In enacting the Americans with Disabilities Act ("ADA"), Congress found:

Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities; . . .

Title III of the ADA establishes a right to equal access to public accommodations. Both Title III and U.S. Department of Justice ("DOJ") regulations interpreting the ADA specifically include the offices of lawyers in the definition of public accommodation. In addition, Colorado's Rules of Professional Conduct ("Colo.RPC" or "Colorado Rules") contain ethical rules that are implicated when representing (or considering representing) a client who is deaf or hearing impaired.

Therefore, attorneys would do well to consider effective communication as both an important civil right and as a necessary component of competent practice. The following questions are posed from the perspective of an attorney in private practice, licensed in Colorado. Through this question and answer format, the article addresses the statutory and ethical duties of attorneys to clients who are deaf or hearing impaired.

Question 1

"Do I have to provide a sign language interpreter during the initial meeting with a potential client who is deaf, even if I ultimately decline to represent the potential client?"

Answer: “Effective communication” is the responsibility of an attorney to any person who seeks his or her services. Just as a ramp will allow a person who uses a wheelchair for mobility to access a building, effective communication through the provision of a sign language interpreter ensures that an individual who is deaf will enjoy access to services offered to the public. Moreover, under the ADA, it is not adequate to have a uniform policy of writing a declination/rejection letter, expecting that this will suffice for an individual who communicates by sign language. This is because Title III requires that a public accommodation provide equal access (distinguished from a uniform policy that may disproportionately and negatively impact individuals with disabilities) to all benefits of a service, such that the access is equal to that afforded to other individuals.

Fluency in sign language does not indicate fluency in English or literacy. Many individuals who are deaf use American Sign Language ("ASL") “... as their primary language and means of communication.” Although derived from English, ASL is a distinct language, “with a separate historical tradition, and separate morphological and syntactic principles of organization.” Again, under ADA requirements for effective communication, it is the lawyer's duty to assess whether the recipient of his or her declination/rejection letter can understand what is written.

Once the lawyer has determined that the would-be client requires an interpreter for effective communication, the attorney must provide one, unless an undue burden would result (see the answer to Question 2 for a discussion of “undue burden”). It is normally acceptable to set an appointment through the use of written notes (if the person understands that communication). The DOJ (analyzing 28 C.F.R. § 36.303 regarding “auxiliary aids”) directs: “The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.”

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Furthermore, the DOJ emphasizes that the ADA does not limit the requirements for the provision of interpreter services to the most extreme circumstances. Instead, the DOJ indicates that a wide range of communications involving health, legal matters, and finance may be sufficiently lengthy or complex to require the provision of interpreter services. It is an effective practice for all lawyers to contact interpreters well in advance of receiving contact by an individual who is deaf so as to learn appropriate retainer procedures.

**Question 2**

“Assume I agree to represent an individual who is deaf and who uses a sign language interpreter for effective communication. What if it becomes apparent that the case is more complex than expected and will incur many times the cost of interpreting than was originally or reasonably expected?”

**Answer:** Over time, as different protected classes come to more full participation in our society, lawyers accept the costs of participation as a natural and necessary part of “overhead” expenses. Not coincidentally, this is the perspective on costs formalized in the ADA. The costs of participation are not specific to an individual, but general to us all as part of the cost of doing business. In determining whether an “undue burden” exists, it is inappropriate to compare the cost of an interpreter with the payment received from a client. The appropriate comparison is between the cost of the interpreter and the resources or overhead of the organization.

As long as the cost of the interpreter is not unduly burdensome, attorneys must provide for effective communication. Even if the cost becomes unduly burdensome (for more on “undue burden,” see the answers to Questions 5 and 7 below), there are other considerations that may limit an attorney’s ability to decline to provide an interpreter (for example, the Colorado Rules noted in the answer to Question 10 below—Colo.RPC 1.14, 1.3, and 1.4).

**Question 3**

“May a family member or member of the law firm use sign language for an individual who is deaf or may e-mail or other written communication be used to keep interpreter costs down?”

**Answer:** Even if a family member would like to interpret for a relative, it is not likely to be effective. First, the family member may be in a poor position to interpret because that person’s own emotions may filter and skew the communication. Also, considerations of confidentiality may adversely affect the ability of a family member to interpret effectively. Moreover, if a member of the law firm signs, he or she may not have the expertise to ascertain how effective the interpretation will be. Consider this DOJ guidance:

Signing and interpreting [are] not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change their signed or fingerspelled communication into spoken words. The interpreter must be able to interpret both receptively and expressively.

In terms of accurately relaying crucial legal terms and concepts, only a professional interpreter who is trained and experienced in the sign language understood by the individual may be effective. The interpreter also must be able to use any necessary specialized vocabulary accurately and impartially. This DOJ guidance suggests that signing “pretty well” is insufficient to meet the specific requirements for effective interpreting and communication.

Written communications may be used, as long as the communication is effective. If the individual is literate and desires to communicate through writing, the ADA is satisfied. However, the attorney may not provide a different, lesser, or segregated service because he or she is using writing for communication. Each situation merits a case-by-case analysis regarding need for effective communication, as illustrated by the DOJ, as follows:

**ILLUSTRATION 2A:** H goes to his doctor for a bi-weekly check-up, during which the nurse records H’s blood pressure and weight. Exchanging notes and using gestures are likely to provide an effective means of communication at this type of check-up.

**BUT:** Upon experiencing symptoms of a mild stroke, H returns to his doctor for a thorough examination and battery of tests and requests that an interpreter be provided. H’s doctor should arrange for the services of a qualified interpreter, as an interpreter is likely to be necessary for effective communication with H, given the length and complexity of the communication involved.

**Question 4**

“In terms of choosing an interpreter, must I provide the individual’s choice of interpreters and must an interpreter be certified for legal matters?”

**Answer:** Although it is not mandatory that an individual’s choice of interpreter be provided, consultation with the person with a disability is strongly encouraged, especially because the individual then will likely inform the service provider about his or her specific needs for effective communication. Once this is known, a trained, experienced interpreter should be able to effectively convey meaning between client and attorney. An interpreter should provide his or her qualifications to the attorney and let the attorney know if he or she is unable to aid effectively in communication. As for certification:

The key question in determining whether effective communication will result is whether the interpreter is “qualified,” not whether he or she has been actually certified by an official licensing body. A qualified interpreter is one who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary. An individual does not have to be certified in order to meet this standard. A certified interpreter may not meet this standard in all situations, e.g., where the interpreter is not familiar with the specialized vocabulary involved in the communication at issue.

**Question 5**

“If I represent one person who is deaf and provide an interpreter, will I have to provide an interpreter for every other deaf client who walks through my door, even if I can’t afford the expense?”

**Answer:** The ADA requirements may lead an attorney to maintain an ongoing cost/burden analysis, and may ultimately result in the attorney declining to represent an individual, based on that burden assessment. However, even given an occasional turndown, referrals by past clients to others who are deaf may still prove to be a positive and productive source of clients.
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A basic premise of the ADA is that a public accommodation may not exclude a would-be client because that person has a disability. Moreover, it is not lawful under the ADA to decline services based on an expectation that the client will refer others who may cause the attorney to incur undue expense. In other words, the “undue burden” standard for declining to provide an interpreter is specific to the individual with a disability and the cost of his or her auxiliary aid (interpreter). The Colorado Bar Association (“CBA”) advises individuals who are seeking a lawyer to “ask friends or relatives who have used a lawyer, ...” for a referral. Certainly, individuals who are deaf are likely to prefer an attorney who has experience serving a client who is deaf.

If an attorney anticipates an undue financial burden (considering the appropriate factors) in connection with the provision of a sign-language interpreter, he or she may lawfully decline representation. However, an attorney who refuses services due to a legitimate undue burden analysis should consider how and when it might become possible to represent an individual and provide an interpreter in the future, because the ADA consistently requires a case-by-case inquiry.

**Question 6**

“If state or federal courts are required to provide interpreters for hearings and trials, does that mean I must provide an interpreter too?”

**Answer:** State and federal courts are required to provide interpreters to participants of any kind, including plaintiffs, defendants, witnesses, jurors, and observers. The Guidelines adopted by the Judicial Conference of the Administrative Office of the United States cover federal courts, and Section 504 of the Rehabilitation Act of 1973 as well as Title II of the ADA cover state courts. Additionally, the Colorado Revised Statutes require the “appointment” of interpreters for “the hearing-impaired” in certain state court proceedings.

Although this state statute allows an individual to make a written waiver of his or her right to an interpreter, none of the civil rights statutes discussed in this article offers a waiver procedure. An interpreter provided by a court need not continue to interpret for a client or attorney outside of the courtroom. Although a court may allow this extra service by an interpreter, the hallway negotiation that is frequently an essential part of the successful resolution of legal matters is within the scope of the attorney’s service. The attorney is therefore responsible for providing an equal service to clients via “effective communication.” The ADA specifically prohibits treating individuals differently or denying services because of the absence of an auxiliary aid (interpreter).

**Question 7**

“As a sole practitioner with low overhead, can’t I argue that any cost is unduly burdensome?”

**Answer:** The “undue burden” standard means “significant difficulty or expense” and is analogous to the statutory definition of “undue hardship” in the employment section (Title I) of the ADA. This test translates generally to a consideration of the overall financial resources of the business and the impact on the business of the provision of an interpreter. As a general rule, no public accommodation is categorically excluded from the ADA’s requirements; therefore, each situation warrants a specific inquiry.

Some readers may remember that the ADA originally contained two exemptions, now expired, for smaller businesses. These exemptions covered: (1) events that occurred before July 26, 1992, in regard to businesses with twenty-five or fewer employees and gross receipts of $1 million or less; and (2) events that occurred before January 26, 1993, in regard to businesses with ten or fewer employees and gross receipts of $500,000, or less.

The DOJ guidance interpreting the “undue burden” factors is indirect, but ample. This DOJ guidance compounds the implicit indications of congressional intent found in the expiration of exemptions for small businesses. Additionally, the DOJ directs that even if the provision of an interpreter would result in an undue burden (excusing the attorney from providing the interpreter), the attorney must provide an alternative auxiliary aid or service, if one exists, that would not result in an undue burden, to ensure that the individual with a disability receives access to services to the maximum extent possible.

**Question 8**

“Would I need to provide an interpreter in a pro bono case?”

**Answer:** Yes, unless such provision would cause an undue burden. The undue burden test does not consider the payment, if any, by the client/customer. The appropriate considerations are the cost of provision in light of the four factors described in Title I of the ADA under the “undue hardship” test as directed by the DOJ. As such, whether a client is paying or represented pro bono is irrelevant. However, see the answer to Question 9, below, for ways to soften the financial impact of providing an interpreter.

**Question 9**

“Are there any ways to soften the financial impact of providing an interpreter?”

**Answer:** There are at least two ways to soften the financial impact of providing an interpreter. First, the CBA established a reimbursement program in 1995 for member attorneys who provide interpreter services. The CBA Board of Governors originally allotted $20,000 for the program. Although the original allotment has been spent, the CBA has provided between $6,000 and $7,000 in 2002 to benefit member attorneys and clients who are deaf. There is currently a $250 per client limit.

Second, the Internal Revenue Code contains a tax incentive for public accommodations that pay or incur expenses for “qualified” sign language interpreters. This “Disabled Access Credit” includes reasonable and necessary amounts paid or incurred to comply with the ADA. The credit is an amount equal to 50 percent of the eligible access expenditures for the taxable year that exceed $250, but not more than $10,250.

An “eligible small business” is defined as a person with gross receipts for the preceding tax year that did not exceed $1 million or, if gross receipts were greater, employed not more than thirty full-time employees during the preceding tax year. Also, such person must elect this provision. The credit may be claimed using IRS Form 8826. As noted above, an important requirement under the ADA is that costs of an interpreter should be considered to be costs of overhead rather than costs of litigation.

**Question 10**

“Other than the ADA and Colorado Civil Rights Act, are there other authorities that would require me to provide an interpreter?”
Conclusion

Effective communication under the ADA is a basic civil right ensuring equal opportunity to participate in the mainstream of American society. An attorney may not refuse to accept a case because the would-be client is deaf. The costs associated with the provision of a sign language interpreter may not be charged to the client. Communication between an attorney and client is of a complex nature, requiring detail and clarity. The provision of a qualified sign language interpreter will allow attorney and client to communicate effectively, leading to both competent representation and an opportunity to participate fully in our legal system.

Sign Language Interpreters are available, usually at an hourly rate, from agencies listed at the following website: http://www.coloradodeaf.com/terps.shtml.

NOTES

1. 42 U.S.C. §§ 12101 et seq.
4. See Colo.RPC 1.14, 1.3, and 1.4.

6. The author will address the role and responsibilities of courts and federal/state/municipal attorneys in a future article.

7. The Legal Center for People with Disabilities and Older People (“The Legal Center”) is the federally mandated and state designated Protection and Advocacy System (“P&A”) for individuals with disabilities. See, e.g., 29 U.S.C. § 794e for an example of P&A authority. Complementing the DOJ’s role of interpreting and enforcing the ADA, 42 U.S.C. §§ 12186(b) and 12206(c), the Legal Center, as do P&As in every state and six territories, protects the legal and human rights of individuals with disabilities through negotiation and litigation.

8. See, e.g., Colo.RPC 1.14 and 1.4 (concerning an attorney’s obligations to communicate); 42 U.S.C. § 12182(b)(2)(A)(iii) (defining discrimination as excluding, denying services, segregating, or otherwise treating differently an individual with a disability because of the absence of auxiliary aids); see also 42 U.S.C. § 12102 (Definitions Section, defining “auxiliary aids” to include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments.”); 28 C.F.R. § 36.104 (Definitions Section, “Qualified interpreter means an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.”) (Emphasis added.); 28 C.F.R. Part 36, App. B (DOJ commentary to the definition of “qualified interpreter”: “This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public accommodation and the individual with disabilities.”).

11. Id.
13. Id.
14. Id.; see also TAM, Title III, supra, note 5, Part 4.3200.
15. 28 C.F.R. Part 36, App. B.
16. Id.
18. See note 32, infra, for the appropriate factors to consider in a cost analysis. See 28 C.F.R. Part 36, App. B, analysis of § 36.104 definition of “undue burden,” explaining that the definition is analogous to the statutory definition of “undue hardship” in employment under § 12111 (10)(B) of Title I of the ADA.
19. For a detailed discussion of a complaint against an attorney for failing to provide a sign language interpreter for a client, see settlement agreement between the United States and attorney Gregg Tirone, posted on the DOJ’s “ADA-Info” website: http://www.usdoj.gov/crt/ada/tirone.htm.
22. 28 C.F.R. § 36.104.
25. TAM, Title III, supra, note 5, 1994 Supp., Illustrations at Part III-4.3200(B).
26. Id.
30. See factors that should be considered in note 32, infra.
31. See the CBA website: http://www.cobar.org, under “For the Public” and “How to Choose and Use a Lawyer.”
32. Appropriate factors for consideration can be found in the DOJ’s analysis of 28 C.F.R. §§ 36.104, 36.303, and 36.309(b)(3), regarding “undue burden,” at App. B. “Undue hardship,” 42 U.S.C. § 12111(10), is determined as follows:
   In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
   (i) the nature and cost of the accommodation needed under this chapter;
   (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
   (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
   (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
33. Id.
36. CRS §§ 13-90-201 et seq.
37. See CRS § 13-90-208. This provision is suspect in that it does not provide a procedure guaranteeing effective communication about the waiver. Moreover, the provision allows a participant to waive what may amount to a procedural due process right. As such, following this state law may violate federal law.
39. See also note 32, supra (factors).
40. 42 U.S.C. §§ 12111(10)(b) and 12181(9). The “readily achievable” standard applicable to physical barrier removal requires consideration of the same factors as the “undue burden” standard, but it requires a lower level of effort on the part of the public accommodation. See DOJ analysis in 28 C.F.R. §§ 36.303 and 36.309(b)(3). See also 28 C.F.R. Part 36, App. B.
42. Given a thorough reading of the TAM for ADA, supra, note 5, Title III, regarding Auxiliary Aids at § III-4.3000.
43. 28 C.F.R. § 36.303(f).
44. Supra, note 32 (factors); see also TAM, Title III, supra, note 5, Part 4.3100.
45. Supra, note 32; 28 C.F.R. § 36.104; see also DOJ analysis at 28 C.F.R. Part 36, App. B, regarding the definition of “undue burden” as defined in § 36.104.
46. 26 U.S.C. § 44.
48. See note 32, supra.
49. CRS §§ 24-34-601 et seq. Although lawyer’s offices are not explicitly listed as public accommodations, the list provided in the Colorado Civil Rights Act is not exhaustive. Id. This state law, if applicable, would add nothing to federal protections already in place, other than important choices of remedies. The topic of remedies under federal or state law is beyond the scope of this article.
50. See, e.g., 28 C.F.R. § 36.303(c)(6) “Effective communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.”