

July 19, 2021

# Something to Talk About: Supported Decision Making and Access to Justice for All

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It is commonly known that the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. It is also commonly known that Title II of the ADA requires that State and local governments, including courts, provide people with disabilities an equal opportunity to access and benefit from all of their programs, services, and activities. Perhaps what is *not* as commonly known is what the ADA requires of courts in terms of providing accessible services to individuals who have cognitive disabilities which affect an individual's ability to comprehend or express themselves in written or spoken language. This includes litigants, witnesses, jurors, and observers who have a broad range of disabilities impacting their ability to communicate, such as developmental disabilities, traumatic brain injury, or who acquire dementia, Alzheimer's disease, or other disabilities associated with aging.

In May 2021, the National Guardianship Network, with the support of the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the Syracuse University College of Law, brought together 125 advocates, family guardians, judges, lawyers, scholars, and other stakeholders for the [Fourth](#)

[National Guardianship Summit](#). At the conclusion of the summit, delegates approved 22 Recommendations to improve and reform the adult guardianship system in the United States. Two of those Recommendations are of particular interest here as it regards effective communication:

**Recommendation 1.2:** States and courts must ensure that all judicial proceedings which may impact any of an adult's rights to legal capacity provide meaningful due process, which includes (in relevant part, emphasis added):

- Reasonable notice provided **in the adult's preferred language in an understandable and accessible format**, served in a manner that ensures timely receipt.
- An impartial, valid, and reliable assessment by a compensated and qualified person conducting a capacity assessment who has knowledge and training about decision-making in the area(s) related to the proceedings, **inclusive of the adult's preferred reasonable accommodations and method of communication**.
- Protection of the adult's right to participate in the proceeding consistent with their preferences, including **preferred communication accommodations**, after the right to appear and the purpose of the proceeding have been explained to the adult **through the means the adult understands**.
- **Recommendation 2.4:** The Department of Justice and other federal and state agencies should recognize that **supported decision-making can be a reasonable accommodation under the Americans with Disabilities Act of 1990, as amended, in supporting an individual in making their own decisions and retaining their right to do so**.

While there is growing awareness of “supported decision-making” (SDM), particularly as an alternative to guardianship, SDM does not have a universally

accepted legal definition. It is, however, becoming a more commonly understood concept of integrated supports which honors an individual's integrity of choice with the underlying principle that, with enough appropriate supports and services, nearly every individual has the capacity to make decisions. When people use SDM as a communication accommodation, they use family members, friends, professionals, and others they trust and who know them well to help them understand the situations and choices they face, but with the ultimate choice left to the adult. This eliminates a substitute decision-maker and maximizes autonomy for the individual who may need communication supports for speaking, reading, writing, or understanding in order to meaningfully participate. The need for this kind of support necessarily includes and can provide for meaningful participation in court services, programs and activities.

### What Does it Mean for Communication to be “Effective” in Court?

In 2017, the Civil Rights Division of the U.S. Department of Justice has issued a technical assistance document entitled “The ADA Best Practices Tool Kit for State and Local Governments” to assist state and local officials to improve compliance with Title II of the ADA. “Effective communication” means that **“whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities.”** ①

“The effective communication requirement applies to ALL members of the public with disabilities, including job applicants, program participants, and even people who simply contact state or local government agencies seeking information about programs, services, or activities.” ②

Effective communication is essential to ensuring that all aspects of judicial proceedings uphold every individual's right to access and engage in meaningful due process. Title II regulations provide several examples of “auxiliary aids and services” to accommodate individuals with disabilities. ③ These include, but

are not limited to, qualified sign-language and foreign-language court interpreters, assistive technology, notetakers, closed-caption decoders, qualified readers, and “other similar services and actions.”

Individuals who have developmental disabilities or who acquire dementia, Alzheimer’s disease, or other age-related cognitive disabilities, however, may experience difficulty with communicating effectively that go well beyond the need for accommodation and supports provided by traditional auxiliary aids and services. For instance, the individual may:

- take longer to absorb information
- may not respond in a timely manner
- have difficulty understanding or remembering questions, abstract concepts or instructions
- have difficulty with reading and writing
- have difficulty with problem-solving
- have a short attention span and might be easily distracted
- find it difficult to maintain eye contact
- find it difficult to adapt to new situations or to plan ahead or solve problems
- find communication over the phone difficult
- have difficulty expressing their needs
- be easily influenced by and eager to please others
- not be considered as credible witnesses

This can all make effective communication challenging, particularly when the language or concepts used are complex and the environment or activity, such as those associated with court-related activities, is stressful. For individuals with cognitive disabilities, traditional accommodations, such as language interpreters or assistive technology, are unlikely to be sufficient supports for effective communication which would ensure the individual is able to meaningfully participate in all aspects of court proceedings.

The need for communication supports and accommodations also includes those for individuals with a wide range of disabilities who are non-verbal, have slurred or difficult-to-understand speech, or those who use body language, vocal sounds, gestures, pictures, assistive technology and communication devices, or rely on both formal and informal communication and decision-making assistance from family, friends, and/or support staff that knows them well. With this in mind, when considering an individual's ability to engage in meaningful communication with the justice system, it is crucial that everyone involved in the court process understand that just because an individual is a non-tradition communicator does not mean they do not have the ability and desire to effectively communicate and make decisions. It does, however, mean they may need ADA accommodations, auxiliary aids, or services to support them with that communication. So, the question becomes how do we make certain that all participants in the court system – judges, court personnel, attorneys, experts, advocates, and other staff - ensure that ADA accommodations are providing effective communication supports and access to justice for *all*?

### **Justice for All: Stretching Beyond Physical Access and Traditional Interpreters**

ADA access to court participation goes well beyond physical access to court buildings and the commonly known accommodations for individuals with hearing and vision impairments, or foreign language interpreters. Most litigants, however, would be hard pressed to find clear, intuitive, and easily accessed

information on available accommodations for communication disabilities related to aging and/or cognitive impairment, how to request such accommodations, or what the administrative process is (how they will receive a response from the court, their right to review or appeal, access to advocates or supports for completing forms and communicating needs, etc.). What are those supports and accommodations? What do those look like for individuals with disabilities that require decision-making supports in order to meaningfully participate in court services, programs, and activities, and how do we start talking about them so that they, too, become commonly known?

A quick online review of State court webpages informs us that frequently listed accommodations include interpreters and assistive technology, and then include some variation of, “other accommodations may also be provided - by the court or by an individual judge - depending on the specific needs and circumstances of the person with a disability.” The information isn’t always intuitive and clear, easy to find, or follow. Some people with disabilities, particularly individuals with cognitive disabilities, are not able to make an ADA accommodation request without decision-making supports. The inquiry itself may require an accommodation. This creates yet another challenge for individuals who require communication or supported decision-making supports to interface with the court.

Consider, for example, Jane Doe, an older adult with evidence of a cognitive disability and physical disabilities that cause slurred and often very difficult to understand speech. Jane has a SDM team of supporters that provide communication and decision-making supports for her daily living needs. Her team includes a sibling, a close family friend, and a volunteer who works at her community disability advocacy organization. As a result of Covid-related hardships, Jane has fallen grossly behind on rent and her landlord has filed an eviction lawsuit. Jane was served with Notice to appear in court, but because Jane had difficulty understanding both the purpose and content of the Notice, she

didn't fully appreciate what the paperwork meant until she was able to work with one of her supports from her SDM team. Those supports had familiarity with her communication style, preferences, and abilities, understood her speech well enough to answer the questions Jane had, and used simplified language to help her review and understand the document, and make decisions about next steps. The question then becomes, what does SDM or the equivalent effective communication accommodation look like when Jane makes her appearance in court? Who will support her in understanding complex concepts, questions, and choices while in court? Who will help with interpretation for her speech impediment? Who or what is considered an ADA accommodation?

Several states have created special rules that give individuals with disabilities accommodations to navigate the justice system. 4 For example, in Washington state, statutes allow for:

- Representation of witnesses: A victim who is incapacitated or otherwise incompetent shall be represented by a parent or present legal guardian, or if none exists, by a representative designated by the prosecuting attorney without court appointment or legal guardianship proceedings. Wash. Rev. Code § 7.69.040.
- Accommodations: "Dependent persons" (includes people with intellectual and developmental disabilities) are afforded particular rights including: having language explained to them, allowing advocate to be present in court, etc. Wash. Rev. Code § 7.69B.020.

In Maine, state statutes allow for:

- Hearsay: An out-of-court statement by someone with a developmental disability is admissible if it describes a sexual act, the court finds that it will

promote the well-being of the witness, and the defense has the ability to cross-examine the witness. 15 M.R.S.A. 1205.

Several states have also passed legislation requiring their law enforcement agencies or courts to undergo interaction with the disability community or bias training. **5** What is still missing, however, are standardized and comprehensive court rules providing seniors and other adults with disabilities who are otherwise un- or underrepresented in judicial proceedings with individualized communication supports, by a skilled individual – one who has experience and expertise working with an individual's specific disability and needs for communication support(s) - appointed by the court, to ensure effective communication and thus, meaningful access to court services, programs, and activities.

### Something to Talk About

According to the *ADA Update: A Primer for State and Local Governments*, more than 55 million Americans –18% of our population–have disabilities. **6** Like all Americans, they participate in a variety of programs, services, and activities provided by their State and local governments, including courts. They are also more than twice as likely to be a victim of crime as those without a disability.

**7** In 2020, as many as 5.8 million Americans were living with Alzheimer's disease and related dementias. The number of people living with the disease doubles every 5 years beyond age 65. **8** By the year 2030, it is anticipated that approximately 71.5 million baby boomers will be over age 65. **9** This growing number of individuals will need services and supports in our court systems that meet their age-related disabilities and needs.

While there is a growing awareness of the need for robust decision-making supports, there are also growing concerns over abuse and exploitation of older persons and individuals with developmental disabilities. **10** There is a growing



need to improve access to justice for people with cognitive disabilities throughout the court system. Accommodations that provide accessible court communication are key not only to procedural fairness, but also the administration of justice. How can we - the law and aging community, people with lived experience, etc. - advocate for systemic improvements in the area of reasonable accommodations in court proceedings for seniors and other adults with disabilities? If we truly seek to honor our Pledge of Allegiance with “...justice for *all*,” clear, concise, informative, accessible, and effective communication for *every* individual involved in the judicial process is imperative, and something to talk about.

## Endnotes



**ABA** American Bar Association |

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