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# **Increased Access to Court** for People with Disabilities





# Representing Clients with Limited English Proficiency or Communication-Related Disabilities

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### By Kelly McAnnany and Aditi K. Shah

uality legal representation demands that lawyers effectively communicate with clients, no matter what the legal setting. But lawyers who represent a diverse clientele are more likely to encounter clients for whom they must take particular steps to ensure that communication barriers due to limited English proficiency or disability do not result in inferior representation. Many forms of discrimination can be avoided by refraining from taking action—for example, refraining from excluding clients on the basis of race or gender. However, avoiding discrimination in the realm of communication often requires the affirmative provision of an accommodation, such as the use of an interpreter. To avoid discrimination and achieve effective communication, law offices can benefit greatly from developing officewide policies and procedures to create equal access for all clients, no matter what their communication needs may be.

Law offices face increasing linguistic and communication diversity in the communities they serve. Approximately 4.6 percent of the U.S. population resides in a household where no one over the age of 14 speaks English very well.<sup>1</sup> This percentage jumps in many local communities. For example, in the New York City metropolitan area, it is 15 percent.<sup>2</sup> Also significant is the growing population of people with disabilities. Roughly 12 percent of the U.S. population has a disability.<sup>3</sup> Of people 65 years old and older, 36.6 percent have a disability.<sup>4</sup>

New York City's vast linguistic diversity, coupled with an organizational focus on immigrant and disability rights, has pushed New York Lawyers for the Public Interest to develop a comprehensive response to clients with varying communication needs.<sup>5</sup> This response has required flexibility and a willingness to reflect regularly on whether the civil rights advocacy we pursue externally is mirrored by parallel internal structures and procedures. New York Lawyers for the Public Interest has spent years developing and improving officewide policies that assess, allocate, and review the resources necessary to strengthen our partnership with and representation of clients and communities with limited English proficiency or disabilities. Here we share

4Id.

<sup>5</sup>New York Lawyers for the Public Interest, www.nylpi.org.

<sup>&</sup>lt;sup>1</sup>U.S. Census Bureau, No One Age 14 and Over Speaks English Only or Speaks English "Very Well": 2011 American Community Survey 1-Year Estimates tbl.S1602 (2011), http://1.usa.gov/11ABpB3.

<sup>&</sup>lt;sup>2</sup>The New York City metropolitan area as captured in this statistic includes New York City, northern New Jersey, and Long Island (*id.* (click on "Back to Advanced Search")).

<sup>&</sup>lt;sup>3</sup>U.S. Census Bureau, Disability Characteristics: 2011 American Community Survey 1-Year Estimates tbl.S1810 (2011), http://1.usa.gov/10wt6L5. This percentage is likely an underestimate because the American Community Survey polls only the noninstitutionalized population.

some of the lessons we have learned with the hope that such information will assist other offices that have similar needs and are striving to achieve the same goals.

### Why Provide Language Access?

Beyond the general goal of providing high-quality legal representation, lawyers have both legal and ethical obligations to ensure effective communication and meaningful access for clients. When clients do not speak or understand English well, or have a disability that complicates their understanding of the relevant information, law offices are often required to provide language services or reasonable accommodations. The following is a brief outline of the relevant legal and ethical bases for these requirements.

**Federal Antidiscrimination Laws.** A few key federal laws obligate law offices to eliminate language barriers and maintain effective communication with clients who have disabilities or limited English proficiency: Title VI of the Civil Rights Act of 1964 (Title VI); Titles II and III of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act of 1973 (Section 504).

Title VI prohibits discrimination on the basis of national origin in all programs and institutions that receive federal financial assistance.<sup>6</sup> National-origin discrimination has been interpreted to include discrimination based on limited English proficiency, meaning against those individuals who have a limited ability to speak,

read, write, or understand English.<sup>7</sup> Title VI specifically requires federal funding recipients to provide limited-English-proficient individuals with language assistance, such as interpreters for oral communication and translation of written documents.<sup>8</sup> While the precise requirements vary with the nature and content of the services provided by the recipient, as well as the demographics of the population served, Title VI generally requires that federally funded organizations provide meaningful access to limited-English-proficient clients.<sup>9</sup>

Law offices are also "places of public accommodation" covered by Title III of the ADA, which prohibits discrimination against people with disabilities.10 The ADA's definition of a person with a disability includes individuals who have a physical or mental impairment that substantially limits one or more major life activities, individuals who have a record of such an impairment, or individuals who are regarded as having such an impairment." Generally, a law office could discriminate by outright denying services to a client with a disability, or by offering a service to a client that is unequal to that afforded individuals without disabilities.12 With specific regard to unequal services, law offices may violate the law by failing to provide reasonable accommodations; remove communication barriers; or modify policies and procedures as needed.<sup>13</sup>

Of particular relevance to communication access considerations, Title III of the ADA requires law offices to adhere

6Civil Rights Act of 1964 tit. VI, 42 U.S.C § 2000d; 28 C.F.R. § 42.104 (2013).

<sup>8</sup>Guidance to Federal Financial Assistance Recipients, 67 Fed. Reg. 41455.

<sup>9</sup>/d. at 41459. Specifically, a federal funding recipient must engage in a balancing test involving the following four factors: "(1) The number or proportion of LEP [limited-English-proficient] persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs" (*id*.).

<sup>10</sup>Americans with Disabilities Act tit. III, 42 U.S.C. §§ 12181(7)(F), 12182(a).

11/d. § 12102(1).

12/d. § 12182(b)(1)(A)(i)-(ii).

<sup>13</sup>*Id.* § 12182(b)(2)(A)(ii)–(iv). While the Americans with Disabilities Act (ADA) also prohibits discrimination in the form of physical and architectural barriers, here we limit our discussion of those obligations that relate to communication and language access in the context of disability access.

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<sup>&</sup>lt;sup>7</sup>See, e.g., Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002). See also *Lau v. Nichols*, 414 U.S. 563 (1974).

to a standard of "effective communication" when interacting with clients with disabilities, and to provide "auxiliary aids and services" where needed to achieve this standard.<sup>14</sup> Some examples of auxiliary aids and services are qualified sign language interpreters (on-site or through video remote interpreting), exchange of written notes, assistive listening devices, and information in large print or Braille.15 The type of accommodation a law office must use depends on the individual's method of communication and the nature, length, context, and complexity of the communication.<sup>16</sup> For example, discussions between lawyers and Deaf clients are more likely to require the use of a qualified interpreter because of their length and complexity.<sup>17</sup> While the decision of what accommodation to provide ultimately rests with the law office, advocates "should consult with individuals with disabilities whenever possible" and the method chosen must result in effective communication with the client.18

Law offices, not their clients, are responsible for covering the cost of any reasonable accommodation.<sup>19</sup> In fact, the law explicitly prohibits requiring clients to have their own interpreters.<sup>20</sup> Although many types of accommodations are considered reasonable, in some limited circumstances law offices may be able to argue that an accommodation would result in an undue burden or would fundamentally alter the nature of the service offered.<sup>21</sup> However, the assertion of an undue burden defense—i.e., that the removal of a barrier is not "readily achievable" because it cannot be done without great difficulty or expense—requires a consideration of the organization's overall financial resources.<sup>22</sup>

Government-run law offices are also covered by Title II of the ADA, in addition to Title III.<sup>23</sup> While we do not delve into each distinction between the two parts of the law, we must note that Title II requires even higher standards of accommodation than Title III in certain circumstances.<sup>24</sup> Law offices that receive federal financial assistance are also covered by Section 504, which imposes disability antidiscrimination obligations similar to those found under the ADA.<sup>25</sup>

State and Local Antidiscrimination Laws. Law offices may also be covered by state and local antidiscrimination laws, which typically reinforce, and in some cases may exceed, the requirements of federal law. For example, in New York City, law offices must provide language access and reasonable accommodations for clients with limited English profi-

1628 C.F.R. § 36.303(c)(1)(ii).

<sup>17</sup>See, e.g., Settlement Agreement Under the Americans with Disabilities Act of 1990 Between the United States of America and the Law Office of Cohen & Jaffe LLC, Complaint No. 202-52-111, ¶ 13 (U.S. Dep't of Justice June 30, 2006 & July 3, 2006), http://1.usa.gov/12csRiB ("Legal, financial and medical transactions may require the use of a qualified interpreter to ensure effective communication because of their length and complexity.").

1828 C.F.R. § 36.303(c)(1)(ii).

<sup>19</sup>*Id.* § 36.301(c).

20Id. § 36.303(c)(2).

<sup>21</sup>42 U.S.C. § 12182(b)(2)(A)(ii)–(iii); 28 C.F.R. §§ 36.302(a), 36.303(a).

2242 U.S.C. § 12181(9).

<sup>23</sup>*Id.* § 12131(1)(B).

<sup>24</sup>E.g., unlike Title III, which allows places of public accommodation to make the ultimate determination as to which auxiliary aid or service is appropriate for an individual with a disability, under Title II a public entity "shall give primary consideration to the requests of individuals with disabilities" (28 C.F.R. § 35.160(b)(2) (2013)).

<sup>25</sup>Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794(a) (2013)).

<sup>14/</sup>d. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(c)(1) (2013).

<sup>&</sup>lt;sup>15</sup>28 C.F.R. § 36.303(b). The ADA defines a "qualified sign language interpreter" as one who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary (28 C.F.R. § 36.104 (2013)).

ciency or disabilities in accordance with both the New York State Human Rights Law and the New York City Human Rights Law.<sup>26</sup> The New York City Human Rights Law, in particular, is to be construed more liberally than even comparably worded federal or state laws.<sup>27</sup> In the case of both the New York State Human Rights Law and the New York City Human Rights Law, the extension of protections against discrimination does not rely on whether an office receives governmental funding; under both laws, law offices are covered by the definition of places of public accommodation.<sup>28</sup>

Rules of Professional Ethics. Professional ethics rules provide lawyers with additional incentives to ensure meaningful access for and effective communication with clients who would otherwise face language barriers. While each state and locality may differ in terms of the specific rules that apply to attorneys within their jurisdiction, the American Bar Association's Model Rules of Professional Conduct offer a comprehensive window into the general requirements of law offices and attorneys.<sup>29</sup> Although nearly all of the Model Rules relate in some capacity to the ability to communicate with one's client, three rules are of particular relevance here.

Model Rule 1.1 obligates lawyers to provide competent representation and clarifies that this requires the "thoroughness and preparation reasonably necessary for the representation."<sup>30</sup> Comment 5 on this rule elaborates that such preparation includes "inquiry into and analysis of the factual elements of the problem."<sup>31</sup> In the absence of language assistance, such as the use of an interpreter or the provision of a reasonable accommodation, language barriers may prevent a lawyer from adequately preparing the case due to gaps in factual information or miscommunication about the nature or timing of events.<sup>32</sup>

The Model Rules also emphasize direct communication between client and attorney. Model Rule 1.4 obligates attorneys to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent ... is required" and to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," among other requirements.<sup>33</sup> Attorneys must also inform the client about the status of the matter, respond to client requests for information, and consult with the client about relevant limitations on the attorney's conduct as per the rules.<sup>34</sup> Perhaps most important, Rule 1.4(b) generally requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>35</sup> How a lawyer can comply with any one of these requirements is difficult to imagine in the absence of effective communication, which may require a reasonable accommodation or a spoken language interpreter.

<sup>26</sup>New York State Human Rights Law, N.Y. Exec. Law § 296(2) (2013); New York City Human Rights Law, Admin. Code of the City of New York § 8-107(4)(a) (2013).

<sup>27</sup>Admin. Code of the City of New York § 8-130 (2013).

<sup>28</sup>N.Y. Exec. Law § 292(9) (2013); Admin. Code of the City of New York § 8-102(9) (2013).

<sup>29</sup>See generally Model Rules of Prof'L Conduct (2012), http://bit.ly/11QAYE3.

<sup>30</sup>*Id.* R. 1.1.

<sup>31</sup>Id. R. 1.1 cmt.5

<sup>32</sup>See, e.g., Committee on Professional and Judicial Ethics, Association of the Bar of the City of New York, Formal Opinion 1995-12 (July 6, 1995), http://bit.ly/ZRBz8m ("A lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law.").

<sup>33</sup>MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1)-(2).

34Id. R. 1.4(a)(3)-(5)

35Id. R. 1.4(b).

To a client with a "mental impairment," such as a cognitive or psychiatric disability, attorneys have an obligation under Rule 1.14 to, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."36 The comments on the rule specify not only that a client should be treated with respect and attention but also that the lawyer should "as far as possible accord the represented person the status of client, particularly in maintaining communication."<sup>37</sup> Even in the event that a client requires a family member or advocate to be present as a reasonable accommodation, the lawyer is required to "look to the client ... to make decisions on the client's behalf."38 Reasonable accommodations may mean taking additional time to explain an aspect of the case to clients with an intellectual disability to ensure good communication and preserve their ability to make decisions on their own behalf.

Against this background of legal and ethical overview, we now turn to our primary focus: best practices to implement an officewide system for effective client communication.

# Five Steps to Ensuring Effective Client Communication

Law offices should adopt five key steps to implement an effective system for communicating with limited-English-proficient clients and clients with disabilities.

1. Create a Nondiscrimination Office Policy. Law offices should develop nondiscrimination policies on language access and disability access.<sup>39</sup> While a single policy to meet both needs is an option, separating them into two policies may create more clarity and space for details about each. In either situation, a policy should specify that staff members shall not provide limited-English-proficient clients or disabled clients services inferior to those for English-proficient or nondisabled clients and that staff shall provide supplemental services (e.g., interpreters) necessary for equal access. The law office, through its staff as well as through notices posted in its reception area, should notify clients of their right to request interpretation, translation, and reasonable accommodations.

The policy or policies should also define the terms "individual with limited English proficiency" and "individual with a disability"; explain when language services and accommodations are necessary; and define what constitutes a qualified interpreter or translator and a reasonable accommodation.<sup>4°</sup>

2. Designate an Office Coordinator. Designating a language access coordinator and a disability access coordinator (either is referred to here as "coordinator") among staff members is another step toward an effective, officewide system. An office could choose to have two separate coordinators or one coordinator who handles both language access and disability access. The coordinator is manager of logistics and source of accountability.

Regarding logistics, the coordinator's role encompasses creating a protocol to implement the policy; planning staff training; maintaining a list of interpreters, agencies, and other resources; and monitoring any developing needs in the office. Creating a clear office protocol is key to ensuring consistency and efficiency across the office and consideration for staff members' time (particularly those staff members who serve as interpreters or translators, as discussed below). Regarding accountability, assigning a coordinator ensures that someone is responsible for implementing the policy and monitoring office procedures. It also ensures that someone is responsible for

<sup>39</sup>To request a copy of New York Lawyers for the Public Interest's policy documents, contact Aditi Shah, ashah@nylpi.org.

<sup>40</sup>The four steps described below should also be included in the nondiscrimination policy or policies.

<sup>&</sup>lt;sup>36</sup>*Id.* R. 1.14(a).

<sup>&</sup>lt;sup>37</sup>*Id.* R. 1.14 cmt.2.

<sup>&</sup>lt;sup>38</sup>*Id.* R. 1.14 cmt. 3.

troubleshooting any glitches and accepting feedback or complaints from clients.

**3. Train Staff.** Staff training includes routine training for all staff and specific training for staff interpreters and other topics as needed.

The coordinator should train all staff members on office policy and protocols. The goal of this training is to ensure that all staff members accommodate clients in a consistent, efficient manner. Staff should be knowledgeable about identifying and providing a reasonable accommodation for a client with a disability and requesting interpretation and translation for a limited-English-proficient client. The staff should be trained about the various types of telephonic interpretation and relay services, such as freely available relay services, and "language line" services for which the office contracts.<sup>41</sup> As mentioned above, an office may choose to have two separate coordinators and sets of policies for clients with disabilities and limited-English-proficient clients. Similarly the basic training on either subject may be separate.

The basic training on accommodating clients with disabilities should aim to make staff members aware of and sensitive to various kinds of disabilities. It should provide guidance on the types of accommodations that may be necessary to facilitate effective communication. For example, for clients with intellectual disabilities, lawyers may need to explain legal concepts in basic terms or take extra time for meetings to allow for breaks or repetition or both explain and take extra time. If the client with intellectual disabilities relies on a family member for communication, allowing that family member to participate in attorneyclient meetings may be a necessary accommodation. When serving clients with psychiatric disabilities, staff members should be aware that such clients may need to take breaks during meetings, or staff members can meet with them at certain times of the day to accommodate medication schedules that affect their ability to concentrate. Staff members should also know to be sensitive when asking personal questions about such clients' disabilities even when relevant to the legal representation; communication on this topic is often made smoother by first explaining the purpose of the questions and establishing the clients' comfort.

Another basic training for all staff should cover how to work with interpreters. For example, staff members should be trained to speak directly to the client (not to the interpreter), and to speak plainly to facilitate accurate interpretation (and reduce risk of idioms and jargon becoming "lost in interpretation"). If the coordinator is familiar with these procedures, the coordinator can lead this training and combine it with the training on policies and protocols. Otherwise another low- or no-cost option is to invite an experienced colleague from another legal or community organization to lead the training. Such advocates from sister organizations, particularly those who focus on language access advocacy, may be willing to lead a training at no cost. A final alternative is to hire a training company, although this is the most expensive option.

Law offices often employ bilingual staff members who provide services directly in their second language and act as staff interpreters or translators or both. Staff

<sup>&</sup>lt;sup>41</sup>Video relay service enables Deaf individuals who speak American Sign Language to phone hearing people through the Internet. Through a webcam and computer, the Deaf person connects to an American Sign Language interpreter, who places the call to the hearing individual. The interpreter sees the Deaf person on the computer screen and wears a headset enabling the interpreter to hear the hearing person on the other end of the line. In this manner, the interpreter interprets the phone call. Neither the Deaf person nor the hearing person must pay for the interpretation. The hearing person can place a video relay service call to a Deaf person in the same manner as dialing a regular telephone call (see Federal Communications Commission, Video Relay Services (n.d.), http://fcc.us/18f1xn2). For Deaf or hard-of-hearing individuals who do not speak American Sign Language, or for individuals with speech impairments, several other forms of telecommunications relay service are available, also at no cost to the hearing person placing or receiving the call (see Federal Communications Commission, Relay Services (n.d.), http://fcc.us/13GioP3; New York Relay Service, What Is Relay Service? (2013), http://bit.ly/19ip891). Any office, whether legal or nonlegal, can contract with companies providing telephonic interpretation services, often generally referred to as "language line." These pay-per-minute services offer ondemand interpretation in dozens of languages.

interpreters must be trained on proper interpreting protocols and ethics. Certified interpreters and training companies are available to conduct such training, but a trusted individual certified interpreter may cost less than a training company.

Law offices likely identify other topics that arise from the nature of their practice. For example, as New York Lawyers for the Public Interest increasingly interacted with Deaf clients, our staff identified the need to have a specific training on working with Deaf clients and American Sign Language interpreters. We invited a trusted American Sign Language interpreter to meet with our staff; this training cost our office only \$150. Similarly our reception area staff members felt the need to have a training on Deaf culture and basic American Sign Language signs (e.g., "please wait"; "bathroom"). They had been interacting with Deaf clients and advocates visiting our office, often as a bridge to a scheduled meeting with an interpreter. A trusted certified Deaf interpreter trained our staff over two lessons about special visual and grammatical issues related to American Sign Language and helped dispel common misconceptions about Deaf individuals (e.g., all Deaf individuals can lip-read or write; using exaggerated mouth movements facilitates lipreading).

**4. Develop a System for Quality Assurance.** Testing the proficiency of bilingual staff, tracking information about policy implementation, and having a mechanism for clients to give feedback assure quality of services.

Law offices, particularly public interest organizations, tend to prefer having bilingual staff members provide language services to avoid the expense of hiring outside interpreters or translators. However, law offices should assess the language proficiency of any bilingual staff members who will serve clients directly in the staff members' second languages or who will serve as staff interpreters or translators. Testing companies are available to administer and evaluate written and oral proficiency tests for around \$50 per test.<sup>42</sup> Some staff members, while having spoken a particular language since childhood or studied a language for several years, have acquired only conversational skills that fall short of the proficiency required in a law office, much less to interpret or translate. Testing is a basic measure—and a valuable investment—to ensure that staff can effectively communicate with clients.

The language access coordinator should also track the experiences of staff members who use various external interpreters and translators, whether freelance or hired through agencies, for quality assurance purposes. Identify top-notch services; equally important, identify individuals and agencies to discontinue using.

Monitor the experiences of staff interpreters and translators for reasons beyond quality assurance. One goal of creating a specific office protocol being to ensure an efficient process that is respectful of staff interpreters and translators, the language access coordinator should seek to ensure that staff interpreters and translators are not overburdened or asked to complete unreasonable or inappropriate tasks, which may happen at times, often inadvertently.

Staff should inform limited-Englishproficient clients and clients with disabilities that they can give feedback on any language services or accommodations. Having open and ongoing communications between the client and the responsible staff member is ideal (e.g., asking whether an interpreter was a good fit at a particular meeting in order to determine whether to rehire the interpreter). Law offices should also consider creating a short notice to clients that they can complain or give other feedback to the coordinator.

<sup>&</sup>lt;sup>42</sup>This cost is based on New York Lawyers for the Public Interest's search for testing companies in U.S. cities. Because all of the testing companies' services can be processed electronically, finding a company in your particular city or state is unnecessary.

5. Develop a System to Collect Data. Along with training all staff members to ensure consistency in the implementation of office policies, law offices should ensure coordination among multiple staff members who may be in touch with the same client with limited English proficiency or a disability. One way is to create a short, mandatory field in the office case management program that simply asks for the client's primary language and whether the client requires an interpreter. Thus anyone who opens the client's file is aware of the client's needs and can act accordingly before calling or mailing any written materials to the client. And the coordinator can periodically compare client demographics with the surrounding community demographics; this can help identify gaps in outreach to particular communities.

### . . .

Effective communication with diverse clients requires that law offices maintain consistent, quality, and flexible procedures. The five steps described above should help lawyers achieve effective communication with their clients who have limited English proficiency or disabilities.



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