Volume 45
Number 3 *20th Anniversary of the Americans with Disabilities Act*
*pp.*927-965

20th Anniversary of the Americans with Disabilities Act

Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings

Douglas M. Pravda

UNDERSTANDING THE RIGHTS OF DEAF AND HARD OF HEARING INDIVIDUALS TO MEANINGFUL PARTICIPATION IN COURT PROCEEDINGS

Douglas M. Pravda*

Teri Mosier, a deaf lawyer, graduated from the Louis D. Brandeis School of Law at the University of Louisville in 1998, and was admitted to practice in the Commonwealth of Kentucky in 1999.[1] In 2007, Mosier requested that the Commonwealth of Kentucky provide her with a sign language interpreter in order to represent clients in Kentucky's Courts of Justice, the judicial system in the Commonwealth of Kentucky.[2] The Commonwealth of Kentucky, through its Administrative Office of the Courts, refused to provide sign language interpreters for Mosier's court appearances.[3]

Scott Harrison, a lawyer with severe to profound hearing loss, practices criminal law in the State of Florida.[4] Harrison spent more than seven years as an assistant public defender in Florida's Ninth Judicial Circuit, which covers the Orlando area, during which time he handled approximately seventy criminal jury trials using a real-time court reporter provided by the State.[5] Harrison then started a criminal defense practice in central Florida, and, in 2006, requested real-time court reporters to transcribe criminal trials and other hearings in certain judicial circuits. His request was denied.[6]

These are two recent examples in a lengthy and well-documented history of discriminatory treatment against the deaf and hard of hearing in the provision of meaningful access to court services. In 2004, the Supreme Court recognized in *Tennessee v. Lane* that "[t]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to

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1 Mosier v. Kentucky (*Mosier II*), 675 F. Supp. 2d 693, 695 (E.D. Ky. 2009); *see also* TERI L. MOSIER PORTFOLIO, http://www.tlmosier.4t.com (providing biographical background).

2 *Mosier II*, 675 F. Supp. 2d at 695.

3 *Id.*

4 Plaintiff's Second Amended Complaint for Preliminary and Permanent Injunctive Relief and Compensatory Damages ¶¶ 13–15 Harrison v. Office of the State Courts Adm'r, 2007 WL 1576351 (M.D. Fla. filed June 8, 2007) (No. 6:06-cv-1878) [hereinafter Plaintiff's Second Amended Complaint].

5 *Id.* ¶¶ 17, 21.

6 *Id.* ¶ 22.

remedy the problem of disability discrimination."[7] The Court explained that prior to the passage of the Americans with Disabilities Act of 1990 ("ADA"), Congress learned "that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities."[8] A congressional task force "heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service [and] failure of state and local governments to provide interpretive services for the hearing impaired."[9]

For the deaf and hard of hearing, denial of accommodations is often tantamount to denial of access to the courts. A deaf or hard of hearing lawyer like Mosier and Harrison, or a deaf or hard of hearing judge, party, juror, witness, or spectator who is unable to participate in a court proceeding for lack of an appropriate accommodation is plainly denied her right of access to the courts. In enacting the ADA, Congress recognized that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion."[10] The "duty to accommodate," the Supreme Court held in *Lane*, "is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts."[11]

This Article reviews the legal rights of deaf and hard of hearing individuals to appropriate courtroom accommodations. Part I of this Article describes the primary sources of the legal rights of deaf and hard of hearing participants in the judicial system. It discusses the legal rights of the deaf to accommodations in court proceedings under the ADA, the Rehabilitation Act, and the Court Interpreters Act, as well as Judicial Conference policy on interpreters in federal courts. The Department of Justice ("DOJ"), which issues regulations implementing the ADA as it pertains to access to courts, has recently amended its regulations. The new regulations, which became effective March 15, 2011, strengthen the existing rights of the deaf and hard of hearing to courtroom accommodations. Part I also touches on advances in technology and on emerging technologies that permit courts to provide accommodations. The increase in the use and affordability of real-time reporting, in which a deaf or hard of hearing individual can obtain a simultaneous written

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7 Tennessee v. Lane, 541 U.S. 509, 531 (2004).

8 *Id.* at 527.

9 *Id.*

10 *Id.* at 531.

11 *Id.* at 532 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

transcription of court proceedings, has the potential to increase the ability of deaf and hard of hearing participants to access the judicial system. Other significant advances like remote video interpreting (though it will require significant investments in technology) offer the potential to alleviate a pressing problem in the availability of sign language interpreters.

Although the legal rights to accommodations of all deaf and hard of hearing participants in the court system derive from the same laws, there are some variations in those rights depending on the capacity in which the deaf or hard of hearing individual is participating in the legal proceeding: as lawyer, judge, litigant (criminal defendant or party to a civil proceeding), witness, juror, or spectator. Part II of this Article uses recent vignettes, like those of Mosier and Harrison above, to discuss the legal rights of the deaf in each of these capacities. These vignettes explore current issues in the law of courtroom access by the deaf and hard of hearing.

As this Article shows below, the law has come a long way since the days when the deaf were routinely excluded from judicial proceedings. Today, the biggest obstacle to courtroom access for the deaf is lack of knowledge. Many deaf individuals are unaware of their rights to such accommodations. Judges and court clerks are often unaware that the deaf individuals generally have the right to such appropriate accommodations free of charge. Many are unaware of the technologies that are available to provide accommodations to deaf and hard of hearing participants in the judicial system. By highlighting the developments in the law and the technology, this Article aims to increase knowledge in order to ensure deaf and hard of hearing individuals full and equal access to the court system.

I. THE LEGAL RIGHTS OF DEAF AND HARD OF HEARING PARTICIPANTS IN THE JUDICIAL SYSTEM

A. Legal Right to Accommodations in State and Local Courts

The legal rights of deaf and hard of hearing lawyers to obtain accommodations in state courts, such as those in which Mosier and Harrison sought accommodations, are governed by the ADA and the Rehabilitation Act of 1973 ("Rehab Act").[12] Under the ADA and Rehab Act, state and local courts must provide and pay for accommodations for

[12] *See* Marc Charmatz & Antoinette McRae, *Access to the Courts: A Blueprint for Successful Litigation Under the Americans with Disabilities Act and the Rehabilitation Act*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 333 (Fall 2003) (containing a helpful overview of these laws).

deaf participants in legal proceedings, subject only to certain defenses such as unreasonable accommodation and undue burden.

The ADA is a broad remedial statute that is designed to address a long and pervasive history of discrimination against individuals with disabilities in areas such as employment, housing, education, and voting.[13] Title II of the ADA addresses access to public services, including state and local court systems. The anti-discrimination mandate of Title II is that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[14]

This mandate covers courtroom access for the deaf and hard of hearing in state and local courts. First, the provision covers state and local courts. The term "public entity" is defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[15] A state or local court system is an "instrumentality" of a state or local government. The notes to the DOJ's regulations implementing Title II explain that "public entities" include "the judicial branches of State and local governments."[16] Second, this provision covers participation in the legal proceedings in such courts. The "services, programs, or activities" include the legal proceedings that take place in the courtroom. For instance, in a section addressing the provision of auxiliary aids and services, the notes to the DOJ regulations implementing Title II explain that an effective aid for a deaf or hard of hearing individual in a courtroom could include "'computer-assisted transcripts,' which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays."[17]

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13 *See generally* 42 U.S.C. § 12101 (2006).

14 *Id*. § 12132.

15 *Id*. § 12131(1)(A)–(B).

16 28 C.F.R. Part 35, App. A, comment to § 35.102 (2010); *see also* Galloway v. Super. Ct. of D.C., 816 F. Supp. 12, 19 (D.D.C. 1993) (holding that Superior Court was a public entity under Title II of the ADA).

17 28 C.F.R. Part 35, App. A, comment to § 35.160 (2010); *see also* Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998) (exclusion of a mobility-impaired veteran from county quorum court due to his inability to access a second floor courtroom violated the ADA); Gregory v. Admin. Office of the Courts of N.J., 168 F. Supp. 2d 319, 331 (D.N.J. 2001) (finding that hard of hearing person stated a claim under the ADA when state officials denied his request to provide real-time transcription services in court proceedings); Soto v. City of Newark, 72 F. Supp. 2d 489, 494 (D.N.J. 1999) (determining that a municipal court was a "service, program or activity" of a public entity when it conducted weddings at the municipal courthouse); Santiago v. Garcia, 70 F. Supp. 2d 84, 90 (D.P.R. 1999) (finding that a hard of hearing litigant in civil trial stated a prima facie claim under the ADA for exclusion from courtroom proceedings due to inability to follow those proceedings); Matthews v.

Third, this provision covers the participation by deaf and hard of hearing individuals. The term "qualified individual with a disability" is defined as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[18]

A person who is deaf or hard of hearing is an individual with a disability. The ADA defines the term "disability" to include a physical impairment that "substantially limits one or more major life activities" and defines "major life activities" to include "hearing."[19] In the context of courtroom access, the deaf or hard of hearing individual will virtually always be a "qualified" individual with a disability. For instance, the deaf or hard of hearing lawyer seeking accommodations in state or local courts will presumably be licensed or admitted to practice in that court and will therefore meet the "essential eligibility requirements" for participation in court proceedings. Similarly, a deaf litigant or witness also meets the eligibility requirements as he or she is entitled to participate in courtroom proceedings by virtue of his or her status as a plaintiff or defendant or witness in a case. A deaf or hard of hearing juror is "qualified" under the ADA because he or she has been called to serve as a juror.[20]

Like the ADA, the Rehab Act was designed to address discrimination against individuals with disabilities and to provide them with the tools necessary to achieve equality of opportunity and full inclusion in society in areas such as employment, housing, education, voting, and public services.[21] Section 504 of the Rehab Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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Jefferson, 29 F. Supp. 2d 525, 534 (W.D. Ark. 1998) (finding that failure to accommodate paraplegic by scheduling court proceedings in an accessible courtroom violated ADA).

18 42 U.S.C. § 12131(2).

19 *Id.* § 12102(1)(A), (2)(A) (Supp. II 2008).

20 *Cf. Galloway*, 816 F. Supp. at 18–20 (holding that blind persons were "otherwise qualified" to serve as jurors and that District of Columbia superior court's policy of excluding blind persons from jury duty violated the ADA).

21 *See generally* Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2006 & Supp. III 2009).

program or activity receiving Federal financial assistance."[22] In the context of courtroom access, the standards applicable for a Rehab Act claim are identical to those under Title II of the ADA. The only difference is that the Rehab Act applies only to state or local courts that receive federal financial assistance.

B. Legal Right to Accommodations in Federal Courts

Federal courts are not subject to the ADA or the Rehab Act.[23] Instead, the legal rights to accommodations in federal courts are governed by the Court Interpreters Act of 1978 and by judicial policy. Under the Court Interpreters Act, the presiding judicial officer shall appoint an interpreter at court expense "in judicial proceedings instituted by the United States" when the judicial officer determines, either on his own or by motion of a party, that

> such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings . . .
> . . . .
> suffers from a hearing impairment . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[24]

The Act provides no automatic *right* to an interpreter. Rather, it is left to the "presiding judicial officer"—meaning a United States district judge, bankruptcy judge, magistrate judge, or the United States Attorney with respect to grand jury proceedings[25]—to determine whether to provide such an interpreter.[26] In practice, however, the presiding judicial officer's discretion is typically exercised in cases involving requests for foreign language interpreters (which are also covered by the

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22 *Id.* § 504; 29 U.S.C. § 794(a).

23 *See* 29 U.S.C. § 794(a)–(b) (showing that the relevant "program or activity" under the Rehab Act refers only to states and local governments or to any executive agency (not judicial branch) of the federal government); 42 U.S.C. § 12131(1) (showing that the Americans with Disabilities Act defines public entities only in terms of states and local governments).

24 28 U.S.C. § 1827(d)(1) (2006).

25 *Id.* § 1827(i) (defining "presiding judicial officer").

26 *Cf.* United States v. Johnson, 248 F.3d 655, 661 (7th Cir. 2001) (noting, in the context of a request for a foreign language interpreter, that there is no automatic right to an interpreter under the Court Interpreters Act).

Act) where there may be a question as to the degree to which a party or witness understands and communicates in English.[27] With a deaf or hard of hearing party or witness, it is more obvious that the individual's impairment inhibits his comprehension of the proceedings.

The primary limitation of this Act is that it requires an interpreter to be appointed at court expense only in judicial proceedings *instituted* by the United States. The statute therefore covers all federal criminal matters (which must be brought by the federal government), including pretrial and grand jury proceedings, but does not cover most civil matters (which are primarily brought by private litigants, not by the government).[28]

Even where a proceeding is not instituted by the United States, the Act also permits—but does not require—the presiding judicial officer to appoint at court expense

> a certified or otherwise qualified sign language interpreter to provide services to a party, witness, or other participant in a judicial proceeding . . . if the presiding judicial officer determines, on such officer's own motion or on the motion of a party or other participant in the proceeding, that such individual suffers from a hearing impairment.[29]

This provision vests "judicial officers with the discretion to provide sign language interpreters at court expense, subject to the availability of funds, to any participant in any type of judicial proceeding."[30]

A second limitation of this Act is that it requires an interpreter to be appointed at court expense only for a party or for a witness. The Act permits an interpreter to be appointed at court expense for "other participant[s] in a judicial proceeding" if "such individual suffers from a hearing impairment," but again does not require the appointment of an interpreter for such other participants.[31]

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27 *E.g.* United States v. Black, 369 F.3d 1171, 1174–75 (10th Cir. 2004) (denying interpreter for witness who asked to testify in Navajo language because witness was able to give clear and responsive answers in English throughout her testimony).

28 *See* 28 U.S.C. § 1827(j) ("[J]udicial proceedings instituted by the United States" include all such proceedings "whether criminal or civil, including pretrial and grand jury proceedings conducted in, or pursuant to the lawful authority and jurisdiction of a United States district court" (parenthetical omitted)).

29 § 1827(*l*).

30 S. REP. No. 104–366, at 35 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4215.

31 28 U.S.C. § 1827(*l*). Defendants who have been denied an interpreter request under the Court Interpreters Act have appealed that denial on the grounds that the presiding judicial officer abused his discretion. *See, e.g.*, United States v. Johnson, 248 F.3d 655, 659–

This law has been supplemented by official federal policy of the Administrative Office of the United States Courts. In September 1995, "the Judicial Conference adopted a policy that all federal courts provide reasonable accommodations to persons with communications disabilities" and directed the Administrative Office of the United States Courts to develop written guidelines to implement this policy.[32] The written guidelines prepared by the Administrative Office of the United States Courts and adopted by the Judicial Conference in March 1996, provide the following: "Each federal court is required to provide, at judiciary expense, sign language interpreters or other appropriate auxiliary aids or services to participants in federal court proceedings who are deaf, hearing-impaired, or have other communications disabilities."[33] Under the federal policy, "'[c]ourt [p]roceedings' include trials, hearings, ceremonies and other public programs or activities conducted by a court," and "'[p]articipants' in court proceedings include parties, attorneys, and witnesses."[34]

C. What Accommodations Are Required?

These laws provide that the deaf and hard of hearing have legal rights to obtain accommodations in court proceedings. But to what accommodations are the deaf or hard of hearing participants entitled? In state and local courts, where accommodations are governed by the ADA and the Rehab Act, the DOJ regulations implementing Title II explain what public entities must do to comply with the anti-discrimination mandate that a public entity may not exclude a qualified individual with a disability from participation in or deny the benefits of their services, programs, or activities. Two provisions are particularly relevant to the issue of courtroom access. First, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the

63 (7th Cir. 2001) (finding that the district court did not abuse its discretion under the Court Interpreters Act by failing to appoint a second interpreter to enable non-English speaking defendants to communicate with counsel while the first interpreter was interpreting the ongoing court proceedings).

32 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13–14 (Mar. 12, 1996), *available at* http://www.uscourts.gov/judconf/96-Mar.pdf.

33 JUDICIAL CONFERENCE OF THE U.S., GUIDE TO JUDICIARY POLICIES AND PROCEDURES, vol. 1, ch. III, pt. H, at 37–39 (Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities) [hereinafter JUDICIAL CONFERENCE GUIDELINES], *available at* http://www.nad.org/issues/justice/courts/communication-access-federal-courts.

34 *Id.*

modifications would fundamentally alter the nature of the service, program, or activity."[35] Second, "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."[36]

The ADA defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[37] The DOJ recently amended its regulations implementing Title II of the ADA. The amended regulations, which took effect March 15, 2011, set forth a number of specific examples of "auxiliary aids and services," including

> [q]ualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.[38]

A number of these "auxiliary aids and services" are particularly appropriate for courtroom settings. Qualified sign language interpreters who are familiar with legal concepts and can communicate them in sign language will often be the most effective auxiliary aid for a deaf or hard of hearing individual who primarily communicates in sign language. Real-time computer-aided transcription services are effective for those with appropriate reading comprehension skills. Assistive listening systems or devices, such as infrared systems or FM systems, could be appropriate for others who have some degree of hearing. Oral

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35 28 C.F.R. § 35.130(b)(7) (2010).

36 *Id.* § 35.160(b)(1).

37 42 U.S.C. § 12102(1) (2006).

38 Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,177 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

interpreters could be an effective accommodation for those who lipread but lack strong reading comprehension skills.

The DOJ regulations provide that the public entity must give "primary consideration" to the type of accommodation requested by the individual with the disability in determining what accommodation is appropriate.[39] It would not help a deaf person who lipreads and does not communicate in sign language, for instance, for a public entity to provide that person with a sign language interpreter. Likewise, real-time transcription might not be an appropriate accommodation for a person who communicates in sign language and is far more accustomed to receiving information in sign language than any other method. Thus, the public entity must provide deference to the type of accommodation requested by the deaf or hard of hearing individual in order to ensure that the accommodation provided is appropriate to the person making the request.

The amended DOJ regulations set forth that required level of deference:

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.[40]

The cost of these accommodations must be borne by the public entity, not by the deaf or hard of hearing lawyer seeking the accommodation. As the DOJ regulation explains, "[a] public entity may not place a

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[39] 28 C.F.R. § 35.160(b)(2).

[40] Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,184. The amended regulations also provide that "[a] public entity shall not require an individual with a disability to bring another individual to interpret for him or her" and "shall not rely on [any] adult accompanying [the] individual with a disability [to provide interpreting services], except . . . [w]here the individual with [the] disability specifically requests that the accompanying adult [provide the services and such interpreting would be] appropriate under the circumstances." *Id*.

surcharge on a particular individual with a disability . . . to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual . . . with the non-discriminatory treatment required by the Act."[41]

The federal Judicial Conference policy covering accommodations in federal courts is similar to the ADA. Under the federal policy, the definition of "auxiliary aids and services" tracks that under the ADA by instructing federal courts to provide "qualified interpreters, assistive listening devices or systems, or other effective methods of making aurally delivered materials available to individuals with hearing impairments" and to give "primary consideration to a participant's choice of auxiliary aid or service."[42] The policy defines "primary consideration" to mean that

> the court is to honor a participant's choice of auxiliary aid or service, unless it can show that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration in the nature of the court proceeding or in undue financial or administrative burden.[43]

The federal policy also mentions computer-assisted real-time reporting. The policy explains that where a court determines such real-time reporting to be appropriate, it "is one of the services that may be provided under these guidelines."[44] However, the policy explains that such real-time reporting is limited to the purpose of providing accommodations for those with communications disabilities. It is not intended to serve as an official court record and is not required to offer features such as key word searches for the benefit of the attorneys or parties using the service.[45]

D. New or More Advanced Accommodations Are Now Available

Many accommodations that are available to deaf and hard of hearing participants in the judicial system today have been available for many years. Sign language interpreters, notetakers, open and closed captioning, and other similar accommodations have been used for years

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41 28 C.F.R. § 35.130(f).
42 JUDICIAL CONFERENCE GUIDELINES, *supra* note 33.
43 *Id.*
44 *Id.*
45 *Id.*

to allow deaf people to access the court system. However, a number of new technologies have emerged or become significantly more advanced in the last decade that, if properly made available, could ensure that no deaf or hard of hearing individual will lack the ability to participate meaningfully in courtroom proceedings.

1. Real-Time Transcriptions

One significant development is the advent of real-time transcription services, such as Communication Access Realtime Translation ("CART"). A real-time transcription is a near simultaneous written transcript of the proceedings. The provider uses stenography shorthand to capture everything that is said in the courtroom. Computer software, such as LiveNote or CaseView programs, converts that shorthand into standard English. The recipient can view the resulting transcription on a computer screen in real time.[46] While real-time transcription is used in classrooms, conferences, and conventions, and to caption live television broadcasts, Broadway plays, and sporting events, this technology is particularly appropriate for use in a courtroom setting. In many courts, court reporters already record proceedings by stenographic means in order to prepare verbatim transcripts of court proceedings. With the appropriate hardware and software, the court reporter could provide the transcription of the proceedings in real-time for the benefit of deaf and hard of hearing participants.[47]

It has become more and more common in recent years for lawyers and judges who are not deaf to use real-time transcriptions during court proceedings. A judge can use a real-time transcription to look back at earlier testimony during a lawyer's examination of a witness. A lawyer can make a private annotation on the real-time transcription for use during cross-examination, closing argument, or jury instructions.[48]

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[46] *See Communication Access Realtime Translation*, NAT'L CT. REPS. ASS'N, http://ncraonline.org/NR/rdonlyres/6556B2C5-B5DB-4DD9-8393-743EFE5933A4/0/CARTmarketingbrochure.pdf (last visited Feb. 3, 2011) (providing a brochure that gives a useful overview of realtime captioning and CART services).

[47] *See Certified Realtime Reporter (CRR)*, NAT'L CT. REPS. ASS'N, http://ncraonline.org/certification/Certification/crr/default.htm (last visited Feb. 3, 2011) (explaining what a certified real-time reporter service is and how it functions). Not every court reporter can provide a meaningful real-time feed. To provide an effective real-time transcript, a reporter must be able to provide a high degree of accuracy on the fly without going back to correct errors. *See id.* (explaining that the National Court Reporters Association requires 96% accuracy for five minutes at a speed of 180 words per minute for a court reporter to be certified as a real-time reporter).

[48] *See* Fredric I. Lederer, *Wired: What We've Learned About Courtroom Technology*, 24 CRIM. JUST. 18, 23 (2010) (explaining the benefits of courtroom technology).

Many lawyers now use real-time transcription services at depositions to get a live transcript of the deponent's testimony.

In short, independent of the benefit such transcriptions provide for a deaf or hard of hearing individual, these real-time transcriptions are becoming much more prevalent throughout the legal profession. As a result, the services offered by real-time reporters are becoming increasingly available and are not limited to situations in which a full-time court reporter is present in a courtroom to record the proceedings. Even courts that do not routinely record proceedings via use of court reporters can hire them on an as-needed basis to provide transcription services for the deaf. Such services can also be provided remotely, by court reporters not physically present in the courtroom. Automated real-time transcription is a work-in-progress, but it offers the promise of making real-time transcriptions available to more individuals at substantially lower costs.[49]

With emerging technologies, however, come significantly more advanced technological know-how to operate them. Real-time transcription requires that the court reporter's stenography machine "talk to" the laptop computer on which the deaf individual is reading the real-time transcription. Based on personal experience, if the program does not work at the outset, the court reporters and court technical specialists are not always able to get the transcription program to work. This problem, however, should disappear with more frequent training and experience in these programs.

2. Remote Video Interpreting

A second significant development has been the rise of remote interpreting services. Sign language interpreters have long been used in courtrooms to provide accommodations to those who communicate via sign language. But one of the biggest problems confronting those who need such interpreters is their lack of availability. A deaf defendant who shows up in court for arraignment may find that there is no sign language interpreter available at that time to provide interpreting services. Remote video interpreting obviates the need for a court system to have a qualified sign language interpreter on-site or on-call at all times by permitting use of interpreters who are in a different location.

The amended DOJ regulations implementing Title II specifically recognize video remote interpreting as an appropriate auxiliary aid and service. Those regulations make clear, however, that the video and audio feed must be sufficient to permit "high-quality video images."

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[49] *Id.*

The regulation provides that a public entity that chooses to provide remote interpreting services

> shall ensure that it provides—
>
> (1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
>
> (2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
>
> (3) A clear, audible transmission of voices; and
>
> (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the [remote video services].[50]

Although remote video interpreting obviates the need for a sign language interpreter to be physically present and therefore could make remote interpreting more widespread, it requires that the public entity make a significant investment in technological capabilities in order to meet the standard set forth in the DOJ regulations.

3. Assistive Listening Technology

A deaf or hard of hearing lawyer may also be able to use assistive listening devices to practice in a courtroom. In a recent article, a deaf lawyer with a cochlear implant described handling a bench trial using assistive listening devices. The judge and witnesses spoke into microphones placed in front of them, while opposing counsel used portable wireless microphones that could be clipped onto their ties or suit jackets. Each of these microphones broadcast to an infrared transmitter, which in turn transmitted to a portable receiver connected to the speech processor of the deaf lawyer's cochlear implant.[51]

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[50] Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,184 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

[51] *See* Brian D. Sheridan, *Hearing at the Hearing: Using Assistive Listening Technology in the Courtroom*, 84 MICH. B.J. 32, 33 (2005).

Other similar assistive listening devices are available and can be modified in ways specific to the individual recipient. For instance, if the deaf lawyer used a hearing aid rather than a cochlear implant, the transmission from the infrared transmitter could have fed into a neckloop, which allows a hearing aid containing a telecoil (or T-coil) switch to pick up the transmission.[52] While amplification and FM technologies are not new, the advances in wireless technology and the clarity of the sound that is being transmitted make this a much better option for those who are deaf or hard of hearing than it was in the past.

4. Universal Design Principles

Courtrooms today are being designed or retrofitted with "universal design" principles in mind, meaning that all participants can take advantage of the technologies offered.[53] Many trial courtrooms, particularly in federal courts across the country, are now high-tech. They have flat-screen monitors for counsel, judges, witnesses, and often jurors to view presentations in opening and closing statements, documents shown to the witnesses, and other evidence presented at trial.[54] These technologies allow all participants in the courtroom—whether deaf or hearing—to benefit. As noted above, some courtrooms offer real-time captioning to all participants, including the lawyers, judges, and jurors. Thus, regardless of whether a deaf or hard of hearing person is a participant in the court proceeding, all participants can take advantage of the real-time transcription to read as well as hear the testimony of a witness.

The deaf lawyer with the cochlear implant who used assistive listening technology at trial noted that the transmission that was fed to his cochlear implant was also transmitted to loudspeakers placed around the courtroom, thus benefiting all the people in the courtroom, including the court reporter and spectators.[55] The lawyer also noted that the court subsequently acquired additional wireless microphones and has used them in trials not involving any deaf or hard of hearing individuals because they provide for greater ease in understanding what others have said.[56]

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52 *Id.*

53 *See* Peter Blanck, Ann Wilichowski & James Schmeling, *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 825, 836 (2004).

54 *See* Lederer, *supra* note 48, at 19–20 (reporting an estimate from the Department of Justice that 95% of federal trial courtrooms are high-tech).

55 Sheridan, *supra* note 51, at 33.

56 *Id.*

Although these technologies are now more widely available and new state of the art technologies for providing accommodations will emerge, the DOJ regulations do not mandate that public entities adopt new and emerging technologies to provide accommodations. In the notes to the definition of "auxiliary aids and services," the DOJ regulation notes that "although the definition [of auxiliary aids and services] would include 'state of the art' devices, public entities are not required to use the newest or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication."[57]

II. THE LAW AS APPLIED TO DEAF AND HARD OF HEARING PARTICIPANTS

A. The Deaf and Hard of Hearing Lawyer

In 2007, it was reported that there are at least 170 deaf lawyers practicing in the United States.[58] That number is likely to grow substantially as the legal rights enshrined in the ADA have produced a new generation of deaf and hard of hearing individuals with greater access to education and other resources and who are now attending and graduating from law school in greater numbers than ever before. Given the relatively few deaf lawyers, it is not surprising that Kentucky and Florida (the states in which Mosier and Harrison requested accommodations) do not have established policies for providing accommodations to deaf and hard of hearing lawyers. Nevertheless, the ADA and the Rehab Act plainly require the states to provide such accommodations.

At the time that she first requested a sign language interpreter for court appearances, Mosier worked for Kentucky's Department of Public Advocacy.[59] Initially and for three months thereafter, the Kentucky Office of Vocational Rehabilitation provided sign language interpreters for Mosier's court appearances.[60] At the end of those three months, however, Kentucky refused to provide further sign language interpreters for Mosier's court appearances.[61] Mosier later left the Department of Public Advocacy and became a solo practitioner.[62] In 2008, Mosier brought a complaint against the Commonwealth of Kentucky, its

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57 28 C.F.R. Part 35, App. A, comment to § 35.104 (2010).

58 *See, e.g.*, Mike, *Deaf Judges*, KOKONUT PUNDIT (July 15, 2007, 1:18 AM), http://kokonutpundits.blogspot.com/2007/07/deaf-judges.html.

59 Mosier v. Kentucky (*Mosier II*), 675 F. Supp. 2d 693, 695 (E.D. Ky. 2009).

60 *Id.*

61 *Id.*

62 *Id.* at 696.

Administrative Office of the Courts, and several individuals in their official capacities for failing to provide qualified sign language interpreters for her court appearances. Mosier sought injunctive and monetary relief under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.[63] The Commonwealth of Kentucky raised a multitude of defenses in two motions to dismiss and a motion for summary judgment, all of which were rejected.

First, defendants argued that a Kentucky statute that authorizes interpreters for the deaf or hard of hearing provides that such qualified interpreters shall be provided for those who are "parties, jurors, or witnesses."[64] Based on this statute, defendants argued that it could not provide interpreters for "attorneys." Indeed, the Administrative Office of the Kentucky Courts had adopted an administrative policy that it does "not provide interpreting services for attorneys, public defenders, law enforcement officers, jail officials, other state agency employees, social workers or mental health workers."[65] The court rejected this argument, finding that a different Kentucky statute required recipients of government funding to ensure equal access for individuals with a disability and that it would make no sense to require the government to provide such access but not to authorize the expenditure necessary to comply with the statute.[66]

Second, defendants argued that Mosier's claims fell within Title I, rather than Title II, of the ADA and that her employer was therefore obligated to provide her with accommodations.[67] Since Mosier was self-employed, the argument boiled down to the contention that Mosier should bear the cost of her own accommodations. The court rejected that argument, finding that Mosier's claim was properly asserted under Title II because the broad language "services, programs or activities" under Title II encompassed the court proceedings for which she sought accommodations.[68]

Third, defendants argued that Mosier's ADA claim was barred by the Commonwealth of Kentucky's sovereign immunity.[69] The Eleventh Amendment grants the States immunity from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens

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63 *Id.* at 694.

64 Memorandum in Support of Defendants' Joint Motion to Dismiss at 3–4 *Mosier II*, 675 F. Supp. 2d 693 (No. 08-CV-184-KSF) (citing KY. REV. STAT. ANN. § 30A.410(1) (2008)).

65 *Mosier II*, 675 F. Supp. 2d at 695.

66 Mosier v. Kentucky (*Mosier I*), 640 F. Supp. 2d 875, 878 (E.D. Ky. 2009) (citing KY. REV. STAT. ANN. §§ 344.120–.130 (2008)).

67 *Id.*

68 *Id.* at 878–79.

69 *Mosier II*, 675 F. Supp. 2d at 699.

or Subject of any Foreign State."[70] Despite the absence of any reference to immunity for suits brought by a State's own citizens for violations of federal law, the Supreme Court has interpreted the Eleventh Amendment to grant such immunity based on the sovereignty the States enjoyed prior to the Constitution's ratification, so long as the States have not consented to such a suit.[71]

The Eleventh Amendment does not bar suits by citizens against state officials for prospective injunctive relief.[72] The *Mosier* court therefore rejected the Commonwealth's claim of immunity as a defense to Mosier's request for injunctive relief.[73] The Eleventh Amendment also does not bar suits by citizens against States for money damages in the area of access to judicial services pursuant to Title II of the ADA. The Supreme Court considered this precise question in 2004 in *Tennessee v. Lane*. In *Lane*, a paraplegic was scheduled to appear in court to answer criminal charges.[74] He arrived at the courthouse at the time of his scheduled appearance, but the courtroom was on the second floor of a county courthouse that had no elevator.[75] After Lane refused to suffer the indignity of crawling or being carried up the stairs (as he had for a prior hearing), he was arrested and jailed for failure to appear at his hearing.[76] Lane subsequently sued the State for money damages under Title II of the ADA. Based on its findings that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" and that decisions of other courts had "demonstrate[d] a pattern of unconstitutional treatment in the administration of justice,"[77] the Supreme Court held that Congress had validly abrogated state sovereign immunity "as it applies to the class of cases implicating the fundamental right of access to the courts."[78] Thus,

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70 U.S. CONST. amend. XI.

71 *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72–73 (2000); Alden v. Maine, 527 U.S. 706, 710–13 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of [their] sovereignty . . . .").

72 Edelman v. Jordan, 415 U.S. 651, 664 (1974).

73 *Mosier II*, 675 F. Supp. 2d at 699.

74 541 U.S. 509, 513 (2004).

75 *Id.* at 513–14.

76 *Id.* at 514.

77 *Id.* at 524, 525 (citing, for example, Ferrell v. Estelle, 568 F.2d 1128, 1132–33 (5th Cir. 1978) (deaf criminal defendant denied interpretive services), *opinion withdrawn as moot*, 573 F.2d 867 (5th Cir. 1978); State v. Schaim, 600 N.E.2d 661, 672 (Ohio 1992) (same); People v. Rivera, 480 N.Y.S.2d 426, 434 (N.Y. Sup. Ct. 1984) (same)).

78 *Id.* at 533–34.

the *Mosier* court, applying the holding of *Tennessee v. Lane*, held that Congress had validly abrogated the Commonwealth's immunity from suit in cases "implicating the accessibility of judicial services," and therefore Mosier could bring a claim against the Commonwealth for money damages for a violation of Title II of the ADA.[79]

Fourth, the defendants in Mosier argued that they did not *intentionally* discriminate against Mosier based on her disability, but rather based on her status as an attorney because they were statutorily barred from providing interpreting services to anyone not a party, witness, or juror.[80] The court rejected this argument, holding that a showing of discriminatory intent was not necessary to sustain a claim for violation of the ADA.[81] Discriminatory intent is necessary only to sustain a claim for monetary damages under the ADA, not a claim for injunctive relief.[82]

Fifth, defendants argued that the Rehab Act claim failed because Mosier could not meet the requirement that she was denied an interpreter solely because of her disability as opposed to her status as an attorney.[83] The court held that Mosier's claim was based on her being treated differently than hearing attorneys with regard to access to court services, and that whether defendants discriminated against her on the basis of her disability was a question for the trier of fact.[84]

Mosier also moved for summary judgment on her own claims for declaratory and injunctive relief. The court held that Mosier qualified for protection under the ADA and the Rehab Act, rejecting defendants' argument that Mosier was not entitled to such accommodations as an attorney.[85] The court left for trial, however, the questions of whether Mosier's requested accommodation was a reasonable one and whether the State's services were "readily accessible to and useable by individuals with disabilities."[86]

Following the court's ruling, the parties reached a settlement of Mosier's claim. Without admitting any violation of the ADA or Rehab

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79 Mosier v. Kentucky (*Mosier II*) , 675 F. Supp. 2d 693, 699 (E.D. Ky. 2009).

80 Mosier v. Kentucky (*Mosier I*), 640 F. Supp. 2d 857, 877–78 (E.D. Ky. 2009).

81 *Id.* at 878.

82 *See, e.g.*, Duvall v. County of Kitsap, 260 F.3d 1124, 1138 (9th Cir. 2001).

83 *Mosier II*, 675 F. Supp. 2d at 698–99.

84 *Id.* Defendants also made a variety of procedural arguments not discussed here, all of which were rejected. *See* Mosier v. Kentucky, No. 08-184-KSF, 2008 WL 4191510, at *2–3 (E.D. Ky. Sept. 11, 2008) (denying motion to dismiss for failure to state a claim for relief under the ADA or the Rehab Act); *Mosier II*, 675 F. Supp. 2d at 696–97 (denying motion for summary judgment based on lack of standing); *id.* at 697–98 (denying motion for summary judgment on statute of limitations grounds).

85 *Mosier II*, 675 F. Supp. 2d at 700.

86 *Id.* at 701.

Act, the defendants—as well as Mosier—recited that they entered into the settlement agreement "to further enhance access to the court system for persons who are deaf or hard of hearing."[87] As part of the settlement, the Kentucky Courts of Justice agreed to change their accommodations policy to "provide interpreting services or auxiliary aids and services, at its own expense, for eligible attorneys, but only for in-court proceedings and court-ordered proceedings in which court personnel are directly involved."[88] An "eligible attorney" is defined as "an attorney who is a qualified individual with a disability under the ADA because he or she is deaf or hard of hearing and who has complied with the procedures promulgated by the [Kentucky Courts of Justice] for requesting an interpreter or auxiliary aids."[89] The settlement provides that the presiding judge in a court proceeding in which an eligible attorney requests accommodations may request written documentation establishing that the attorney is disabled within the meaning of the ADA.[90] As under the ADA regulations, "the Presiding Judge will give primary consideration to the specific auxiliary aid or service requested by that attorney," but the eligible attorney must engage in an interactive process with the court to permit the presiding judge to evaluate how to provide interpreting services or auxiliary aids and services.[91]

Interestingly, and consistent with defendants' argument that Mosier's employer should pay for the accommodation under Title I of the ADA, the settlement agreement permits the Administrative Office of the Courts to ask for reimbursement from the eligible attorney's employer, though it does not guarantee that any reimbursement will be provided.[92] Mosier herself was deemed to have qualified as an eligible attorney without the need to submit verifying documentation confirming her disability, to have permanently established the need for interpreting services or auxiliary aids, and to be provided interpreting services or

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87 Settlement Agreement and General Release of All Claims, Recitals at E, *Mosier II*, 675 F. Supp. 2d 693 (No. 08-CV-184-KSF) [hereinafter Mosier Settlement Agreement].

88 *Id.* at Covenants at II.B.1.

89 *Id.* at II.B.3.

90 *Id.* at II.B.4.

91 *Id.* at II.B.6–7.

92 *Id.* at II.B.11. Because Title I of the ADA requires an employer (who falls within the definition provided in the ADA) to provide reasonable accommodations to its employees, see 42 U.S.C. § 12112(a) & (b)(5)(A), the Administrative Office of the Courts evidently believes that the employer should accept joint responsibility for the provision of accommodations. The ADA does not provide any guidance on the question of joint responsibility.

auxiliary aids pursuant to the revised policy.[93] Mosier also received a payment of $120,000 from defendants as part of the settlement.[94]

Like Mosier, Harrison brought an ADA claim after denial of his request for real-time transcription. In his criminal defense practice, Harrison requested and received real-time court reporters to transcribe criminal trials and other hearings in the First, Seventh, and Tenth Judicial Circuits.[95] However, he was denied similar accommodations in the Ninth and Eighteenth Judicial Circuits.[96] In December 2006, Harrison brought suit against the Office of the State Courts Administrator and various related individuals and entities for failure to provide real-time court reporters for Harrison's criminal trials and court appearances. Harrison sought injunctive and monetary relief for violations of the Americans with Disabilities Act of 1990.[97]

Harrison moved for a preliminary injunction seeking a court order directing that defendants provide him with a real-time court reporter for state court criminal jury trials until the court made a final ruling.[98] The court denied his request, finding that he had not established a likelihood of success on the merits.[99] The court also found that he had not established a likelihood of irreparable injury because he had failed to provide evidence of any upcoming jury trials in which he would need accommodations.[100]

Like Mosier, Harrison settled his case with the state. Without admitting any liability or any violation of the ADA, the State of Florida agreed to provide Harrison with "Real-time Transcription Services" at its own expense "in criminal trials in county and circuit court" and to ensure that the court reporter "shall provide a laptop and all connectivity to Plaintiff for use in the criminal trial."[101] The agreement

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93 *Id.* at II.B.4, 6, 8 & II.D.

94 *Id.* at IV.A.

95 Plaintiff's Second Amended Complaint, *supra* note 4, ¶ 21.

96 *Id.* ¶ 22.

97 Harrison v. Office of the State Courts Adm'r, No. 6:06-cv-1878, 2007 WL 1576351, at *1 (M.D. Fla. May 30, 2007).

98 *Id.* at *1, *5.

99 *Id.* at *6. That denial was based on procedural defects in Harrison's papers; he had not sued the proper state officials and his state law claims for breach of contract were barred by Florida's Eleventh Amendment immunity. *Id.* at *3–5.

100 *Id.* at *6.

101 Settlement Agreement at III.A Harrison v. Office of the State Courts Adm'r, No. 6:06-cv-01878 (M.D. Fla. settled Oct. 26, 2007) [hereinafter Harrison Settlement Agreement], *available at* http://www.law.miami.edu/disabilityservices/pdf/settlement_agreement.pdf. The agreement specified that Harrison would be entitled to the provision of real-time transcription services in criminal trials

> while he has an impairment which, without mitigating measures, substantially limits a major life activity, consistent with decisional case

provided that Harrison could request real-time transcription services in other criminal proceedings and such requests would be handled on a case-by-case basis.[102] In addition, Harrison received the sum of $19,600 from defendants or others on their behalf.[103]

B. The Deaf and Hard of Hearing Judge

Richard Brown is the chief judge of the Wisconsin Court of Appeals, the state's intermediate appellate court.[104] Brown was elected to that court in 1978 and has served for the last thirty-three years. He is also deaf.[105]

Brown lost the hearing in his right ear after a childhood bout with the measles; he lost his hearing in his left ear in 1983, when an operation to remove a brain tumor left him deaf.[106] Prior to the surgery, which he knew would likely leave him deaf, Brown worried that his career as a judge would be over.[107] Brown received a cochlear implant and took lipreading classes. He soon realized that he could continue to serve as a judge with appropriate accommodations.[108] In court in the 1980s, he used a computer captioning system, which delivered text after a seven-second delay. Advances in technology have made life in the courtroom easier for him. In addition to lipreading and an updated cochlear implant, Brown now uses real-time CART services.[109] Brown has a judicial assistant who used to be a court reporter and is proficient in

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> law. Should Plaintiff undergo any treatment which mitigates his hearing impairment such that he no longer is substantially limited in a major life activity, he will not be entitled to the accommodation provided in this Settlement Agreement.

Id. at II.D.1. The Agreement reflects the ruling in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 493 (1999), that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorating effects of mitigating measures. Congress overruled *Sutton* when it enacted the ADA Amendments Act of 2008. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553, 3554. The Amendment provided that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." *Id.* § 3(4)(E)(i).

102 Harrison Settlement Agreement, *supra* note 101, at III.A.

103 *Id.* at III.B.

104 Karen Sloan, *Wisconsin Judge Overcomes Hearing Impairment*, NAT'L L.J., Oct. 11, 2010, at 20.

105 *Id.*

106 *Id.*; *see also People in the News*, THIRD BRANCH, Winter 2000, at 19, 20, http://www.wicourts.gov/news/thirdbranch/docs/winter00.pdf.

107 Sloan, *supra* note 104, at 20.

108 *Id.*

109 *Id.*

providing CART services.[110] He believes that using CART has made him a better judge "since he can take a few extra seconds to mull over important motions."[111]

At least two other deaf or hard of hearing lawyers, with appropriate accommodations, have also served as judges. In Delaware, Norman Barron served as associate judge on the Superior Court of Delaware.[112] He was appointed to a twelve-year term starting in 1989.[113] Barron was deaf in one ear since 1968 and lost his hearing completely in his other ear in 1997, as a result of Meniere's disease, a rare inner-ear disorder. Barron uses hearing aids, an FM system, and real-time captioning.[114] In an interview in 1998, Barron said that his hearing loss "is severe enough today that I could not get by without real-time reporting."[115] In that interview, Barron said that he believed that courts "have not been in the forefront when it comes to accessibility," but that since the passage of the ADA, they have been in "catch-up mode to ensure courtroom accessibility for all of our citizens."[116] At the time the article was published, Barron had taken a leave of absence to get a cochlear implant.[117]

In Illinois, Theodore Burtzos served as associate judge of the Cook County Circuit Court in the mid-1990s.[118] Burtzos lost his hearing in 1986 as a result of Meniere's disease.[119] Burtzos received a cochlear implant and uses real-time captioning.[120] Of these three judges, only Burtzos became a judge after losing all of his hearing.

Given the fact that federal judges have life tenure and often serve until very advanced ages, it is likely that there are a number of other judges who are hard of hearing and use various types of accommodations such as amplification devices to assist them in serving as judges. Based on publicly available information, however, these judges appear not to self-identify as deaf or hard of hearing. The lack of deaf judges who identify as being deaf is likely the result of the relatively

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110 *Id.*
111 *Id.*
112 Barry Strassler, *Delaware's Hearing Impaired Judge*, SILENT NEWS, June 30, 1998.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 Pat Clawson, *Deaf Lawyer Named New Circuit Judge,* CHI. TRIB., Feb. 22, 1995, at 3; Judy Hevrdejs & Mike Conklin, *It Looks Like Lawyer Ted Burtzos Again Will Make History*, CHI. TRIB., Feb. 8, 1995, at 16.
119 Clawson, *supra* note 118, at 3; Hevrdejs & Conklin, *supra* note 118, at 16.
120 Clawson, *supra* note 118, at 3; Andrew Fegelman, *Deaf Lawyer Among 13 New Cook Judges*, CHI. TRIB., Feb. 22, 1995, at 4.

few deaf lawyers in the legal profession. There are far more blind judges, for instance, than deaf judges, particularly when it comes to the federal courts.[121]

But with the benefit of the accommodations available today to ensure that deaf judges—like other deaf participants in the judicial system—can follow everything that is happening in the courtroom, there should be no concern about deaf people not being able to perform the role of a judge. In particular, a concern has been raised about the ability of a deaf judge to sit as fact-finder and assess the credibility of a witness based on, for instance, the inflection in his voice or pauses in his answers to questions on the witness stand.

The same criticisms were raised about blind judges. When Richard C. Casey was nominated for a federal judgeship, he was asked during his confirmation hearing if he would be able to ascertain the credibility of a witness if he could not see the witness.[122] He responded that there was no disadvantage in being blind since the sighted might be distracted by a pretty face, hair, or clothing.[123] "What it really comes down to is whether their story strings together. . . . So I see the real world without ever seeing it."[124] Similarly, a deaf judge might not be able to hear inflection in a voice or stumbling in an answer from a witness but could focus on numerous visual cues and on the words used by a witness to determine whether the "story strings together."[125]

It is not surprising that there are no lawsuits involving deaf judges suing over lack of accommodations. Because a judge exercises a great deal of control over his or her courtroom, a deaf judge could arrange for whatever accommodation he or she deemed most appropriate to assist him or her in following the court proceedings. A deaf judge has the advantage of being able to stop a trial or court proceeding if there were any problems with the accommodation.

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121 For example, the late Richard Conway Casey (United States District Court for the Southern District of New York), David Tatel (United States Court of Appeals for the District of Columbia Circuit), and Bruce Selya (United States Court of Appeals for the First Circuit). There are also numerous blind state court judges, such as Richard Teitelman (Supreme Court of Missouri).

122 Larry Neumeister, *Judge in Abortion Trial Overcomes Personal Obstacles in Successful Career*, ASSOCIATED PRESS, Apr. 11, 2004, http://legacy.signonsandiego.com/news/nation/20040411-1053-abortionlawsuit-judge.html.

123 *Id.*

124 *Id.*

125 *See id*.

C. The Deaf and Hard of Hearing Criminal Defendant

An innocent deaf man spent *seven nights* in jail in 2005 solely because there was not an interpreter available to assist him during arraignment.[126] Humberto Suarez was mistakenly arrested on a Monday evening in August 2005, on a warrant that had been issued for another person.[127] He was brought to the Los Angeles Metropolitan Courthouse on Tuesday morning for arraignment and placed in a holding cell.[128] About an hour and a half later, a police officer "apparently realized that [he] was deaf and taped a sign reading 'DEAF' to the front of his shirt. No other action was taken to alert the court to Suarez's [deafness]."[129] When Suarez was brought to the courtroom, the court clerk did not notice the sign and no one on the court staff realized that Suarez needed an interpreter until it was too late to obtain one. An interpreter was requested for Wednesday morning and Suarez was returned to jail.[130]

Suarez, for reasons not clear in the record, was put on medical hold at the jail and not delivered to court for arraignment on Wednesday, Thursday, or Friday mornings.[131] He was held over the weekend until court opened for session the next Monday morning.[132] Suarez was brought back to court, but the sheriff's department did not contact the court in advance to arrange for an interpreter.[133] Instead, Suarez simply arrived with the "DEAF" sign taped to his shirt.[134] Again, the court staff did not become aware of his presence until it was too late that day to arrange for an interpreter.[135] Suarez was returned to jail on Monday evening and an interpreter was arranged for the next day.[136] Suarez was finally released on Tuesday when he was arraigned with an American Sign Language ("ASL") interpreter present, at which point it quickly became clear that the police had arrested the wrong man.[137]

Suarez sued the Superior Court of California for money damages under Title II of the ADA.[138] As noted above, a plaintiff seeking to

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126 Suarez v. Superior Court, 283 F. App'x 470, 471–72 (9th Cir. 2008) (concurring opinion).
127 *Id.* at 472.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at 471.

recover money damages must prove intentional discrimination on the part of the defendant.[139] The district court granted summary judgment to defendant, finding no evidence of intentional discrimination, and the Ninth Circuit affirmed that ruling.[140] Notwithstanding the Ninth Circuit's ruling that Suarez could not show intentional discrimination, no one disputed that Suarez, as a deaf criminal defendant facing arraignment, had the right to an interpreter.

Given the threat to liberty inherent in a criminal prosecution, courts recognize that due process rights are implicated when a criminal defendant is unable to hear or participate meaningfully in the criminal proceedings. It has been settled that the constitutional guarantee of due process in a criminal trial "is, in essence, the right to a fair opportunity to defend against the State's accusations" and that this guarantee encompasses both the rights of a defendant to confront witnesses against him and to assist in his own defense.[141] In the context of a criminal defendant with a disability, the Supreme Court noted in *Tennessee v. Lane* that the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment "guarantee to a criminal defendant such as respondent Lane the 'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings'" and a "meaningful opportunity to be heard" by removing obstacles to his full participation in judicial proceedings.[142]

A number of courts have held that a non-English speaking criminal defendant has a constitutional right to an interpreter.[143] In one leading case, the conviction of a Spanish-speaking defendant was vacated because he was tried and convicted of murder in New York state court without the assistance of an interpreter for much of the trial.[144] Finding that in the absence of an interpreter, "most of the trial must have been a babble of voices" for the defendant, the court held that the trial "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."[145] The court held as follows:

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139 *See supra* note 82 and accompanying text.

140 *Suarez*, 283 F. App'x at 471.

141 Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

142 Tennessee v. Lane, 541 U.S. 509, 523 (2004).

143 *See, e.g.*, United States v. Yee Soon Shin, 953 F.2d 559, 561 (9th Cir. 1992); United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991); United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985); United States *ex rel.* Negron v. New York, 434 F.2d 386, 387 (2d Cir. 1970).

144 *Negron*, 434 F.2d at 387.

145 *Id.* at 388, 389.

> Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial . . . . And it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[146]

Compared with the abundant case law addressing the rights of non-English speakers to an interpreter, "[t]here is little case law addressing the issue of whether a criminal defendant who is deaf or hearing-impaired has a constitutional right to an interpreter or some other assistance."[147] One of the leading cases is *Ferrell v. Estelle*, a 1978 case in which the Fifth Circuit ordered a new trial for a deaf criminal defendant who was denied stenographers to transcribe the spoken words and was instead given frequent recesses for the defendant's lawyer to confer with him as to what was happening at trial.[148] Noting that the Constitution requires "that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense," the Fifth Circuit held that the rights of the deaf criminal defendant "were reduced below the constitutional minimum."[149] Nevertheless, some courts have been reluctant to declare that a deaf criminal defendant has a constitutional right to an interpreter.[150]

Even if there were no constitutional right of access to the court, the statutory bases discussed above would still apply. In federal court, the Court Interpreter Act applies to all cases involving a deaf criminal defendant, as a criminal prosecution in federal court must by definition be instituted by the United States.[151] Despite the concern that rights of the deaf in federal court are protected only by judicial policy and not by

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146 *Id.* at 389 (citations omitted) (quoting Dusky v. United States, 362 U.S. 402, 402 (1962)).

147 Phillips v. Miller, No. 01 Civ. 1175, 2000 WL 33650803, at *9 (S.D.N.Y. Dec. 3, 2000).

148 568 F.2d 1128, 1129 (5th Cir. 1978).

149 *Id.* at 1132, 1133.

150 *See, e.g.*, DuQuin v. Cunningham, No. 07CV31, 2009 WL 899434, at *3 (W.D.N.Y. Mar. 26, 2009) ("The Supreme Court has *not* held that a defendant has an absolute right to an interpreter and that the failure to provide one at any stage of a criminal prosecution violates the constitutional rights of the defendant regardless of whether the lack of an interpreter actually prejudiced the defendant."); Hoke v. Miller, No. 02-CV-0516, 2007 WL 2292992, at *5 (N.D.N.Y. Aug. 6, 2007) ("Petitioner failed to cite and this Court could not locate any established Supreme Court precedent indicating that due process demands that specific accommodations be made to address a [criminal] defendant's hearing difficulties.").

151 *See supra* note 24 and accompanying text.

federal law, that is not the case where a deaf criminal defendant is involved. The ADA and Rehab Act also continue to protect the rights of deaf criminal defendants in state courts.[152]

It is in the context of the deaf criminal defendant that the issue of what accommodation is provided appears to be most significant. Under these statutes, a defendant is not entitled to the accommodation of his choice, merely a reasonable accommodation. Thus, requests by deaf criminal defendants for multiple interpreters (one to interpret the criminal proceedings and one to interpret conversations between the deaf defendant and his counsel), deaf-relay interpreters, or consecutive interpretation (rather than simultaneous interpretation) have been denied.[153] As one court described, "[a]lthough the [appellate court] may be right that a deaf-relay interpreter could have been 'the best' solution to appellant's lack of hearing, it erred in concluding that the three interpreters that the trial judge did use were constitutionally insufficient to ensure her due process rights."[154]

It is in this context as well that the concern for those deaf individuals with minimal language skills is most prevalent:

> There is a pervasive belief within the legal system that if we put an interpreter in front of a deaf person, the interpreter will instantly (and perfectly) convert spoken language to the appropriate language for the deaf person and the communication problem will be solved, thereby freeing everyone from further worry or inquiry and allowing business to proceed as usual.[155]

In reality, as several interesting articles have explored, deaf people with minimal language skills have a far more difficult time obtaining meaningful communication in criminal proceedings.[156]

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[152] *See, e.g.*, Suarez v. Superior Court, 283 F. App'x 470, 471 (9th Cir. 2008) (no dispute that plaintiff was entitled to an interpreter under the ADA).

[153] *See* State v. Wright, 768 N.W.2d 512, 527 (S.D. 2009) (denying request for consecutive interpretation); Linton v. State, 275 S.W.3d 493, 509 (Tex. Crim. App. 2009) (denying request for deaf-relay interpreter or certified deaf interpreter).

[154] *Linton*, 275 S.W.3d at 509.

[155] Michele LaVigne & McCay Vernon, *The Deaf Client: It Takes More Than a Sign – Part 1*, CHAMPION, June 2005, at 27.

[156] *Id.* at 28; *see also* Brandon M. Tuck, Comment, *Preserving Facts, Form, and Function When a Deaf Witness with Minimal Language Skills Testifies in Court*, 158 U. PA. L. REV. 905 (2010).

D. The Deaf and Hard of Hearing Civil Litigant

Joseph Popovich suffered from mild to moderate hearing loss.[157] In 1990, Popovich's ex-wife sought custody of their daughter by filing a motion in the Domestic Relations Division of the Cuyahoga County Court of Common Pleas ("DRD"), an arm of the State of Ohio.[158] During a hearing on that motion in August 1992, Popovich informed the referee that he was having trouble hearing the proceedings.[159] He was then given an FM system to accommodate his hearing loss.[160] Because the headphones caused an ear infection, Popovich requested real-time captioning to accommodate his disability.[161] In the interim, Popovich—believing the FM system was ineffective—filed a charge of discrimination with the Department of Justice.[162] In response to the DOJ investigation, the DRD contended that it had met its burden by providing the FM system.[163] Not until October 1994—two years later—did the court agree to provide Popovich with real-time captioning.[164] He was then permitted to visit his daughter, but for reasons that are unclear, did not see her until the summer of 1997, five years after she had been removed from his custody.[165] She had by then turned sixteen.[166]

Popovich filed suit against the DRD in 1995, alleging that it discriminated against him in violation of Title II of the ADA and retaliated against him after he filed a discrimination charge against the court with the DOJ.[167] In April 1998, a jury returned a verdict for Popovich and awarded compensatory damages in the amount of $400,000.[168] Based on the jury's finding, the court awarded injunctive relief: (1) requiring the defendants to provide real-time captioning for Popovich in the state custody matter; (2) enjoining the defendants from discriminating against him in connection with providing any auxiliary aids; and (3) enjoining the defendants from retaliating against him.[169] On appeal to the Sixth Circuit and a subsequent rehearing en banc, the court

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157 Popovich v. Cuyahoga County Court of Common Pleas, 227 F.3d 627, 630 (6th Cir. 2000).
158 *Id.* at 629.
159 *Id.*
160 *Id.* at 630.
161 *Id.*
162 *Id.*
163 *Id.* at 631.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*

addressed whether Ohio was immune from suit under the Eleventh Amendment, an issue subsequently resolved by the United States Supreme Court in *Tennessee v. Lane*.[170] In the en banc decision, the Sixth Circuit vacated the jury verdict and remanded for a new trial on Popovich's claims of retaliation and unreasonable exclusion from participation at trial.[171] Following the *Tennessee v. Lane* decision, Popovich moved to reinstate the $400,000 jury verdict; defendants moved for summary judgment on the disability and retaliation claims.[172] After both motions were denied,[173] the case ultimately settled before retrial.[174]

Popovich raises the interesting question of whether a deaf person is entitled to the accommodation that he seeks (real-time transcription), as opposed to a lesser accommodation that the court believes is sufficient (an FM system). There was no dispute that the ADA governed the request and that the court was obligated to provide some form of accommodation. The issue was what accommodation was to be provided. As noted above, the public entity must give "primary consideration" to the accommodation requested but is not then obligated to provide that accommodation.[175] Nevertheless, the accommodation provided must be adequate to permit the deaf individual meaningful access to the court proceedings.

In a more recent case raising the issue of *when* an accommodation request should be decided, a deaf man and his neighbor filed dueling civil claims involving a trespass action.[176] Neighbor Terry Strook brought a complaint against Dean Kedinger, a deaf man; Kedinger asserted cross-claims and counterclaims.[177] Prior to the first hearing in the case, Kedinger called the court via TTY to request a sign language

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170 *Id.* at 641–42; *see also* Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002) (en banc). The author of this Article (along with other lawyers) submitted an amicus brief on behalf of Mr. Popovich to the U.S. Supreme Court in 2003 in *Medical Board of California v. Hason*, 537 U.S. 1231 (2003), a case dealing with Congress's power to abrogate state sovereign immunity in enacting Title II of the ADA. *Hason* was withdrawn by Petitioner, the Medical Board of California, and the issue presented in *Hason* was decided a year later by the Supreme Court in *Tennessee v. Lane*.

171 *Popovich*, 276 F.3d at 818.

172 Memorandum Opinion & Order at 4–5, Popovich v. Cuyahoga Cnty. Court of Common Pleas (N.D. Ohio filed Sept. 30, 2004) (No. 1:95-cv-684) (on file with author); Order at 1–2, Popovich v. Cuyahoga Cnty. Court of Common Pleas (N.D. Ohio filed Mar. 25, 2005) (No. 1:95-cv-684) (on file with author).

173 *See id.*

174 Order, Popovich v. Cuyahoga County Court of Common Pleas (N.D. Ohio filed Oct. 12, 2006) (No. 1:95-cv-684).

175 28 C.F.R. pt. 35, App. A, comment to § 35.160 (2010).

176 Strook v. Kedinger, 766 N.W.2d 219, 221–22 (Wis. Ct. App. 2009).

177 *Id.* at 222.

interpreter.[178] When Kedinger was told that an interpreter would not be provided, he indicated that he would not attend the hearing.[179] Kedinger subsequently filed a motion requesting a sign language interpreter and stated that he would not appear at the hearing without an interpreter being provided for him.[180] No indication was ever provided to Kedinger that his request for an interpreter would be considered at the hearing, although he had been denied an interpreter for the hearing itself.[181] Because Kedinger did not attend the hearing, the court struck his cross-claims and counterclaims.[182]

The Wisconsin Court of Appeals, in an opinion by Judge Brown (himself a deaf judge), held that the trial court had violated Title II of the ADA, as well as state law and due process, by failing to hold a hearing to address Kedinger's request for a sign language interpreter.[183] The Court of Appeals held that once Kedinger properly notified the court that he needed an interpreter, the trial court was required to act on that request by obtaining an interpreter or setting a hearing date to determine the need for the interpreter.[184] Both "due process" and "the interests of justice" demanded that Kedinger be notified that the court would consider his request for an interpreter at the hearing.[185]

Also, the Court of Appeals held that it was an improper exercise of discretion for the trial court to hear the interpreter issue together with the substantive merits.[186] If an accommodation is necessary, it should be in place before the substantive proceeding.[187] The court held that it puts the disabled person between a "rock and the hard place" to have to appear for "an important proceeding to determine liberty or property interests not knowing whether the requested accommodation is going to be granted."[188] Because courts are public entities "that must be accessible to all," the deaf person "should not have to worry about access issues when preparing for the substantive hearing."[189]

Finally, while the trial court appeared to view lipreading and written notes as sufficient for Kedinger to participate in the proceedings, the Court of Appeals held that such accommodations did not provide

178 *Id.* at 223.
179 *Id.*
180 *Id.*
181 *Id.* at 228.
182 *Id.*
183 *Id.* at 227–29.
184 *Id.* at 228.
185 *Id.*
186 *Id.* at 229.
187 *Id.*
188 *Id.*
189 *Id.*

effective communication within the meaning of the ADA.[190] As a result, the appellate court required the trial court to conduct a hearing on whether Kedinger should be provided with an interpreter.[191] While suggesting that perhaps a real-time reporter would be an appropriate accommodation, the appellate court held, "[i]t is up to the circuit court on remand to discover Kedinger's capabilities and the best form of communication and go from there."[192] Following that hearing, the trial court would then have to redo the case from the beginning.[193]

E. The Deaf and Hard of Hearing Juror

There has been a long and unfortunate history in this country of discrimination against jurors on the basis of disability. Many states once had statutes on the books that prevented deaf or hard of hearing individuals from even serving as jurors. Now, the ADA covers jury duty in state and local courts even where a state may still have a discriminatory or exclusionary statute on its books.

In federal court, the Judicial Conference policy specifies that it does not govern "[t]he determination of whether a prospective juror with a communications disability is legally qualified to serve as a juror."[194] Rather, such a determination is left for "the judgment of the trial court under the Jury Selection and Service Act. . . . However, where an individual with a communications disability is found so qualified, a sign language interpreter or other appropriate auxiliary aid or service should be provided under these guidelines."[195]

In contrast to the history of discrimination against the deaf and hard of hearing in jury service, today there are few cases in which a juror who is deaf or hard of hearing sues on the ground that he has been denied the right to serve as a juror on account of his disability. It is possible that this is because people are often happy to be excused from jury duty. Cases in recent years concerning the rights of deaf and hard of hearing individuals to sit on juries tend to arise because a criminal defendant seeks to challenge the exclusion of a deaf or hard of hearing juror or argues that the inclusion of such a juror denied him his right to a fair trial.[196]

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190 *Id.* at 230–31.
191 *Id.* at 232.
192 *Id.* at 231.
193 *Id.* at 232.
194 JUDICIAL CONFERENCE GUIDELINES, *supra* note 33.
195 *Id.*
196 *See infra* notes 197–216 and accompanying text (identifying recent cases involving the rights of deaf and hard of hearing jurors).

A defendant in a 2005 case appealed his conviction because the court had struck a deaf venireperson based on the court's inability to accommodate the venireperson's disability.[197] The trial court did not find that the venireperson was unqualified to serve as a juror because of his deafness.[198] Rather, the deaf venireperson was struck because only one sign language interpreter was available for voir dire when two were needed to provide accommodations given that the interpreter could not go for more than an hour without a break.[199] The appellate court held that the trial court did not have the discretion to strike the deaf venireperson once the court had determined that he was qualified to serve as a juror.[200] Nevertheless, the appellate court affirmed the conviction because the venireperson, who was juror number twenty-seven, could not have been selected for the jury, which consisted of twelve of the first twenty-four venirepersons.[201]

Likewise, a losing defendant in a 2006 disability discrimination case challenged the trial court's decision to strike a potential juror with a hearing loss.[202] At voir dire, the juror stated that she had ringing in her ears and could not hear people when they turned around or lowered their voices.[203] She refused to use a hearing aid, indicated that she would not benefit from moving to the front row, and had difficulty understanding the judge who was sitting three or four feet away.[204] The Third Circuit therefore found no abuse of discretion in the trial judge's decision to excuse the juror.[205]

The cases discussed above stand for the relatively straightforward proposition that a qualified juror whose deafness can be accommodated should not be struck, while a juror who could not follow a trial even with accommodations should be excused. A more troubling example comes when a court excuses a deaf or hard of hearing juror based on a determination that the evidence in a case requires some degree of hearing to assess.

In a 2008 case, the challenge to the seating of a hard of hearing juror turned on her ability to assess a recording of a 911 call.[206] At voir dire, the juror indicated that she needed to read lips in order to understand

197 State v. Wilson, 169 S.W.3d 571, 572–73 (Mo. Ct. App. 2005).
198 *Id.* at 575.
199 *Id.* at 574.
200 *Id.* at 576.
201 *Id.*
202 Fendrick v. PPL Services Corp., 193 F. App'x 138, 140 (3d Cir. 2006).
203 *Id.*
204 *Id.*
205 *Id.* at 140–41.
206 State v. Speer, 904 N.E.2d 956, 961 (Ohio Ct. App. 2008).

what was being said at trial.[207] She was moved to the front of the jury box and, several times during trial, asked that counsel turn toward her when they were speaking.[208] The defendant moved for the juror to be struck for cause but was denied.[209] The defendant had four peremptory challenges but used those to strike other potential jurors, thus leading to the juror with the hearing loss being included in the jury panel.[210]

After the defendant was convicted, he complained that the trial court erred in not striking for cause the juror with the hearing loss.[211] The appellate court found that the juror could not have properly evaluated the evidence presented because much of the determination as to the defendant's guilt turned on a 911 tape that had been played for the jury.[212] Although the juror could read the words as they had been transcribed, she could not "listen to appellant's speech patterns, the inflections in his voice, the pauses in the conversation, and many other audio clues that would be meaningful only if actually heard."[213] The written transcript of the tape, the court found, "would not have conveyed the nuance and inflection imparted by the spoken words."[214] The court therefore held that the juror should have been excused for cause and reversed the conviction.[215]

The court's finding that a deaf or hard of hearing juror lacked the ability to assess the credibility of the evidence is precisely the kind of slippery slope that courts should take care to avoid. Few would dispute that there are likely some cases where a deaf juror ought not to be on a jury panel, such as a case where the guilt of a defendant turns on whether his voice matches the voice on a recording (though with today's technology, it would likely be possible to render a visual comparison of two different excerpts of sound).[216] Nevertheless, courts should make every effort to find a way for that juror to participate and meaningfully weigh the evidence, so as to avoid the situation where deaf jurors become routinely excused solely for reasons relating to their deafness.

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207 *Id.* at 957.
208 *Id.* at 960.
209 *Id.* at 957.
210 *Id.*
211 *Id.* at 958.
212 *Id.* at 961.
213 *Id.*
214 *Id.*
215 *Id.*
216 *Cf.* Galloway v. Superior Court, 816 F. Supp. 12, 18 (D.C. Super. Ct. 1993) (recognizing that it might be inappropriate for a blind juror to serve on a case with a substantial amount of documentary evidence).

F. The Deaf and Hard of Hearing Witness

Deaf and hard of hearing witnesses face an interesting limitation on their right to accommodations in federal court. While the federal policy adopted by the Administrative Office of the United States Courts includes "witnesses" in the definition of those who are entitled to accommodations under the policy, a later section implies that accommodations for deaf witnesses need to be provided *only* during the duration of that individual's participation in the proceeding.[217] In a section discussing real-time reporting as an appropriate accommodation, the policy provides that "real-time reporting should be provided for only as long as and for the specific purposes required by a participant: for example, only for the duration of the deaf witness's testimony."[218]

On the one hand, the policy is sensible in that the deaf witness is often going to participate in the judicial proceeding only when he is testifying and therefore does not need accommodations before or after his participation. In some proceedings witnesses may be barred from viewing the testimony of other witnesses out of concern that they will shape their testimony to that of other witnesses.[219] This approach is consistent with the federal policy's treatment of spectators. As discussed below, the policy denies spectators accommodations altogether, except in situations in which the court determines that it is appropriate to provide such accommodations.[220] When a witness is not testifying, he is merely a spectator, so it makes sense to treat him as one. On the other hand, the witness is more than just a spectator. The witness is an interested participant in the proceeding and may wish to be present for parts of the proceeding that are relevant to his testimony to the extent that is permissible.

In state court, the ADA and Rehab Act apply equally to deaf witnesses and spectators as to other participants at trial.[221] When a witness is not testifying in a judicial proceeding, he is still entitled to an accommodation as a spectator.

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217 JUDICIAL CONFERENCE GUIDELINES, *supra* note 33.

218 *Id.*

219 FED. R. EVID. 615 ("At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.").

220 *See infra* Part II.G (discussing federal policy affecting deaf and hard of hearing spectators).

221 *See infra* Part II.G (noting that Title II's definition of "service, program or activity" includes attending trial as an observer). *But cf. In re* McDonough, 457 Mass. 512, 519 n.16 (2010) (declining to reach whether Congress could validly require state courts to provide reasonable accommodations for witnesses with disabilities because a state statute explicitly required such accommodations).

G. The Deaf and Hard of Hearing Spectator

In June 2004, Bruce Rafford, who is hard of hearing, requested real-time captioning during his adult son's civil commitment trial (brought in county court) as a sexually violent predator.[222] Rafford was a spectator at the trial—he did not participate as a witness.[223] The presiding Snohomish County (Washington) Superior Court Judge Richard Thorpe and county administrators declined to provide real-time captioning and instead provided an assistive listening device.[224] Following the conclusion of his son's trial, Rafford brought suit in federal court against Thorpe and Snohomish County under Title II of the ADA, the Rehab Act, and Washington state law for denying him his requested accommodation and participation in a government service.[225]

The federal court found that "[t]here appears to be no published caselaw that addresses a court's obligation to provide auxiliary aids to accommodate a hearing-impaired *spectator*," as opposed to participants in the trial process such as litigants and jurors.[226] Reviewing the language of the DOJ regulations implementing Title II, the court held (and defendants did not challenge) that "attending a trial as a spectator is a 'service, program, or activity' to which the regulation applies."[227]

The court found that Judge Thorpe declined to provide real-time captioning because he believed that it "could be confusing" and because of the potential that Rafford "would audibly object during the proceedings and disrupt the trial."[228] The defendants did not argue that real-time captioning was unavailable or that it would be too expensive or burdensome to provide it.[229] Because the court found that Judge Thorpe did not give "primary consideration" to the accommodation that Rafford requested and did not "investigate whether [the] requested accommodation [was] reasonable," the court held that a jury could potentially find that Judge Thorpe violated the ADA.[230]

Based on Rafford's affidavit that even with the assistive listening device, "he could not hear entire portions of the proceedings," the court also held that there was an issue of fact as to whether the assistive listening device "was a reasonable accommodation and whether plaintiff

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222 Rafford v. Snohomish County, No. C07-0947RSL, 2008 WL 346386, at *1 (W.D. Wash. Feb. 6, 2008).
223 *Id.*
224 *Id.*
225 *Id.*
226 *Id.* at *3.
227 *Id.*
228 *Id.*
229 *Id.* at *3 n.3.
230 *Id.* at *3.

was able to participate equally in the proceedings" compared to other spectators.[231] The court thus permitted Rafford's claim for declaratory relief (a declaration that defendants had unlawfully discriminated against plaintiff by refusing to provide real-time captioning for his son's trial) to proceed.[232]

The court granted judgment for defendants on Rafford's claim for injunctive relief to enjoin defendants from denying him real-time captioning in court proceedings because the trial was over and there was no evidence that plaintiff planned to attend other proceedings.[233] In addition, the court granted judgment for defendants on Rafford's claim for monetary damages, finding that there was no evidence of intentional discrimination.[234] The court found that Judge Thorpe and the county had provided an assistive listening device, which was the same accommodation Rafford had requested for his son's previous trial in 1992, and made various efforts to remedy the problem when Rafford complained that the assistive listening device was ineffective.[235] Rafford appealed the district court's dismissal of his claims for monetary damages premised on intentional discrimination.[236] The Ninth Circuit affirmed the dismissal, agreeing with the district court that "Rafford failed to present evidence that the County was deliberately indifferent to his request for a reasonable accommodation."[237]

As this decision makes clear, deaf spectators, like other deaf participants in court proceedings, are entitled to reasonable accommodations under the ADA and the Rehab Act. Those statutes make no distinction between spectators and other participants. However, in federal courts, the Judicial Conference policy does not apply to deaf spectators.[238] In adopting the written guidelines prepared by the Administrative Office of the United States Courts, the Judicial Conference specifically noted that the policy "does not apply to spectators."[239] Similarly, the written policy provides that "[t]he services called for under these guidelines are not required to be provided to

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231 *Id.* at *4.

232 *Id.* at *1, *6.

233 *Id.* at *2.

234 *Id.* at *1, *4.

235 *Id.* at *4.

236 Rafford v. Snohomish County, No. 08-35884, 349 F. App'x 245, 246 (9th Cir. Oct. 27, 2009).

237 *Id.* (citing Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001); Memmer v. Marin County Courts, 169 F.3d 630, 633 (9th Cir. 1999)).

238 JUDICIAL CONFERENCE GUIDELINES, *supra* note 33.

239 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 32, at 14.

spectators."[240] However, the policy does contain an exception to this rule. It provides that "courts may elect to [provide accommodations to spectators] in situations where they determine such to be appropriate, for example, providing an interpreter to the deaf spouse of a criminal defendant so that the spouse may follow the course of the trial."[241] Had Rafford's son's civil commitment trial been in a federal court rather than county court, this exception in the policy likely would have applied to him.

III. CONCLUSION

This Article shows that there have been significant advances in the legal rights to accommodations of deaf and hard of hearing participants in the judicial process. There have also been significant advances in the technology to provide accommodations. Despite these significant advances in both the law and technology, it is often lack of knowledge that is the biggest obstacle today to the ability of deaf and hard of hearing participants in the judicial system to enjoy meaningful right of access to the courts. For instance, Mosier, Harrison, Suarez, Popovich, Kedinger, and others whose stories are described here were plainly entitled to accommodations under the ADA and Rehab Act.

Lack of knowledge on the part of state officials of the relevant law may very well have been a reason that the states resisted providing the required accommodations.[242] Lack of knowledge of the technologies is also an issue. As one deaf lawyer recognized, "the problem those of us with hearing impairments face is not so much resistance to the idea of accommodations, but rather ignorance on the facility's part (and sometimes that of the hearing impaired person) as to what technology is available, and how to use it."[243]

The continuing growth in the population of deaf lawyers and deaf judges may be among the single greatest factors that will lead to stronger enforcement of legal rights of the deaf and hard of hearing. It is no coincidence, for instance, that a ringing endorsement of Dean Kedinger's

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240 JUDICIAL CONFERENCE GUIDELINES, *supra* note 33.

241 *Id.*

242 Undue burden may have been a reason in some of these cases as well. For instance, neither Kentucky nor Florida asserted undue burden as a defense to Mosier's and Harrison's requests for accommodations, but the ongoing burden of providing repeated accommodations to lawyers likely to be frequent participants in a state judicial system may have played a role in the degree to which state officials opposed the requests. Because the undue burden defense under the ADA and Rehab Act is based on the burden to the entire court system, not to any specific judicial entity, it would have been virtually impossible for the states to claim undue burden.

243 Sheridan, *supra* note 51, at 33.

right to meaningful access and an effective accommodation was written by Judge Brown of the Wisconsin Court of Appeals. As more judges, court clerks, and others who routinely make accommodations decisions become more familiar with the idea of deaf participants in the legal system—particularly in the context of deaf lawyers and deaf judges, who are likely to be knowledgeable about their rights and about the available technologies—that familiarity should lead to greater compliance with the legal rights of the deaf to meaningful access to the judicial system.