whenever they believe they have been wronged. Lawyers, due to their experience and training, understand that rights must be connected to a specific statute or common law principle. They must explain to the client that not every wrong—even what seems to be a violation of a basic human right—has a legal remedy in American law. This is particularly true with regard to the Americans with Disabilities Act (ADA) and similar federal and state statutes that cover only some persons who have disabilities, and then only in limited situations.

With respect to rights-driven cases, particularly disability rights, relatively few situations are worthwhile for the client to pursue litigation. Unless clients have "deep pockets" to pay for such representation—and relatively few people with disabilities do—they are likely to encounter substantial difficulties in finding a lawyer to take their case unless it looks particularly meritorious from a legal perspective and there are money damages and/or attorneys' fees available for plaintiffs who prevail. Lawyers, however, would be well-advised to clearly explain this reality to potential clients before rejecting their cases.

Similar differences in lawyer and client perspectives may arise in civil cases in which monetary damages are the client's primary objective. However, this gap most likely will narrow since the client shares the lawyer's interest in only pursuing those cases which make sense monetarily. However, clients still may not understand why a case is not promising from a monetary standpoint until the lawyer explains why.

In one sense, this monetary perspective is an exception to the aforementioned principle that the lawyer should allow the client to make the decision to bring a suit. As a

[23] Id. at R. 1.14(a).

practical matter, unless the client is willing to pay the lawyer directly in hopes of obtaining monetary damages and perhaps attorneys' fees later, the lawyer determines whether the case is worth pursuing on a contingency basis after estimating the odds of being successful and what that success is likely to mean in terms of money to the lawyer and firm.

(e) Ethical Obligations in Representing Clients with Disabilities

While there are many different ethical considerations that apply to lawyers representing any client, only three provisions apply specifically to clients with disabilities. All three fall under Rule 1.14 of the *Model Rules of Professional Conduct* and pertain to clients who for any reason—including mental, cognitive, or physical deficits—have diminished capacity to make decisions.[24] Lawyers would be well-advised to consult Rule 1.14 whenever they have a client with a legally significant disability to ascertain what they should do and what they should not do.

First, lawyers should, "as far as reasonably possible, maintain a normal client-lawyer relationship," even if the "client's capacity to make adequately considered decisions . . . is diminished." To best carry out this proviso, the lawyer should be aware, as much as possible, of the true nature and individual circumstances of the client's disability, as well as those steps that can be taken, through various accommodations mentioned earlier, to minimize the impact of any impairment(s) on the ability of the client or the lawyer to participate in a normal client-lawyer relationship.[25]

Second, in the less likely event that a client with diminished capacity "is at risk of substantial physical, financial or other harm unless action is taken and [the lawyer] cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian."[26] The lawyer may be able to act in the client's own interests after reasonable accommodations have been made. Even if reasonable accommodations fall short of restoring the client to full capacity, this does not mean that the lawyer should take more drastic action, if he or she believes a

[24] MODEL RULES OF PROF'L CONDUCT R. 1.14.
[25] *See* ABA Ethics Opinions, Formal Opinion No. 96-404.
[26] MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

better course or alternative is indicated by the circumstances. Personal autonomy, particularly for persons with disabilities, is a precious consideration and should be curtailed only as a last resort to ensure the health, safety, and welfare of the client.[27]

Finally, if the lawyer decides to take protective action, this may involve revealing information about the client to others, but "only to the extent reasonably necessary to protect the client's interests."[28] Both the amount of information conveyed and the number of people informed should be strictly limited based on a need-to-know protocol.

(f) Legal Duty to Provide Reasonable Accommodations

While many different practical and ethical considerations should encourage lawyers to provide their clients with accommodations, there are specific legal reasons to do so as well. Lawyers who hold themselves out to the public and take on individuals---as opposed to corporate or organizational entities---as clients are covered under the ADA. If the lawyers are in private practice, they fall under Title III,[29] and if they are working for state or local governments or for an entity receiving funding from the federal government or the states, they are covered under Title II or Section 504 of the Rehabilitation Act.[30] Both Titles II and III of the ADA, as well as §504, have reasonable accommodation or modification requirements that apply to lawyers.[31] In addition, state discrimination laws may have similar requirements that may be weaker, stronger, or different than those found in the federal laws. Under most of these federal and state statutes, the failure to provide required accommodations is deemed to constitute discrimination.[32]

Although many technical complexities in these federal and state discrimination statutes may provide cover for lawyers and law firms intending to ignore the spirit of these laws, the ethical boundaries against discriminating on the basis of disability are clear, so the real question becomes what is reasonable in terms of providing accommodations. Overwhelmingly, the case law indicates that what is reasonable is determined on a case-by-case basis and brings an almost unlimited number of

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[27] *See id.* comment No. 7.
[28] Id. r. 1.14(c).
[29] 42 U.S.C. §§12181(7)(F) (ADA Title III).
[30] 42 U.S.C. §§12131(1) (ADA Title II); 29 U.S.C. §794(b) (Section 504).
[31] 42 U.S.C. §12131(2) (Title II); 42 U.S.C. §12182 (b)(2)(a)(ii)-(v) (Title III); 29 U.S.C. §794 (Section 504).
[32] Should we insert a reference to the chapter discussing state laws?

circumstantial factors into play.[33] In this sense, legal certainty is precluded. Some of the most persuasive factors that pertain to the client-lawyer relationship are:

- Financial costs and administrative burdens relative to the firm's size and resources;
- Importance of the disputed accommodation with regard to ensuring that the client-lawyer relationship is maintained consistent with a lawyer's ethical duties; and
- Identification of readily available resources in the community to help reduce any unreasonable financial cost or administrative burden.

Ultimately, though, to avoid the appearance of impropriety and sustain a productive client-lawyer relationship, what is reasonable should be viewed broadly, taking into account the legal profession's obligation to provide legal representation to all potential clients, notwithstanding disability.

6.04 The Case Perspective

(a) Introduction

The client-lawyer relationship is directly affected by the nature of the case. Significant differences exist between civil and criminal litigation, as well within civil litigation. Whether litigation is civil or criminal is a distinction that has significant implications on how a lawyer will account for a client's disability in building a case.

In most types of civil litigation, the state typically is not a party, and generally the party who is initiating the litigation has the burden of proof is on by a preponderance of the evidence, except where fundamentally important individual rights are at issue, such as involuntary civil commitment, and the clear and convincing evidence standard applies. In criminal litigation, by comparison, the state normally has the dominant role and the burden of proof beyond a reasonable doubt.

Clients with legally relevant disabilities are most likely to rely on civil litigation to pursue benefits of some kind or specific rights, or to settle a dispute with another party. The focus in disability discrimination law is on specific rights, although benefits come

[33] Insert reference to the chapter dealing with accommodations.

into play with regard to the Individuals with Disabilities Education Act (IDEA). Also, dispute resolution may be used to resolve disability discrimination claims, including those involving the provision of reasonable accommodations or modifications.

(b) Civil Rights

Many clients with disabilities present basic civil rights issues that generally are related to alleged discrimination based on their disabilities. These claims may be founded on any of a variety of federal disability discrimination statutes, such as the ADA, the Rehabilitation Act, the IDEA, or the Fair Housing Amendments Act, or state discrimination statutes. On the other hand, clients with disabilities may raise rights-related claims that have nothing or little to do with their disabilities.

In disability discrimination cases, the lawyer will want to be well-versed about the client's disability, types and levels of impairment, and fluctuating symptoms, for example, to prove that the client is covered by the statute at issue. In general, unless the client has or is perceived to have the necessary disability characteristics, the claim will fail.[34] Moreover, the client must be qualified, despite his or her disability, for whatever program, activity, or job is at issue. The lawyer will need to be intimately familiar with the impact of the client's disability on the basic qualification criteria set out in the applicable statute.

Due to these technical requirements, many, if not most, clients with disabilities lose their cases on summary judgment, before the merits are determined. Thus, the potential benefits of pursuing a settlement may be greater than litigation. Moreover, many disability rights statutes and the regulations governing those statutes including the ADA encourage or require mediation as a necessary first step before going to court.

(c) Benefits

Because many major programs in which substantial benefits are awarded involve disability or health care, such as Social Security, Medicaid, and Medicare, a disproportionate percentage of cases in which benefits are a principle concern involve persons with disabilities. However, a greater percentage of people with disabilities also may participate in other programs that provide income or housing subsidies. As many

[34] Insert reference to the disability definition chapter.

different studies have shown, persons with disabilities tend to have lower incomes than non-disabled people, and a higher percentage of them meet the applicable income criteria.

In cases involving benefits, the most common disputes revolve around eligibility, which, depending on the program, will require proof of a certain level of impairment, that a medical expense is justified, and/or that the person's total available income falls below a specified amount. Detailed knowledge of a client's disability, level of impairment, and symptoms are therefore essential. In addition, knowledge of a client's disability and the programs for which the client is qualified or may be eligible to receive in the future are often relevant in determining eligibility for income and housing subsidies that have income-based eligibility requirements.

Substantiating a disability for program eligibility purposes generally has two parts: (1) proof of the existence of a diagnosis that the claimant has a particular condition or set of conditions, and (2) establishing a link between that condition(s) and a level of impairment that meets the governing eligibility standard, which is program specific. Normally the diagnosis of a condition will be the same regardless of the program, but how that condition is linked to the governing standard will depend on the particular program.

As mentioned earlier, benefits cases lend themselves to contingency fee arrangements, which allow the client to retain the lawyer without having to pay for the representation up front, and provide a direct economic incentive to the lawyer if he or she is successful.

(d) Disputes

Many cases do not involve benefits or rights directly, but instead focus on the facts and circumstances that involve two parties in a dispute. Generally, the fact that the client has a disability, though relevant to the lawyer in providing accommodations to or in communicating with the client, probably has little or no relevance with regard to the facts of the case. An exception are torts, including medical malpractice and negligence, where a person is injured physically or emotionally and the level of their impairment is directly related to any damages that may be awarded. In these cases, the lawyer needs to be intimately familiar with the extent of the client's impairment(s), as compared to the client's health status before the tort occurred. Any preexisting impairments must be

known, since the defendant will be trying to convince the court that potential damages were not actually the result of the injury.