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# Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act

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## COMMUNICATION ACCESS FUNDS: ACHIEVING THE UNREALIZED AIMS OF THE AMERICANS WITH DISABILITIES ACT

Howard A. Rosenblum\*

*Access to medical care and legal services is a basic right taken for granted in this country. Yet, in 2011, law and medicine are not accessible for millions of individuals who are deaf and hard of hearing. Despite federal and state laws mandating access, doctors and lawyers have largely been resistant and reluctant to make their services accessible to this population through alternative communication options. This Article looks at how federal law has mandated access to professional services for at least two decades and the factors that have generally prevented such access. This Article examines the importance of communication within the medical and legal professions, and how this affects medical and legal services when communication access is denied. A look at one program model to rectify this lack of access reveals the challenges within providing communication access in professional services. Finally, this Article explores communication access funds as a systemic solution to this vexing problem and proposes this model be implemented in all states.*

### I. INTRODUCTION

Doctors and lawyers are among the most trusted professionals to whom people turn for advice and assistance. Every day, people seek out doctors to treat medical ailments and lawyers to resolve legal difficulties. People trust these professionals largely in part because they know that doctors and lawyers are bound by a code of ethics, and people are especially comforted by the knowledge that all of their communications are kept confidential. With such confidentiality, patients and clients are willing to communicate openly and completely with their doctors and lawyers. However, a large portion of the population in the United States

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is essentially unable to communicate with doctors and lawyers simply because they are deaf or hard of hearing.<sup>1</sup>

Despite the passage of civil rights legislation for people with disabilities, the mandate for communication access continues to be ignored to the detriment of people who are deaf or hard of hearing. Part II of this Article looks at the importance of communications between consumers and their professionals, such as doctors and lawyers. Part III reviews the federal and state laws that mandate equal access to this type of communications with professionals for people with disabilities, particularly those who are deaf or hard of hearing. Part IV addresses the challenges of communication access with professionals that persist despite federal and state mandates. Part V examines a legal referral center model to assess how it assists in securing communication access between lawyers and the deaf and hard of hearing community. Part VI reviews existing communication access funds in an effort to understand their advantages and limitations and then proposes a more sustainable form of this type of fund. Part VII focuses on the barriers throughout the country that might prevent the creation of communication access funds and how to mitigate or remove these barriers. The Article concludes with recommendations to implement communication access funds as a solution for making all professions fully and equitably accessible in the communication sense for people who are deaf or hard of hearing.

## II. IMPORTANCE OF COMMUNICATIONS WITH PROFESSIONALS

Professional organizations place a great deal of importance on ensuring that communications between their professional members and the consumers remain confidential. The medical and legal professions are especially known to value open and honest communications—their ethical codes of professional conduct mandate absolute confidentiality, with rare exceptions, between their members and the consumers they serve.

According to the American Bar Association (“ABA”),

The protection of communications between client and lawyer, as embodied in the attorney-client privilege, has been a bedrock principle of our justice system for hundreds of years. The privilege is designed to permit

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<sup>1</sup> For the purpose of this Article, the phrase “deaf and hard of hearing” is intended to cover all individuals with varying levels of hearing limitations including but not limited to those who are deaf-blind, late-deafened, culturally Deaf, hearing aid users, cochlear implant users, and deaf or hard of hearing people who do not know sign language (which may mean speech and lip-reading, with or without the use of cued speech).

the full and frank exchange of information as a necessary measure to ensure effective legal representation and protection of civil liberties. It enables the attorney to provide informed and more effective advice to the client in fulfilling the client's legal obligations.<sup>2</sup>

The American Medical Association ("AMA") has the same rationale for doctor-patient confidentiality:

[T]he purpose of a physician's ethical duty to maintain patient confidentiality is to allow the patient to feel free to make a full and frank disclosure of information to the physician with the knowledge that the physician will protect the confidential nature of the information disclosed. Full disclosure enables the physician to diagnose conditions properly and to treat the patient appropriately.<sup>3</sup>

Despite the high value the AMA and ABA place on developing trust and unfettered discourse between their professional members and consumers, the vast majority of doctors and lawyers do not consider communication access for people with disabilities as important. Twenty years of federal mandates for communication access have not resulted in widespread use of sign language interpreters or other alternative means of communications between these professionals and consumers who are deaf or hard of hearing.

### III. FEDERAL AND STATE MANDATES FOR ACCESS

In 1990, Congress enacted the Americans with Disabilities Act ("ADA") in an effort to eradicate discrimination against people with disabilities with respect to employment, public entities, public accommodations, and telecommunications. As explained in the Preamble of the ADA, "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of . . . communication barriers . . . and relegation to lesser services, programs, activities,

<sup>2</sup> *Task Force on Attorney Client Privilege*, ABA, <http://www.abanet.org/buslaw/attorneyclient/> (last visited Nov. 23, 2010).

<sup>3</sup> *Patient Physician Relationship Topics*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/patient-confidentiality.shtml> (last visited Nov. 23, 2010).

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benefits, jobs, or other opportunities.”<sup>4</sup> Further, the Preamble states that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”<sup>5</sup> Most importantly, Congress found the following:

[T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.<sup>6</sup>

Much of the ADA focuses on removing physical barriers to ensure that people with mobility impairments and other physical disabilities can enter and use workplaces, government facilities, businesses and places of recreation and entertainment.<sup>7</sup> However, the ADA also mandates that employers, government agencies, and businesses that are open to the public provide communication access to persons with disabilities.<sup>8</sup>

Title III of the ADA specifies that it is discrimination by a place of public accommodation if it fails “to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”<sup>9</sup> The Department of Justice (“DOJ”) regulations provide examples of “auxiliary aids and services,” which include the following:

[q]ualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD’s), videotext displays, or other effective methods

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<sup>4</sup> 42 U.S.C. § 12101(a)(5) (2006).

<sup>5</sup> *Id.* § 12101(a)(8) (Supp. II 2008).

<sup>6</sup> *Id.* § 12101(a)(9) (2006).

<sup>7</sup> *Id.* § 12101 (2006 & Supp. II 2008).

<sup>8</sup> *Id.* § 12103(1) (Supp. II 2008); *id.* §§ 12111(9)(B), 12112(b)(5), 12131(2), 12132, 12182(b)(2)(A)(iii), 12184(b)(2)(B) (2006).

<sup>9</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

of making aurally delivered materials available to individuals with hearing impairments.<sup>10</sup>

In addition, the ADA defines “disability” to mean, in part, “a physical or mental impairment that substantially limits one or more major life activities,” and “major life activities” include speaking and hearing.<sup>11</sup>

As a result, according to the ADA, if a public accommodation refuses to provide auxiliary aids and services that enable a deaf or hard of hearing person to gain access to its services, then the public accommodation has engaged in discrimination. The offices of lawyers and professional health care providers are included in the definition of a “[p]ublic accommodation.”<sup>12</sup> The ADA is clear in its mandate that the offices of doctors and lawyers must provide communication access to deaf and hard of hearing individuals seeking their services.

In the context of communicating with lawyers and health care providers at their offices, it must be understood that most of the examples of auxiliary aids and services provided in the DOJ regulation—other than qualified interpreters and Computer-Aided Transcription (“CART”) services—are not suitable.<sup>13</sup> The ADA intends the list of auxiliary aids and services to be comprehensive and inclusive of all possible situations, but to communicate with a doctor or lawyer in their office requires an instantaneous assisted dialogue between the professional and the consumer. Although some consumers can communicate with their doctor or lawyer using hearing aids and lip-reading or through the use of written notes, many deaf and hard of hearing consumers require more assistance. Sign language interpreters and CART services are the standard forms of auxiliary aids and services needed by the vast majority of deaf and hard of hearing consumers who need any type of assistance in communicating with their doctors and lawyers.

Virtually all states have their own version of disability rights laws that mirror the language of the ADA or add to it for a stronger state

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<sup>10</sup> 28 C.F.R. § 36.303(b)(1) (2010).

<sup>11</sup> 42 U.S.C. § 12102(1)(A), (2)(A) (Supp. II 2008).

<sup>12</sup> *Id.* § 12181(7)(F) (2006).

<sup>13</sup> Computer Aided Transcription Services are commonly referred to as CART in the deaf and hard of hearing community. CART is an acronym for Communication Access Realtime Translation, which is typically a computer screen showing real-time text fed from a stenographer utilizing specialized equipment to simultaneously transcribe spoken language. For more information, see *Accessibility—Communication Access Realtime Translation (CART)*, ABOUT.COM, <http://deafness.about.com/cs/cart/a/cart.htm> (last visited Nov. 23, 2010).

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mandate.<sup>14</sup> The AMA recognizes the federal and state obligations and posts a page on its website guiding its doctors to comply with the law.<sup>15</sup>

<sup>14</sup> ALA. CODE §§ 21-7-1 to 21-7-10 (LexisNexis 2006); ALASKA STAT. §§ 18.80.200–.295 (2010); ARIZ. REV. STAT. ANN. §§ 41-1401 to 41-1492.12 (2004 & Supp. 2010); Arkansas Civil Rights Act of 1993, ARK. CODE ANN. §§ 16-123-101 to 16-123-108 (2006); California Unruh Civil Rights Act, CAL. CIV. CODE §§ 51–55.57 (West 2007 & Supp. 2011); COLO. REV. STAT. ANN. §§ 24-34-401 to 24-34-804 (West 2008 & Supp. 2010); CONN. GEN. STAT. ANN. §§ 46a-51 to 46a-104 (West 2009 & Supp. 2010); Delaware Equal Accommodations Law, DEL. CODE ANN. tit. 6, §§ 4500–4513 (2005 & Supp. 2010); D.C. CODE §§ 2-1401.01 to 2-1431.08 (2007 & Supp. 2010); Florida Civil Rights Act, FLA. STAT. ANN. §§ 760.01–760.11 (West 2010 & Supp. 2011); Rights of Persons with Disabilities Law, GA. CODE ANN. §§ 30-4-1 to 30-4-4 (2007); HAW. REV. STAT. §§ 368-1 to 368-17 (1993 & Supp. 2009); IDAHO CODE ANN. §§ 67-5901 to 67-5912 (2006 & Supp. 2010); Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-101 to 5/10-104 (2009); Indiana Civil Rights Law, IND. CODE ANN. §§ 22-9-1-1 to 22-9-9-5 (West 2005 & Supp. 2010); IOWA CODE ANN. §§ 216.1–216E.7 (West 2009 & Supp. 2010); Kansas Acts Against Discrimination, KAN. STAT. ANN. §§ 44-1001 to 44-1044 (2000 & Supp. 2010); Kentucky Civil Rights Act, KY. REV. STAT. ANN. §§ 344.010–344.990 (West 2006 & Supp. 2010); Louisiana White Cane Law, LA. REV. STAT. ANN. §§ 46:1951–46:1959 (2010); Maine Model White Cane Law, ME. REV. STAT. ANN. tit. 17 §§ 1311–1316 (2006 & Supp. 2010); MD. CODE ANN., STATE GOV'T, §§ 20-101 to 20-1203 (LexisNexis 2009 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West 2000); Michigan Persons with Disabilities Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.1101–37.1607 (West 2001); Minnesota Human Rights Act, MINN. STAT. ANN. §§ 363A.01–.43 (West 2004 & Supp. 2011); Mississippi Rights and Liabilities of Individuals with Disabilities Law, MISS. CODE ANN. §§ 43-6-1 to 43-6-171 (2009 & Supp. 2010); MO. ANN. STAT. §§ 213.010–.137 (West 2004 & Supp. 2011); Montana Rights of Persons with Disabilities, MONT. CODE ANN. §§ 49-4-101 to 49-4-511 (2009); NEB. REV. STAT. §§ 20-113 to 20-169 (2007 & Supp. 2010); NEV. REV. STAT. ANN. §§ 233.010–.210 (LexisNexis 2010); New Hampshire Law Against Discrimination, N.H. REV. STAT. ANN. §§ 354-A:1 to 354-A:26 (LexisNexis 2008); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (West 2002 & Supp. 2010); New Mexico Human Rights Act, N.M. STAT. ANN. §§ 28-1-1 to 28-1-15 (LexisNexis 2004 & Supp. 2010); New York Human Rights Law, N.Y. EXEC. LAW §§ 290–301 (McKinney 2010 & Supp. 2011); North Carolina Persons with Disabilities Protection Act, N.C. GEN. STAT. §§ 168A-1 to 168A-12 (2009); N.D. CENT. CODE §§ 14-02.4-01 to 14-02.4-23 (2009); OHIO REV. CODE ANN. §§ 4112.01–.99 (West 2007 & Supp. 2010); OKLA. STAT. ANN. tit. 25, §§ 1101–1901 (West 2008 & Supp. 2011); ORE. REV. ST. §§ 659A.001–.990 (2009); Pennsylvania Human Relations Act, 43 PA. STAT. ANN. §§ 951–963 (West 2009); R.I. GEN. LAWS §§ 11-24-1 to 11-24-8 (2002 & Supp. 2010); South Carolina Equal Enjoyment and Privileges to Public Accommodations Act, S.C. CODE ANN. §§ 45-9-10 to 45-9-120 (Supp. 2010); S.D. CODIFIED LAWS §§ 20-13-1 to 20-13-56 (2004 & Supp. 2010); Texas Rights and Responsibilities of Persons with Disabilities, TEX. HUM. RES. CODE ANN. §§ 121.001–123.010 (West 2001 & Supp. 2010); Utah Rights and Privileges of a Person with a Disability Law, UTAH CODE ANN. §§ 62A-5b-101 to 62A-5b-107 (LexisNexis Supp. 2010); VT. STAT. ANN. tit. 9, §§ 4500–4507 (2006 & Supp. 2010); VA. CODE ANN. §§ 51.5-40 to 51.5-46 (2009); Washington Law Against Discrimination, WASH. REV. CODE ANN. §§ 49.60.010–.505 (West 2008 & Supp. 2011); The West Virginia Human Rights Act, W. VA. CODE ANN. §§ 5-11-1 to 5-11-20 (LexisNexis 2006 & Supp. 2010); WIS. STAT. ANN. §§ 106.50–.58 (West 2002 & Supp. 2010); WYO. STAT. ANN. §§ 35-13-201 to 35-13-206 (2009).

<sup>15</sup> *Americans with Disabilities Act and Hearing Interpreters*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/regulatory-compliance-topics/the-americans-disabilities-act-hearing-interpreters.shtml> (last visited Nov. 23, 2010).

The DOJ has settled with doctors and lawyers to resolve cases where the doctors or lawyers had refused to provide sign language interpreters to consumers that required them to communicate.<sup>16</sup> There are also settlements for the same reason with hospitals and state courts, but this Article focuses on access to professionals in their offices. Despite the legal mandate and the availability of this information on the Internet, many doctors and lawyers remain unaware of their obligation to provide communication access to deaf and hard of hearing individuals without passing the cost on to them. In addition, when doctors and lawyers realize that they must provide communication, there is confusion over how to provide such access. To remedy this pervasive problem, the government must devise a better system with logistical support for the provision of auxiliary aids and services so that there is a seamless delivery of legal, medical, and other professional services to deaf and hard of hearing consumers.

#### IV. CHALLENGE OF COMMUNICATION ACCESS WITH PROFESSIONAL SERVICES

Communication access is more complex and difficult to achieve than physical access. For example, the ADA and its regulations and accessibility guidelines provide detailed information about architectural designs for physical access including the width of passageways, the height of elevator buttons, and the length of ramps. By contrast, communication access depends on the deaf or hard of hearing individual's level of hearing, technological aids, language development, mode of communication, and other factors. Too often, doctors and lawyers assume that all deaf and hard of hearing individuals can read and write well enough so that using pen and paper is an effective way to communicate complex medical and legal terminologies and concepts.

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<sup>16</sup> See, e.g., *United States v. Saimovici*, No. 05 Civ. 7712 (S.D.N.Y., Sept. 1, 2005), available at <http://www.ada.gov/advancedeyecr.htm>; *Drew v. Merrill*, No. CV 99-810-KI (D. Or. 1999), available at <http://www.ada.gov/drew.htm>; Settlement Agreement Between the United States of America and Medbrook Medical Associates, Inc., Dep't of Just. No. 202-83-8 (2008), <http://www.ada.gov/medbrook.htm>; Settlement Agreement By the United States of America, Clifford B. Hearn, Jr., and Clifford B. Hearn, Jr., P.A., Dep't of Just. No. 202-15-37 (2008), <http://www.ada.gov/hearn.htm>; Settlement Agreement Between the United States of America and Joseph David Camacho, Esq., Albuquerque, New Mexico Under the Americans with Disabilities Act, Dep't of Just. No. 202-4937 (2007), <http://www.ada.gov/albuquerque.htm> [hereinafter *Camacho Settlement Agreement*]; Settlement Agreement Between the United States of America and Ray Hand, Ph.D., Dep't of Just. No. 202-60-76 (2006), <http://www.ada.gov/rhandsa.htm>; Settlement Agreement Between the United States of America and Lawyer's Advocate, Inc., Dep't of Just. No. 202-13-125 (2001), <http://www.ada.gov/lawadv.htm>.



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Many professionals also mistakenly assume that using family members to interpret is perfectly acceptable, as evident on the AMA website which states that “qualified interpreters may include: family members or friends, as long as they are effective, accurate, impartial (especially in personal or confidential situations), and an acceptable choice to the patient; personnel from the practice or facility; or interpreters from interpreter services.”<sup>17</sup> This is an incorrect understanding of the regulatory definition for a “qualified interpreter,” which is “an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary.”<sup>18</sup>

The DOJ explains in a publication that

[s]ign language or other interpreters must be qualified. An interpreter is qualified if he or she can interpret competently, accurately, and impartially. In the hospital setting, the interpreter must be familiar with any specialized vocabulary used and must be able to interpret medical terms and concepts. Hospital personnel who have a limited familiarity with sign language should interpret only in emergency situations for a brief time until a qualified interpreter can be present.

It is inappropriate to ask family members or other companions to interpret for a person who is deaf or hard of hearing. Family members may be unable to interpret accurately in the emotional situation that often exists in a medical emergency.<sup>19</sup>

Although the DOJ publication addresses communication access within the hospital setting, the rationale and recommended protocol is equally applicable in the doctor’s office context. Yet, the AMA states on its website that the use of family members and even medical staff to “interpret” is appropriate, despite this same principle being discouraged by the DOJ.

The use of written communications or family members as interpreters is both fraught with risk for miscommunications and liability for discrimination. In 2008, a jury reached a \$400,000 verdict

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<sup>17</sup> *Americans with Disabilities Act and Hearing Interpreters*, *supra* note 15.

<sup>18</sup> 28 C.F.R. § 36.104 (2010).

<sup>19</sup> *ADA Business BRIEF: Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings*, ADA HOME PAGE, <http://www.ada.gov/hospcombr.htm> (last visited Nov. 23, 2010).

against a rheumatologist Robert Fogari for not providing an interpreter to Irma Gerena, a deaf patient that he treated for lupus for several years.<sup>20</sup> Although Ms. Gerena asked Dr. Fogari to provide an interpreter so she could better understand her treatment, Dr. Fogari refused on the grounds that it would have cost him between \$150 to \$200 per visit.<sup>21</sup> Instead, Dr. Fogari chose to use written communications with Ms. Gerena and her deaf civil union partner who had better English skills, and also had the couple's nine-year-old daughter interpret their conversations.<sup>22</sup> Dr. Fogari's defense in court was that the cost of the interpreter was an undue burden on his practice when he only received \$49 per visit for treating Ms. Gerena.<sup>23</sup> However, during the trial Ms. Gerena established that Dr. Fogari's annual income was over \$400,000.<sup>24</sup>

Dr. Fogari's insistence on written communications for a patient who did not read well and the use of a nine-year-old family member as a medical interpreter was not appropriate, but he chose to use these forms of communication access for economic purposes. Such a scenario is common and provides support for the need to remove financial disincentives from being a barrier to providing professional services to deaf and hard of hearing consumers.

More importantly, when deaf consumers seek the services of a doctor or a lawyer, it is critical that trust be established between the professional and the deaf individual. But deaf and hard of hearing individuals seeking legal or medical services routinely encounter a professional reluctant to pay out of pocket to provide communication access. Such reluctance immediately eradicates the bond of trust that is essential to every doctor-patient and attorney-client relationship.

In addition, when a doctor or lawyer refuses to provide the communication access that a deaf or hard of hearing individual feels is necessary, the remedies available to resolve this problem do not help re-establish any bond of trust. This problem is compounded by the difficulty of finding a lawyer willing to provide communication access in order to proceed in a case where communication access was denied by a doctor or lawyer. This scenario actually occurred when New Mexico attorney Joseph David Camacho took on the case of Carolyn Tanaka, a

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<sup>20</sup> *Case Summaries by Topic: Americans with Disabilities Act*, Gerena v. Fogari, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/litigation-center/case-summaries-topic/americans-disabilities-act.shtml> (last visited Jan. 26, 2011); see also Mary Pat Gallagher, *Jury Awards \$400,000 to Deaf Patient for Denial of Interpreter Services*, N.J. L.J., Oct. 17, 2008, <http://www.law.com/jsp/article.jsp?id=1202425326286>.

<sup>21</sup> *Case Summaries by Topic*, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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deaf woman who uses American Sign Language, against the University of New Mexico Hospital for failure to provide her with a qualified sign language interpreter.<sup>25</sup> Even though Mr. Camacho understood that Ms. Tanaka was entitled to a qualified sign language interpreter when she was treated by the defendant hospital, Mr. Camacho did not provide a qualified sign language interpreter to Ms. Tanaka in the course of providing her with legal services.<sup>26</sup>

V. REFERRAL CENTER STRATEGY

In 1992, the author of this Article completed law school and became licensed to practice law in Illinois. At that time, he was the only profoundly deaf attorney in active practice in Illinois and fluent in American Sign Language. Numerous deaf individuals throughout Illinois contacted him to request legal representation in every conceivable area of law. He explained to most of these individuals that their cases were outside his practice areas and optimal geographic area. He encouraged these individuals to contact their local bar associations and check telephone directories to find lawyers in the right geographic area with the appropriate expertise. Most of these individuals contacted the author shortly thereafter and complained that no lawyer would even grant a consultation meeting to discuss the merits of the case. The general responses were along the lines of: "You need a different lawyer who has experience dealing with deaf clients," "We do not provide interpreters here," and "Sorry, I'm too busy."<sup>27</sup>

The many deaf and hard of hearing consumers seeking lawyers and being unable to find any willing to take on their cases contacted the author of this Article to seek assistance. He began contacting attorneys he knew and convincing them to take on these cases. Even for an attorney trained in disability rights law, convincing lawyers to not only do the right thing but also to comply with federal and state laws was very challenging. It became apparent that the challenge was hugely daunting for the average consumer to convince lawyers (as well as doctors) that there was a legal mandate to provide communication access at no additional cost to the consumer.

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<sup>25</sup> See Camacho Settlement Agreement, *supra* note 16.

<sup>26</sup> *Id.*

<sup>27</sup> This experience is shared by staffers at the National Association of the Deaf ("NAD"). The NAD receives numerous requests for legal or advocacy assistance from deaf and hard of hearing consumers, and in recent months approximately one of every four requests concerns a lawyer who refuses to provide communication access. Interview with Shane Feldman, NAD Chief Operating Officer, and Debra Patkin, NAD staff attorney (Oct. 26, 2010).

For this author, such referrals were time-consuming so it was clear that the system needed a change. This led to the founding, in 1997, of the Midwest Center on Law and the Deaf ("MCLD"), an information and referral center designed to bridge the divide between lawyers and the deaf and hard of hearing community.<sup>28</sup> The Center began operations in 1999 with the hiring of its staff person, Karen Aguilar.<sup>29</sup> Karen Aguilar is a certified sign language interpreter who has a master's degree in public health law.<sup>30</sup> She is thoroughly familiar with the diverse communication needs and culture of the deaf and hard of hearing individuals as well as with all the different areas of the judicial and legal system.<sup>31</sup>

With Ms. Aguilar's guidance, MCLD provides information and referrals to deaf and hard of hearing individuals who are experiencing legal issues.<sup>32</sup> MCLD also provides advocacy services for deaf and hard of hearing individuals who experience denial of effective communication access with their medical doctors, psychologists, mental health professionals, dentists, and other health professionals.<sup>33</sup> The core mission of the Center, however, is to match deaf and hard of hearing individuals with attorneys able to service their legal needs in the appropriate practice and geographic areas, while making sure the attorneys provide communication access.<sup>34</sup>

The strategy to ensure prompt and effective legal representation for this population has been to locate and recruit attorneys willing to represent these individuals and willing to provide communication access, including qualified sign language interpreters.<sup>35</sup> MCLD searches for such attorneys in various geographic areas of the Midwest and all types of practice areas, and compiles a directory to be used whenever a deaf or hard of hearing individual contacts the Center seeking a specific type of lawyer in their home area.<sup>36</sup>

From the outset, the staff at MCLD experienced great difficulty convincing most attorneys to take on deaf and hard of hearing clients.<sup>37</sup> Attorneys contacted by MCLD routinely declined to accept deaf and hard of hearing clients without meeting the clients or reviewing their

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<sup>28</sup> A Letter from the Chairperson, MCLD, <http://mclld.org/about.html> (last visited Nov. 23, 2010).

<sup>29</sup> *Id.*; Interview with Karen Aguilar, MCLD Assoc. Dir. (Oct. 5, 2010).

<sup>30</sup> Interview with Karen Aguilar, *supra* note 29.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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legal case.<sup>38</sup> The staff at MCLD experienced numerous occasions where they contacted more than ten attorneys in a given area before finding one willing to meet with the deaf or hard of hearing client.<sup>39</sup>

Once MCLD located attorneys willing to take on deaf and hard of hearing clients and provide them with the appropriate communication access, the attorneys truly appreciated the referrals as it gave them a niche in the market.<sup>40</sup> Over time, however, many of the attorneys began to express disenchantment with the number of referrals that required expenditures for communication access.<sup>41</sup> While the expenditures for one deaf client each year might not bother an attorney in solo practice, it became difficult for the attorney to taken on dozens of deaf clients in a single year.<sup>42</sup>

It became evident that the drawback of this model was that it placed the entire cost of accommodating the deaf and hard of hearing population on a select few lawyers. These few lawyers bore such costs for the whole legal profession, while the lawyers who evaded any responsibility to take on deaf and hard of hearing clients evaded this cost. This inequity and eventual disenchantment among the initially willing attorneys renders the referral center model an unsustainable solution both in the economic and practical sense.

The Center continues to operate after eleven years, but struggles now more than ever to find attorneys willing to take on deaf and hard of hearing clients. There needs to be a different—and more sustainable—solution to ensure that deaf and hard of hearing individuals have equal access to legal services.

## VI. COMMUNICATION ACCESS FUNDS AS A SOLUTION

### A. *What Type of Solution is Needed?*

Is there a solution or model that would create an atmosphere where deaf and hard of hearing consumers can contact any doctor or lawyer to set up an appointment without the tension of arguing over the provision of communication access? Such a solution would retain the trust that is automatic with most doctor-patient and attorney-client relationships. If there were a way to eliminate the upfront financial disincentive to providing communication access, doctors and lawyers would likely not be so reluctant to take on deaf and hard of hearing clients.

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Yet, communication access must be provided. Doctors cannot effectively treat patients without open and unfettered communication. Attorneys cannot effectively represent clients without full and honest disclosure and communication. To rely on less-than-reliable alternatives to fully accessible communications would have a deleterious effect on the completeness of full disclosure and thereby significantly increase the risk of mistakes and malpractice. Such communication options are a recurring expense and not a one-time purchase that provides permanent access, as is the case with wheelchair ramps.

Is it possible to have both: no upfront financial disincentive *and* fully accessible communication? How would communication access be possible if there were no upfront requirement on individual lawyers and doctors to pay for sign language interpreters and real-time captioning? One option is to have a pooled fund with monies paid into it from the license fees of each profession.

#### *B. The Pooled Fund Concept*

As explained above, Title III of the ADA puts the responsibility of accommodating persons with disabilities squarely on public accommodations, including the offices of lawyers and doctors.<sup>43</sup> However, the ADA does not specify the manner by which lawyers and doctors pay for such auxiliary aids and services to serve their clients or patients with disabilities. Although the ADA requires lawyers and doctors to provide auxiliary aids and services to the extent necessary to make communications effective with their clients and patients, there is no specific mandate regarding how lawyers or doctors can pay for such auxiliary aids and services. There is also no prohibition on the pooling of funds by all lawyers and doctors to pay for anticipated accommodations in a year of serving clients and patients with disabilities.

In fact, the ADA contains provisions for the pooling of funds to provide for communication access in another context. Title IV of the ADA governs the provision of telecommunications relay services that allow deaf, hard of hearing, and speech-impaired individuals to use the telephone system to communicate with others who do not have disabilities.<sup>44</sup> The costs of interstate telecommunications relay services are “recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services [are] recovered

<sup>43</sup> 42 U.S.C. §§ 12181(7)(F), 12182(b)(2)(A)(iii) (2006).

<sup>44</sup> 47 U.S.C. § 225 (2006); *see also* Michael Steven Stein & Emily Teplin, *Rational Discrimination and Shared Compliance: Lessons from Title IV of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1095 (2011) (discussing what can be learned from Title IV).

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from the intrastate jurisdiction.”<sup>45</sup> Essentially, a tax is imposed on all telephone bills and the monies recovered from the tax are funneled into the telecommunications relay service fund. This fund is used to cover the costs of all relay services.

This concept can and should be applied to the cost of accommodating the communication needs of every client with a disability who retains a lawyer and every patient with a disability who consults a doctor. Such an approach avoids imposing the cost of accommodating the communication needs of a large deaf and hard of hearing population in any given geographic area on the few doctors and lawyers willing to work with this population. This approach also opens up the field for deaf and hard of hearing individuals with respect to choosing a doctor or a lawyer, rather than being limited only to those willing to bear the cost of communication access. This approach puts the responsibility of making an entire profession accessible on all the members of that profession and spreads the cost among them so that none bear a large portion of the cost.

More importantly, the tension that often accompanies any request for communication access is absent when the request is no longer made of the doctor or lawyer prior to any specific appointment. Rather, the request can be made to a central agency supported by the fund and that agency can arrange communication access for all appointments with lawyers or doctors. By shifting the responsibility for such access away from individual doctors and lawyers, the deaf or hard of hearing patient or client no longer seeks medical and legal attention with tension and probable rejection. Such a fund is not a foreign concept to any state licensing authority for lawyers or doctors.

*C. Existing State License Fee-Based Funds as a Parallel Model*

Most if not all states have some form of license fee-based funds established as a matter of public policy. These license fee-based funds prove the feasibility of creating a parallel fund for communication access purposes.

The most prevalent version of such license fee-based funds for lawyers are those run by each state’s attorney licensing and regulating authority to protect consumers from any possible fraud perpetuated by lawyers. Such funds are typically termed “Client Protection Program,” “Client Security Fund or Program,” or “Client Assistance Program.”<sup>46</sup>

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<sup>45</sup> *Id.* § 225(d)(3)(B).

<sup>46</sup> For more information about state license fee-based funds, see the following resources listed alphabetically by state: ALA. ST. B. CLIENT SEC. FUND RS., available at <http://www.alabar.org/ogc/Client%20Security%20Fund%20RULES.pdf> (Client Security

Fund); ALASKA ST. BAR R. 45–60 (Lawyers' Fund for Client Protection); ARIZ. SUP. CT. R. 31; ARK. RULES OF THE CLIENT FUND SEC. COMM., *available at* [http://courts.arkansas.gov/rules/client\\_security\\_fund/index.cfm](http://courts.arkansas.gov/rules/client_security_fund/index.cfm) (Client Security Fund); CAL. BUS. & PROF. CODE § 6140.5 (West 2010) (Client Security Fund); COLO. R. CIV. P. 252 (Attorney's Fund for Client Protection); CONN. GEN. STAT. ANN. § 51-81d (West 2009 & Supp. 2010) (Client Security Fund); DEL. SUP. CT. R. 66, *available at* <http://courts.delaware.gov/forms/download.aspx?id=39368> (Lawyers' Fund for Client Protection); FLA. B. R. 7 (Clients' Security Fund); GA. STATE BAR HANDBOOK, PT. X (Clients' Security Fund); HAW. SUP. CT. R. 10, *available at* [http://www.state.hi.us/jud/ctrules/rsch.htm#Rule\\_10](http://www.state.hi.us/jud/ctrules/rsch.htm#Rule_10) (Lawyers' Fund for Client Protection); IDAHO B. COMM'N RS. § VI, *available at* <http://isb.idaho.gov/pdf/rules/ibcr.pdf> (Client Assistance Fund); ILL. SUP. CT. R. 780 (Client Protection Program); *Clients' Financial Assistance Fund*, IND. ST. B. ASS'N, <http://www.inbar.org/ISBALinks/Committees/ClientsFinancialAssistanceFund/tabid/138/Default.aspx> (last visited Mar. 16, 2011); IOWA CT. R. 39, *available at* [http://publications.iowa.gov/107/2/Court\\_Rules.pdf](http://publications.iowa.gov/107/2/Court_Rules.pdf) (Client Security Commission); KAN. SUP. CT. R. 227, *available at* <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=375> (Lawyers' Fund for Client Protection); KY. SUP. CT. R. 3.820, *available at* [http://www.kybar.org/documents/scr/scr3/scr\\_3.820.pdf](http://www.kybar.org/documents/scr/scr3/scr_3.820.pdf) (Clients' Security Fund); *Client Assistance Fund*, LA. ST. B. ASS'N, <http://www.lsba.org/2007MembershipDirectory/ClientProtectionFund.asp?Menu=PR> (last visited Mar. 16, 2011); ME. RS. FOR LAWYER FUND FOR CLIENT PROT., *available at* [http://www.courts.state.me.us/rules\\_forms\\_fees/rules/LawFundClientProt7-08.pdf](http://www.courts.state.me.us/rules_forms_fees/rules/LawFundClientProt7-08.pdf) (Lawyers' Fund for Client Protection); MD. CODE ANN., BUS. OCC. & PROF. §§ 10-310 to 10-313 (LexisNexis 2009 & Supp. 2010) (Client Protection Fund); MASS. SUP. CT. R. 4:04, *available at* <http://massreports.com/courtrules/sjcrules.aspx#top> (Clients' Security Fund); *Client Protection Fund*, ST. B. MICH., <http://www.michbar.org/client/protectionfund.cfm> (last visited Mar. 16, 2011); MINN. CLIENT SEC. BD. R. 2.01, *available at* <http://csb.mncourts.gov/rules/Documents/CSB%20Rules.pdf> (Client Security Fund); MISS. B., BYLAWS 9-9 (2009), *available at* <http://www.msbar.org/admin/spotimages/2160.pdf> (Clients' Security Fund); *Client Security Fund*, MO. B., <http://www.mobar.org/24967105-04c1-4488-99c7-0dd09eb75698.aspx> (last visited Mar. 16, 2011); *Frequently Asked Questions About the Lawyers' Fund for Client Protection*, ST. B. MONT. <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=18> (last visited Mar. 16, 2011); CLIENT ASSISTANCE FUND OF THE NEB. ST. B. ASS'N, *available at* [http://www.nebar.com/associations/8143/files/CAF\\_Rules.pdf](http://www.nebar.com/associations/8143/files/CAF_Rules.pdf); ST. B. OF NEV., RS. OF P. OF THE CLIENTS' SEC. FUND, *available at* [http://www.nvbar.org/CSF/CSF\\_Rules\\_08-10.pdf](http://www.nvbar.org/CSF/CSF_Rules_08-10.pdf); N.H. SUP. CT. R. 55, *available at* <http://www.courts.state.nh.us/rules/scr/index.htm> (Public Protection Fund); N.J. CT. R. GEN. APPLICATION, R. 1:28, *available at* <http://www.judiciary.state.nj.us/rules/r1-28.htm> (Lawyers' Fund for Client Protection); ST. B. OF N.M., RS. GOVERNING THE CLIENT PROTECTION FUND, <http://www.nmbar.org/Attorneys/CPF/CPF%20Rules%202010.pdf> (last visited Mar. 16, 2011) (Client Protection Fund); N.Y. JUD. LAW § 468-b (McKinney 2005) (Clients' Security Fund); N.Y. ST. FIN. LAW § 97-t (McKinney 2009) (Lawyers' Fund for Client Protection); RS. OF THE STANDING COMMS. OF THE N.C. ST. B. § .1400, *available at* <http://www.ncbar.com/rules/regulations.asp?page=199> (Client Security Fund); *Client Protection Fund*, ST. B. ASS'N N.D., <http://www.sband.org/PublicServices/index.asp?category=Client%20Protection%20Fund> (last visited Mar. 16, 2011); SUP. CT. R. FOR THE GOVT' OF THE B. OF OHIO, R. VIII, *available at* <http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf> (Clients' Security Fund); *What is the Clients' Security Fund?*, OKLA. B. ASS'N, <http://www.okbar.org/members/gencounsel/CSFfaq.htm#fund> (last visited Mar. 16, 2011); *OSB Client Security Fund*, OR. ST. B., <http://www.osbar.org/csf>; PA. RULES OF DISCIPLINARY ENFORCEMENT SUBCH. E, *available at* <http://www.padisciplinaryboard.org/documents/PARDE-current.pdf> (Lawyers Fund for Client Security); *Rhode Island Bar Association Lawyer's Fund for Client*



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These programs were created to address situations where lawyers might abscond with funds that belonged to clients.<sup>47</sup> Similarly, some states mandate a patient compensation fund where all health care providers pay surcharges for the purpose of covering compensation to patients for "judgments or settlements in a medical liability cause of action above a defined amount."<sup>48</sup> In addition, New Jersey requires medical professionals to pay into a fund that assists individual doctors who are unable to afford high medical malpractice liability insurance premiums.<sup>49</sup>

It is notable that many of these funds, particularly the client protection programs for lawyers, have information for the public explicitly stating that the funding for the programs are not paid by tax dollars but from lawyers' licenses or registration fees.<sup>50</sup> Consequently, state mandated funds operating from surcharges on professional licenses are not a new concept. Most states use this mechanism for funding needed programs. While no state has yet created a mandated communication access fund based on surcharges from the licenses of professionals, communication access funds have existed in different forms.

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*Reimbursement*, R.I. B. ASS'N, <http://www.ribar.com/For%20the%20Public/ClientReimbursementFund.aspx> (last visited Mar. 16, 2011); S.C. BAR, RS. OF P. FOR THE LAWYERS' FUND FOR CLIENT PROTECTION § I.2, *available at* <http://www.sbar.org/public/files/docs/LFCPRules2009.pdf>; *Client Security Fund*, ST. B. S.D., [http://www.sdbar.org/pamphlets/client\\_security.shtm](http://www.sdbar.org/pamphlets/client_security.shtm) (last visited Mar. 16, 2011); TENN SUP. CT. R. 25, *available at* <http://www.tsc.state.tn.us/opinions/TSC/RULES/TNRulesOfCourt/scindex.htm> (Lawyers' Fund for Client Protection); ST. B. OF TEX., CLIENT SEC. FUND OF THE ST. B. OF TEXAS, *available at* <http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/OurLegalSystem/TheClientSecurityFund.pdf>; SUP. CT. RS. OF PROF'L CONDUCT CH. 14, ART. 9, *available at* [http://www.utcourts.gov/resources/rules/ucja/#chap14\\_article\\_8](http://www.utcourts.gov/resources/rules/ucja/#chap14_article_8) (Utah Lawyers' Fund for Client Protection); VT. B. ASS'N, CLIENTS' SEC. FUND RS., *available at* [https://www.vtbar.org/Upload%20Files/Attachments/ClientSecFundRules\[1\].pdf](https://www.vtbar.org/Upload%20Files/Attachments/ClientSecFundRules[1].pdf); VA. ST. BAR, 2009-2010 PROF'L GUIDELINES 222-27, <http://www.vsb.org/docs/2009-10-pg.pdf> (Clients' Protection Fund); WASH. ST. CT. RS.: ADMISSION TO PRACTICE R. 15, *available at* [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=ga&set=APR](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=APR) (Lawyers' Fund for Client Protection); *Procedural Rules for Lawyers' Fund for Client Protection of the West Virginia Bar*, W. VA. ST. B., [http://www.wvbar.org/public\\_information/lawfundclprorules.aspx](http://www.wvbar.org/public_information/lawfundclprorules.aspx) (last visited Mar. 16, 2011); WIS. SUP. CT. R. 12.04-12.12, *available at* <http://www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=59259> (Lawyers' Fund for Client Protection); *Rules of Procedure for the Clients' Security Fund of the State Bar of Wyoming*, WYO. JUD. BRANCH, [http://courts.state.wy.us/CourtRules\\_Entities.aspx?RulesPage=ClientsSecurityFund.xml](http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=ClientsSecurityFund.xml) (last visited Mar. 16, 2011).

<sup>47</sup> See *supra* note 46 (providing citations to various states' license fee-based funds for lawyers).

<sup>48</sup> *State Patient Compensation Funds*, AM. MED. ASS'N, <http://www.ama-assn.org/ama1/pub/upload/mm/378/mlrpatcomp.pdf> (last visited Nov. 23, 2010).

<sup>49</sup> N.J. STAT. ANN. § 17:30D-29 (West 2010).

<sup>50</sup> See sources cited *supra* notes 46, 48.

*D. Existing Communication Access Funds*

Although there are no apparent communication access funds (“CAFs”) or pooled funds publicly known in use within the medical profession, there are CAFs in use with respect to lawyers throughout the country. However, none of these funds are funded through surcharges on the license fees of the lawyers. Rather, the money for such existing CAFs comes from membership dues, grants, or state taxes. In addition, these funds typically have limitations on the use of monies, which detracts from the concept that communication access is a matter of civil right rather than a charitable cause.

At the present time, there are CAFs for lawyers in three state bar associations (Colorado,<sup>51</sup> Pennsylvania,<sup>52</sup> and Texas<sup>53</sup>), one county bar association (Monroe County, New York<sup>54</sup>), one city bar association (Philadelphia, Pennsylvania<sup>55</sup>), and one funded by the State of Maine.<sup>56</sup> This Article examines each of these CAFs to assess their effectiveness and drawbacks.

## 1. Colorado Bar Association’s Reimbursement Program

The Colorado Bar Association (“CBA”) “established a reimbursement program in 1995 for member attorneys who provide interpreter services . . . [to] clients who are deaf.”<sup>57</sup> Twenty-thousand dollars was originally allotted for the program in 1995, but “the original allotment has been spent.”<sup>58</sup> This is indicative of the flaw of a fund that is dependent on grants, donations, or allotments. When the first grant is depleted, additional funds must be secured from somewhere. Consequently, the longevity of the program depends on the level of the

<sup>51</sup> Eric Maxfield, *Access to Justice: Sign Language Interpreters: Who Pays?*, COLO. LAW., Apr. 2004, at 29, available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=3130](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=3130).

<sup>52</sup> *Pennsylvania Bar Association Sign Language Interpreter Fund Reimbursement Application*, <http://www.pabar.org/public/committees/disabili/Sign%20Lang.pdf> (last visited Nov. 23, 2010) [hereinafter *Penn. Reimbursement Application*].

<sup>53</sup> *Sign-Up Fund: Basic Guidelines for Use*, DISABILITY ISSUES COMMITTEE ST. B. TEX., <http://www.texasbar.org/disabilityissues.org/committee/assets/Sign-Up%20Fund%20Basic%20Guidelines.pdf> (last visited Jan. 26, 2011).

<sup>54</sup> *Foundation Grants Awarded in 2010*, MONROE COUNTY B. ASS’N, <http://www.mcba.org/Foundation/Grants/> (last visited Nov. 23, 2010).

<sup>55</sup> *Philadelphia Bar Association Sign Language Interpreter Fund Reimbursement Application*, <http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/SignLanguageInterpreterFundApp1.pdf> (last visited Jan. 26, 2011) [hereinafter *Phila. Reimbursement Application*].

<sup>56</sup> ME. REV. STAT. ANN. tit. 5, § 48-A(4) (Supp. 2010).

<sup>57</sup> Maxfield, *supra* note 51, at Answer to Question 9.

<sup>58</sup> *Id.*

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bar association's commitment to this issue. According to an article published in 2004, the CBA provided between \$6,000 and \$7,000 in 2002 to reimburse "member attorneys and clients who are deaf."<sup>59</sup> If demand for services and the cost of interpreters remained constant, the CBA would need approximately \$7,000 each year to preserve this program.

Moreover, the program is one of reimbursement, which means that lawyers would first need to pay for sign language interpreter services in the course of meeting with clients who are deaf. Such a program would continue to require clients who are deaf to get the lawyer to take their case, while at the same time convincing the lawyer to provide and pay for the interpreter for appointments and spend the time and effort to seek reimbursement from the bar association. Additionally, the reimbursement is not whole; this program has a \$250 per client limit.<sup>60</sup>

In establishing this reimbursement program, the CBA clearly believed that it was necessary to ensure that deaf clients have access to legal services; however, such access is limited. By focusing only on sign language interpreters, this reimbursement program denies communication access to deaf and hard of hearing consumers who do not sign but require other auxiliary aids and services to communicate with their lawyers. Also, a deaf individual seeking a lawyer and wishing to take advantage of the reimbursement program is limited to contacting lawyers who are members of the CBA, as the "bar association membership is voluntary" in Colorado.<sup>61</sup>

## 2. Pennsylvania Bar Association's Sign Language Interpreter Fund

The Sign Language Interpreter/CART Fund, established by the Pennsylvania Bar Association ("PBA"), was created in order "to reimburse attorneys who pay for sign language and/or CART interpreters to communicate with clients or potential clients who are deaf or hard of hearing."<sup>62</sup> In this Fund's Reimbursement Application posted on the PBA's website, it explains that "[w]hile the Fund is open to all members of the [PBA], it is intended primarily to benefit clients of small firms, solo practitioners, public interest firms and pro bono volunteers."<sup>63</sup> The Reimbursement Application on the website provides both instructions and a form that lawyers use to seek reimbursements.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> FAQ Page, COLO. B. ASS'N, <http://www.cobar.org/index.cfm/ID/2626/dpmem/Help---FAQs> (last visited Jan. 26, 2011).

<sup>62</sup> *Penn. Reimbursement Application*, *supra* note 52.

<sup>63</sup> *Id.*

The Reimbursement Application expressly states that there are financial limits to the fund and to reimbursements: “[t]he Fund will reimburse a member for up to \$100 for sign language interpreter or CART fees per interpreter appointment, up to a maximum of two (2) appointments per quarter until the fund is exhausted.”<sup>64</sup> This point is further emphasized later in the same application instruction where it states that lawyers seeking reimbursement should contact a “staff liaison of the PBA Legal Services to Persons with Disabilities Committee” to verify that there is money in the Fund.<sup>65</sup>

This Fund offers CART in addition to sign language interpreters, which increases the number of deaf and hard of hearing consumers who benefit from the program. This increased availability is favorable but conversely also represents an increased risk of depleting the funds early in each fiscal period.

Similar to the CBA Reimbursement Program, any PBA member who wants access to the fund must first pay the interpreter’s or CART provider’s bill. The attorney can then send a copy of the bill, along with a signed copy of the certification, to the PBA in order to receive their reimbursement.<sup>66</sup> This process means that the consumer who is deaf or hard of hearing will need to convince the lawyer not only take on the case, but also to pay upfront for a sign language interpreter or CART services, and take on the task of seeking possible reimbursement from the PBA. Furthermore, the reimbursement is limited to \$100 per appointment for a maximum of two appointments per quarter.

The maximum of two appointments per quarter would prevent numerous referrals for attorneys willing to serve this population. Deaf and hard of hearing consumers would then have to seek out attorneys other than those who often represent the community because of this quarterly limitation as well as the \$100 limit on reimbursements. The fact that this reimbursement plan is available only to members of the PBA, a voluntary membership organization, compounds the restrictions on finding accessible attorneys in the area.<sup>67</sup> Accordingly, consumers who are deaf or hard of hearing would need to identify which attorneys are members of the PBA before trying to convince them to provide sign language interpreters or CART services with the possibility of reimbursement.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Pennsylvania Bar Association*, MARTINDALE-HUBBELL LEGAL DIRECTORY, [http://www.martindale.com/Professional\\_Development/Bar\\_Associations/US\\_State/pennsylvania.aspx](http://www.martindale.com/Professional_Development/Bar_Associations/US_State/pennsylvania.aspx) (last visited Jan. 26, 2011).

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3. Texas Bar Foundation's Sign-Up Fund

The Texas Bar Association established the Sign-Up Fund "in order to assist attorneys in meeting their obligations under Title III of the [ADA]." <sup>68</sup> The Texas Bar Association created the Sign-Up Fund in 2007 with \$20,000 from the Texas Bar Foundation. <sup>69</sup>

The Texas Bar Association's website contains the "Basic Guidelines for Use" of the Sign-Up Fund. <sup>70</sup> The guidelines indicate that the Sign-Up Fund "will be administered by Texas Lawyers Care <sup>71</sup> and the Disabilities Issues Committee of the State Bar." <sup>72</sup> The Sign-Up Fund provides money to lawyers who facilitate attorney-client communications by paying for "qualified sign language interpreters and other auxiliary aids, such as CART." <sup>73</sup>

The website states that the first year is a "pilot project for Sign-Up" during which "monies will not be made [available] for interpreting needs for which there may be alternative sources of funds." <sup>74</sup> To ensure this, there are three listed circumstances governing the availability of funds. First, the "Sign-Up [Fund] may not be used to cover expenses for sign language interpretation or auxiliary aids of court room proceedings or deposition proceedings themselves, but may be used for attorney-client communications during these proceedings." <sup>75</sup> Second, the "Sign-Up [Fund] may be used to cover expenses for sign language interpreters and auxiliary aids incurred by court-appointed lawyers, including but not limited to those court-appointed in family or probate matters, but only after the attorney has made application to the court for such funding." <sup>76</sup> Third, the expenses for interpreters and aids in criminal cases may be covered, but only once the attorney has applied "to the court for coverage under the Code of Criminal Procedure." <sup>77</sup>

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<sup>68</sup> *Sign-Up Fund Basic Guidelines for Use*, *supra* note 53.

<sup>69</sup> John Sirman, *Sign Up Fund has an Extra \$6K for Sign-Language Costs*, TEX. B. BLOG (Oct. 9, 2009), <http://blog.texasbar.com/2009/10/articles/access-to-justice/sign-up-fund-has-an-extra-6k-for-signlanguage-costs/>.

<sup>70</sup> *Sign-Up Fund Basic Guidelines for Use*, *supra* note 53.

<sup>71</sup> Texas Lawyers Care Section, ST. B. TEX., [http://www.texasbar.com/AM/Template.cfm?Section=Texas\\_Lawyers\\_Care\\_TLC](http://www.texasbar.com/AM/Template.cfm?Section=Texas_Lawyers_Care_TLC) (last visited Jan. 26, 2011). According to the Texas Bar Association website, the "Texas Lawyers Care (TLC) department of the State Bar provides critical support, assistance, and materials to both legal services programs and attorney volunteers. TLC is the *only* organization in the state providing legal training to those groups who advocate on behalf of low-income Texans." *Id.*

<sup>72</sup> *Sign-Up Fund Basic Guidelines for Use*, *supra* note 53 (footnote added).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

A lawyer seeking to use the Sign-Up Fund must first send an email to Texas Lawyers Care and include the lawyer's name, telephone number, and the working address but should not identify or include identifying information about the deaf client or potential client.<sup>78</sup> In addition, the lawyer should include a description of the type of legal case for which the interpreter is requested in order to allow "Sign-Up [to] determine whether interpreter services would or should be available through another source."<sup>79</sup> The lawyer should also include in the request "the estimated number of hours for which interpreter services will be needed throughout the life of the case. . . . [and] the estimated dollar amount of funds sought."<sup>80</sup> Once the request is approved for a set dollar amount, the lawyer is to send an invoice to Texas Lawyers Care "demonstrating the lawyer's payment for interpreter services, the number of hours, and the rate charged, along with the email from Sign-Up specifically approving the dollar for which reimbursement is sought."<sup>81</sup> The invoice should be sent in no more than thirty days after the services were provided.

After being sent in, a request will be processed promptly, with an email being sent once the funds are available. The exact dollar amount will be "based on the hourly request, the dollar amount requested, and the standard interpreter rates in the area."<sup>82</sup> However, all requests are considered "on a case-by-case basis . . . subject to the availability of funding and the number and size of other requests."<sup>83</sup> The sentiment about funding availability is that "[p]articipation in Sign-Up is contingent upon the availability of funds."<sup>84</sup> In a separate section of the guidelines, under the heading of "What if the Money Runs Out?" it is stated that the funds "will likely be depleted at some point during its first year of operation."<sup>85</sup> In addition, Sign-Up asserts that requests will not be approved unless there are sufficient funds to cover the request.<sup>86</sup>

The frequent mention of the limited availability of funds in the Basic Guidelines reflects the concern of the Texas Bar Association that \$20,000 would be quickly depleted. After the first two years, \$6,000 remained in the Sign-Up Fund. The Disability Issues Committee report for the 2008 to 2009 fiscal year, printed in the July 2009 *Texas Bar Journal*, reported

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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that the project had come to an end because all funds ran out or were accounted for.<sup>87</sup> However, in the July 2010 *Texas Bar Journal*, the report from the Disability Issues Committee was that it had “disbursed to attorneys and legal organizations \$4,175.75 in interpreting costs, with approximately \$700 in requests still pending.”<sup>88</sup> It is unclear whether this expenditure represents new funding or the remainder of the original \$20,000 allotment.

Unlike Colorado and Pennsylvania, Texas state law prohibits any person from “practic[ing] law in this state unless the person is a member of the state bar.”<sup>89</sup> Because Texas requires every lawyer in Texas to be a member of the Texas State Bar, a deaf or hard of hearing consumer seeking a lawyer does not need to verify state bar association membership prior to urging any lawyer to look into reimbursement for sign language interpreters, CART services, or any other auxiliary aids or services. However, the deaf or hard of hearing consumer would still need to persuade the lawyer to provide an auxiliary aid or service for communication access purposes as well as seek reimbursement after this provision. Given that the original allotment of \$20,000 was not depleted after two years, it is possible that the restrictive nature of the Texas Bar’s Sign-Up Fund may have discouraged lawyers from opting to utilize the fund and provide accessible legal services to deaf and hard of hearing consumers.

#### 4. Monroe County Bar Association’s Deaf Equal Access Fund

The Monroe County Bar Association (“MCBA”) created the Deaf Equal Access Fund (“DEAFund”) in 2005 “[u]sing \$7,000 from funds from the association and its foundation.”<sup>90</sup> When a Penfield lawyer “admitted violating the [ADA] by not providing an interpreter for a deaf client” in 2004, the MCBA established a task force, which determined that they needed the DEAFund.<sup>91</sup> Michael Wolford, MCBA president, stated, “When we became aware of that situation, we at the bar association decided we didn’t want to see that happen again.”<sup>92</sup>

<sup>87</sup> Rosa E. Torres, *Disability Issues*, in 2008–2009 *State Bar of Texas Committee Reports*, 72 TEX. B.J. 580, 583 (2009).

<sup>88</sup> Rosa E. Torres, *Disability Issues*, in 2009–2010 *State Bar of Texas Committee Reports*, 73 TEX. B.J. 586, 589 (2010).

<sup>89</sup> TEX. GOV’T CODE ANN. § 81.102(a) (West 2005).

<sup>90</sup> Greg Livadas, *Fund to Help Pay Interpreters: Bar Association Aids Lawyers with Hearing Impaired Clients*, ROCHESTER DEMOCRAT & CHRON., Mar. 24, 2005, at B.3, available at [http://www.deaftoday.com/v3/2005/03/fund\\_to\\_help\\_pa.html](http://www.deaftoday.com/v3/2005/03/fund_to_help_pa.html).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

MCBA's DEAFund reimburses attorneys who provide sign language interpreters for clients who are deaf or hard of hearing, with certain conditions.<sup>93</sup> According to the MCBA's Quick Reference Guide, there are three steps: (1) scheduling an interpreter for the client meeting; (2) submitting paperwork for reimbursement; and (3) receiving reimbursement.<sup>94</sup> The Quick Reference Guide emphasizes that reimbursement is only made if they secure the interpreter from one specific interpreter referral agency: Lifespan Interpreting Services.<sup>95</sup> With each deaf or hard of hearing client, "[t]he MCBA will reimburse any member attorney the total amount of the interpreter for the first client meeting, not to exceed two hours."<sup>96</sup> For all subsequent visits, the MCBA reimburses at a fifty percent rate (up to a maximum cost of \$150 per client) on the cost of the interpreter as long as the firm secured the interpreter from Lifespan Interpreting Services.<sup>97</sup> Consequently, there is a cap on the amount of reimbursement for each client, but there is no cap for individual attorneys.<sup>98</sup>

The attorney seeking reimbursement is then required to submit the DEAFund Interpreter Reimbursement Form, which is available online, and a receipt from Lifespan Interpreting Services.<sup>99</sup> The Executive Director of MCBA then reviews the form request and invoice and determines whether to approve the request.<sup>100</sup> Consequently, a deaf or hard of hearing consumer seeking legal services in the Monroe County area would need to convince a lawyer to take on the case and provide communication access upfront, paying costs out of pocket with only partial reimbursement being possible.

##### 5. Philadelphia Bar Association's Sign Language Interpreter Fund

The Philadelphia Bar Association has a Sign Language Interpreter Fund that mirrors that of the Pennsylvania Bar Association. A look at the Reimbursement Application on the Philadelphia Bar Association website reveals that it is virtually identical to the Reimbursement Application for the Pennsylvania Bar Association on its respective

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<sup>93</sup> *Id.*; *DEAFund Quick Reference Guide*, MCBA, <http://www.mcba.org/Data/Documents/DEAFund%20Quick%20Guide%20May%202009.pdf> (last visited Jan. 26, 2011).

<sup>94</sup> *DEAFund Quick Reference Guide*, *supra* note 93.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Reimbursement Form*, MCBA, <http://www.mcba.org/Members/Memberservices/Reimbursements/> (last visited Mar. 15, 2011).

<sup>100</sup> *DEAFund Quick Reference Guide*, *supra* note 93.



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website.<sup>101</sup> The main difference is that the Pennsylvania Bar includes reimbursement for CART services while the Philadelphia Bar only offers reimbursement for sign language interpreters.

The same drawbacks that afflict the Pennsylvania Bar reimbursement programs also afflict the Philadelphia Bar program. In other words, the consumer who is deaf or hard of hearing needs to convince the lawyer to not only take on the case, but also pay upfront for a sign language interpreter and take on the task of seeking possible reimbursement from the Philadelphia Bar. Again, the reimbursement is limited to \$100 per appointment for a maximum of two appointments per quarter.

In addition, the same maximum cap of two appointments per quarter discourages attorneys willing to serve this population from taking on more deaf clients. Deaf and hard of hearing consumers then have to seek out attorneys other than those who often represent the community because of this quarterly limitation as well as the \$100 limit on reimbursements. As with the Pennsylvania Bar, this reimbursement program only applies to members of the Philadelphia Bar. Hence, consumers who are deaf or hard of hearing need to identify which attorneys are members of the Philadelphia Bar before trying to convince them to provide sign language interpreters or CART services with the possibility of reimbursement.

#### 6. State of Maine's Legal Interpreting Fund

The reimbursement programs discussed above are all run by state bar associations, but since 2003 Maine has the only publicly known statutorily created and state-funded "legal interpreting fund."<sup>102</sup> This statute states that the Maine Department of Labor, Bureau of Rehabilitation Services ("Bureau") "shall maintain a legal interpreting fund, which must be used to reimburse private attorneys and advocates for the cost of interpreting services or CART that assists the attorney or advocate in effectively representing deaf persons, hard-of-hearing persons or late-deafened persons."<sup>103</sup> The Bureau provides an invoice form for private attorneys and advocates securing this reimbursement.<sup>104</sup>

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<sup>101</sup> Compare *Phila. Reimbursement Application*, *supra* note 55, with *Penn. Reimbursement Application*, *supra* note 52.

<sup>102</sup> ME. REV. STAT. ANN. tit. 5, § 48-A(4) (Supp. 2010).

<sup>103</sup> *Id.*

<sup>104</sup> The Bureau of Rehabilitation Services of the Maine Department of Labor provides a link on their website to a Word document version of an invoice to submit reimbursement for the provision of sign language interpreter or CART services. LEGAL INTERPRETING

The same law also mandates that courts and agencies conducting legal proceedings involving a deaf, hard of hearing, or late-deafened person (or the minor child of such a person) provide and compensate the qualified legal interpreters or CART providers necessary for the proceedings to be accessible.<sup>105</sup> In addition, the law requires courts to provide and compensate qualified legal interpreters and CART providers necessary to ensure effective consultation between any court-appointed attorney and clients who are deaf, hard of hearing, or late-deafened (or the minor child of such a person).<sup>106</sup> In those two latter scenarios, the relevant court or agency is responsible for the provision and payment of interpreters and CART providers, which is in keeping with the obligations of public entities under Title II of the ADA.<sup>107</sup>

However, for lawyers in private practice, Maine has elected to provide a fund for them that reimburses all costs for interpreting or CART services used to communicate with deaf and hard of hearing persons. Maine's statute does not have a maximum cap on reimbursement, nor are there any restrictions on which private attorney or advocate a deaf or hard of hearing client can contact for assistance.

There is no indication whether the statutory provision of full reimbursement persuades private attorneys to take on cases for deaf and hard of hearing individuals. The full and unlimited reimbursement with no restrictions for all communication access with deaf and hard of hearing clients may be compelling enough for lawyers to take such cases even with the additional work necessary to seek reimbursement.

Maine's statutory solution to ensure effective communication access between attorneys and deaf and hard of hearing consumers may not work for other states in this era of fiscal cutbacks and restraint. Maine itself has had to cut its budget drastically across the board; in some areas there were budget cuts as high as 16.7%.<sup>108</sup> This puts in question the sustainability of any state statute that provides state funding for the costs of all communication access between attorneys and clients who are deaf or hard of hearing. The sustainability of such coverage is less probable

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FUND INVOICE, ME. DEP'T OF LAB., *available at* <http://www.maine.gov/tools/whatsnew/attach.php?id=59481&an=1> (last visited Jan. 27, 2011).

<sup>105</sup> ME. REV. STAT. ANN. tit. 5, § 48-A(2).

<sup>106</sup> *Id.* § 48-A(3).

<sup>107</sup> 42 U.S.C. § 12132 (2006); 28 C.F.R. § 35.160 (2010); *see also* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,183 (Sept. 15, 2010) (to be codified at 28 C.F.R. pt. 35).

<sup>108</sup> *General Fund Adjustments Recommendations for Fiscal Year 2010–2011*, ME. DEP'T ADMIN. & FIN. SERVS., BUREAU BUDGET, [http://www.maine.gov/budget/budgetinfo/2010-2011\\_supplemental/general\\_fund\\_adjustments.htm](http://www.maine.gov/budget/budgetinfo/2010-2011_supplemental/general_fund_adjustments.htm) (last visited Jan. 27, 2011).

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when attorneys and all other licensed professionals need this kind of service to interact with deaf and hard of hearing individuals.

7. Summary of All Existing Communication Access Funds

The existing communication access funds set aside to provide for communication access between lawyers and clients who are deaf or hard of hearing are designed to be handled through reimbursements. This means attorneys must first be willing to pay for the interpreter or CART services and seek reimbursement later. Moreover, with the sole exception of Maine's statutory mandate, the reimbursements are only partial and come with restrictions.

Such restrictions and less-than-whole reimbursements may cause attorneys to avoid accepting deaf and hard of hearing clients in the same way that attorneys who used to accept referrals from MCLD no longer do so after handling a number of such cases with the attendant expense.

The more immediate effect of any such reimbursement system is the burden it places on deaf and hard of hearing consumers to persuade attorneys to take on their cases. The experience of MCLD has been that it is difficult for even seasoned attorneys and advocates to convince busy attorneys to take on the case of a deaf or hard of hearing consumer with the unique challenges inherent in achieving communication access. Consequently, the existence of a reimbursement system—whether partial or full, and whether it imposes restrictions—resolves only part of the problem for deaf and hard of hearing individuals seeking access to lawyers.

This reimbursement system requires deaf and hard of hearing consumers to persuade attorneys to make an initial investment in order to communicate with them and thereby represent them. The economic disincentive is still present despite the fact that there would be eventual reimbursement. Moreover, nearly all of the currently existing CAFs have reimbursement caps of \$100 to \$250 per client and some have restrictions on how many times a lawyer can seek reimbursement in a given period of time.<sup>109</sup> Most of these funds also appear to have limited resources to cover the needs of deaf and hard of hearing consumers seeking legal representation.

Only the State of Maine has a fund that appears to cover the entire cost of communication access for deaf and hard of hearing people communicating with their attorneys, but even this fund requires

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<sup>109</sup> *Advocacy Statement on Using Communication Access Funds to Access Legal Services*, NAT'L ASS'N DEAF, <http://www.nad.org/issues/justice/lawyers-and-legal-services/communication-access-funds> (last visited Jan. 27, 2011); see also *id.* at exhibit A.

attorneys to first obtain and purchase interpreting services and seek reimbursement after the fact.<sup>110</sup> Although all other CAFs are grant-based and therefore subject to the availability of donations, Maine's fund is more secure but nevertheless vulnerable to cuts in state budgets.

A more practical and sustainable option is to devise a communication access fund supported entirely by the license fees of the professionals who are obligated to provide access to deaf and hard of hearing consumers.

*E. A More Practical and Sustainable Communication Access Fund*

Several bar associations as well as the State of Maine have recognized the lack of access to lawyers and legal services that deaf and hard of hearing people widely experience. The common response from all these entities was to create a fund to provide for the cost of sign language interpreter services as well as CART services and other auxiliary aids. The general consensus was to find a way to eliminate the perceived financial disincentive in providing communication access and prompt lawyers into taking on clients who are deaf and hard of hearing.

However, the provision of a reimbursement system may not be sufficient to persuade many attorneys to take on deaf and hard of hearing clients. This is particularly true when the reimbursement is partial and restrictive. The bar association for Colorado has a \$250 cap for each client while those of Pennsylvania and Philadelphia both have a cap of \$100 for each client. Monroe County covers 100% of the first meeting with the client (as long as it does not exceed two hours) and 50% of subsequent meetings with a cap of \$150. Texas appears to cover the entire reimbursement but requires advance approval and is subject to the discretion of the fund manager. Only Maine appears to have full reimbursement with minimal restrictions.

The challenge of persuading attorneys and medical professionals to take on deaf and hard of hearing clients and patients has been difficult in the past twenty years of the ADA, and it does not appear that full reimbursement is compelling enough to change the comprehensive failure of these professions to be communication accessible.

If lawyers and doctors were to see deaf and hard of hearing consumers like any other prospective client, without any financial or logistical disincentive, then there would likely be far less resistance to taking on and communicating with such consumers as clients and patients. To achieve this goal, it is necessary to remove both financial and logistical roadblocks. For all the existing funds, the bar associations

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<sup>110</sup> ME. REV. STAT. ANN. tit. 5, § 48-A(4).

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believed that reimbursement was a way to remove the financial roadblock preventing lawyers from serving deaf and hard of hearing clients. While reimbursement does remove the ultimate financial disincentive in that the cost is recovered in the end, the act of seeking reimbursement is an initial financial disincentive as well as an overall logistical disincentive.

Therefore, the ideal arrangement to remove both the financial and logistical barriers is one where the manager of the communication access fund (instead of the lawyer or doctor) secures the necessary communication access services and takes care of the cost at that time. Rather than having the fund manager pre-approve a communication access expense (as in the case of the Texas Bar's Sign-Up Fund) or receive invoices from lawyers for the purpose of reimbursing them (as is done in all of the above described funds), the fund manager could receive auxiliary aid or service requests from the lawyers or the deaf or hard of hearing clients, verify the situation with the lawyers and clients, and arrange for the communication access.

Lawyers and doctors are typically not aware of the best ways to arrange for such auxiliary aids or services. In most of the above described CAFs, the staff for the fund offers information about how to locate the appropriate auxiliary aids or services. In each of the above existing funds, the communication access fund manager is probably the one with the most knowledge and expertise on the provision and adequacy of the specific communication access in need or requested by a deaf or hard of hearing consumer.

Placing the financial and logistical responsibility for the provision of communication access on the fund manager resolves a great deal of uncertainty and likely reduces the number of mistakes made with respect to auxiliary aids and services. More importantly, shifting this responsibility reduces the need for a deaf or hard of hearing consumer to convince a lawyer or doctor to bear the upfront cost and logistical details of communication access in the course of trying to secure legal representation or a medical appointment. Instead, the consumer can focus solely on convincing the lawyer of the merits of the case or the doctor to agree to look into the medical condition. In essence, removing the upfront costs and logistical steps would likely enable doctors and lawyers to view deaf and hard of hearing consumers the same as any other consumer.

In addition to being an upfront inconvenience, reimbursements perpetuate the myth that communication access is a form of charity rather than the civil right that it was designed to be under the ADA and other disability anti-discrimination statutes. Also, it is important to have

a fund that is reliable and sustaining so that professionals are not wondering at any time whether they can or cannot get funding to cover auxiliary aids and services to meet the communication needs of deaf and hard of hearing consumers.

To better assure professionals that there is sufficient money to meet communication needs, the cost of providing such communication access should not rely on grants or state funding, both of which are vulnerable to economic upheavals. Rather, there should be a self-sustaining funding source such as an increase in licensing fees.

This was the case for some state licensing authorities that came to a realization that grant or charity-based funding does not necessarily sustain programs while license fee-based funding is sustainable. For example, in 1980, the Illinois State Bar Association and the Chicago Bar Association created the Lawyers' Assistance Program ("LAP"), a non-profit organization, to provide "assistance to any Illinois judge, attorney, or law student whose professional performance may be impaired due to addiction or mental illness."<sup>111</sup> From the start, "LAP's funding was dependent upon cash and in-kind services from the Illinois State Bar Association and the Chicago Bar Association and the contributions of the profession at large."<sup>112</sup> According to the President of LAP, despite this generosity, "LAP still found itself constantly financially strapped. Yet, LAP always managed to survive [even though] doing so was a constant challenge."<sup>113</sup> The President of LAP explained that

[w]hen the Illinois Supreme Court generously adopted LAP by allowing an increase in lawyer registration fees to fund it, LAP enjoyed the assurance of stable, reliable funding, which in turn allowed it to become more professional and efficient. LAP now has its own offices, a fact that insures the confidentiality of its activities, a full time Executive Director, Clinical Director and Downstate Associate Director, and Administrative Assistant.<sup>114</sup>

A sustainable communication access fund is critically necessary to ensure that professionals can confidently rely on the fund to provide for

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<sup>111</sup> *About Lawyers' Assistance Program*, ILL. LAW. ASSISTANCE PROGRAM, <http://www.illinoislap.org/about-lap> (last visited Jan. 27, 2011).

<sup>112</sup> Honorable Michael T. Caldwell, *President's Page*, ILL. LAW. ASSISTANCE PROGRAM, <http://www.illinoislap.org/presidents-page> (last visited Nov. 22, 2010) (on file with journal).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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the communication needs of their deaf and hard of hearing consumers. With the exception of Maine's program, which is supported by taxes, all existing CAFs rely on grants and have explicit warnings that their support for the provision of auxiliary aids and services is subject to the availability of money in the funds.

As explained above, the ADA has provisions for pooled funds to support communication access in the telecommunications field, and many professions already have license fee-based pooled funds created to share specific burdens across the entire industry.

In a state such as Illinois, which has nearly 85,000 licensed lawyers<sup>115</sup> and more than 40,000 licensed doctors,<sup>116</sup> adding an additional \$10 to the license fee of each lawyer and doctor would bring in \$850,000 and \$400,000 respectively for each profession's communication access fund. The amount of the annual fee for this fund could be adjusted depending on the amount needed each year to cover all communication access requests between each profession and its consumers who are deaf or hard of hearing.

The use of a centralized pooled fund to provide for all communication access needs is especially needed in the context of services to indigent consumers. Legal aid organizations, pro bono attorneys, and free medical clinics all struggle to provide basic professional services at no cost, which can be unavailable to deaf and hard of hearing consumers simply because of the need to purchase auxiliary aids and services. The use of the pooled fund eliminates this problem and allows all deaf and hard of hearing individuals who are indigent to have access to free professional services that are available to others.

Using license fees to support the communication access fund ensures the sustainability and durability of the fund, which in turn is what professionals need to adequately serve their consumers who are deaf and hard of hearing. Despite the many advantages of creating a communication access fund that is supported by an increase in license fees, there are barriers that need to be removed before CAFs become the norm across the country.

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<sup>115</sup> As of October 31, 2009, Illinois had 84,777 lawyers on the Master Roll. ILL. ATT'Y REGISTRATION & DISCIPLINARY COMM'N, ANN. REP. 2009, *available at* <https://www.iardc.org/AnnualReport2009.pdf>.

<sup>116</sup> As of 2008, Illinois had 40,255 licensed doctors according to the American Medical Association's 2008 Issue of Physician Characteristics and Distribution in the United States. DEREK R SMART & JAYME SELLERS, AM. MED. ASS'N, PHYSICIAN CHARACTERISTICS AND DISTRIBUTIONS IN THE U.S. 222 (2008).

## VII. BARRIERS TO FORMING COMMUNICATION ACCESS FUNDS

Creating communication access funds requires action on the part of legislative or administrative bodies in each state that act as the licensing authority for each profession. For lawyers, the state's Supreme Court is generally the body that determines how much the license or registration fee is for each type of lawyer. Each state's department of professions tends to have a licensing board overseeing registration and license fees for medical doctors. Typically those licensing authorities are not aware of the lack of access to professional services that deaf and hard of hearing individuals currently face. Without such awareness, the licensing authorities are not compelled or pressured to create any fund with license fees to address the needs of deaf and hard of hearing individuals.

The licensing authorities are pressured to keep license fees as low as possible by each profession, as there is typically resistance to any increase in the license fee for any type of program.<sup>117</sup> However, notwithstanding the desire to keep license fees low, it is economical for all lawyers and doctors to participate in a communication access fund. Without a fund, each lawyer and doctor is subject to paying potentially \$50 to \$200 for the provision of auxiliary aids or services for communication access each time a deaf or hard of hearing person seeks an appointment or meeting. With the fund, the lawyer or doctor would only pay a one-time annual fee (which could be as low as \$5 depending on the number of professionals in the state) and could see an unlimited number of deaf or hard of hearing consumers with auxiliary aids or services. Moreover, with this type of pooled fund, the lawyer and doctor do not need to pay for the auxiliary aid or service upfront and seek reimbursement later. Rather, the auxiliary aid or service is handled by the fund manager, relieving the lawyer and doctor of the logistical difficulty of determining the appropriate aid or service.

This mechanism for ensuring communication access would not be isolated to lawyers and doctors, but would be applicable to all licensed professions. The state could create a fund for each profession based on the money collected from their license registration fees and a centralized entity could ensure the coverage of auxiliary aids and services for all appointments and meetings involving deaf and hard of hearing consumers.

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<sup>117</sup> See comments in various articles and website blogs such as Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1057; Mark Cohen, *The High Cost of Being a Lawyer*, MINN. LAW. BLOG (Nov. 10, 2009), <http://minnlawyer.com/minnlawyerblog/2009/11/10/the-high-cost-of-being-an-attorney/>.



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It is important to note that the funds should be used for each respective profession in their private practices. Other entities subject to the ADA should be responsible for their own communication access and should not raid the funds supported by the various professions. For example, hospitals are responsible for providing communication access within its facilities and should not be permitted to drain communication access funds established by medical doctors. Similarly, courts are responsible for ensuring communication access within its proceedings and should not be able to take monies out of the lawyers' communication access fund. The CAFs that exist in Colorado, Pennsylvania, Texas, Monroe County, Philadelphia, and Maine expressly separate the provision of interpreter services to lawyers in private practice from the courts' obligation to provide their own access.<sup>118</sup>

VIII. CONCLUSION

Medical and legal services are essential in today's modern world. Routine checkups and the inevitable need for medication, procedures, and operations make it essential for every person to communicate with a doctor. Similarly, every person seeks out and communicates with a lawyer at some point, whether it is for a traffic ticket, a will, an adoption, a bankruptcy, a contract dispute, or a divorce. Finding a doctor or a lawyer is a stressful personal decision for every person, with trust and the ability to communicate with such a professional being one of the most important factors in this selection process. Imagine having to compound such a difficult choice by arguing with every doctor and lawyer you meet about whether they are required to provide you with communication access. Despite the protections of federal and state laws mandating communication access for deaf and hard of hearing people as a matter of civil right, many doctors and lawyers decline to take on this population as patients and clients.

A systemic change is needed. The change must resolve the upfront economic disincentive that discourages professionals from agreeing to see deaf and hard of hearing individuals. The change must also allow deaf and hard of hearing individuals to have equal access and the same choices of selecting professionals to be their doctors and lawyers. Such a change is possible if state licensing authorities created communication access funds that provide and pay for sign language interpreters, captioning, and any other type of access for all appointments. Asking professionals to provide such access initially and later reimbursing them

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<sup>118</sup> See *supra* Part VI.D (discussing current communication access funds in the United States).

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for such costs resolves part of the problem but fails to remove the initial burden on deaf and hard of hearing consumers seeking to find and trust doctors and lawyers.

Communication access funds not only remove the financial disincentive for the professionals to take on deaf and hard of hearing individuals as clients but also make it possible for the deaf and hard of hearing individuals to talk to professionals at the outset with the same level of trust everyone else takes for granted. Twenty years after the passage of the ADA, widespread lack of access to doctors and lawyers is inexcusable. Centralized communication access funds supported by professionals' license fees represent a systemic change that creates the access to professional services that the ADA promised two decades ago.