

Click to print or Select 'Print' in your browser menu to print this document.

Page printed from: <https://www.law.com/newyorklawjournal/2020/11/03/the-hearing-challenged-attorney-in-the-courtroom-progress-and-pitfalls/>

The Hearing-Challenged Attorney in the Courtroom— Progress and Pitfalls

The hearing-challenged attorney does not seek to be defined by the disability or garner sympathy; rather, the hearing-challenged attorney seeks to be on equal footing with all attorneys and the court.

By **David B. Saxe and Giovanna Tuttolomondo** | November 03, 2020



Book that reads, *The Americans With Disabilities Act*. Photo: Vitalii Vodolazskiy/Shutterstock

July 26, 2020 marked the 30th anniversary of the Americans with Disabilities Act (ADA), universally recognized as providing a significant pathway for individuals with disabilities to participate in the mainstream of life without discrimination and hindrance. Widespread recognition of the ADA continues to produce an evolving awareness of the need for accommodations and guidelines to ensure compliance with this pioneering Act. The ADA has become so established in American society that the New York Times recently published a special series of articles and editorials celebrating the profound effect it has made, and continues to make, in American society.

Within the vast spectrum of daily life activities, significant advances have been made to further the intent behind the ADA, from the installation of wheelchair ramps and elevators, to the availability of sign language interpreters. However, with the ADA comes a greater awareness: Not all disabilities fall squarely within the categories contemplated by the statute. To this end, awareness of disabilities is not enough: There must be unremitting progress in the manner through which disabilities are recognized, appreciated and accommodated.

There are instances where an individual with a particular disability, which often is not immediately conspicuous, simply cannot benefit from the most-recognized accommodation prescribed by the ADA. Take, for instance, a hearing-impaired, hard-of-hearing (HOH) or deaf attorney [collectively, hearing-challenged attorney] in the courtroom.

Research on the number of individuals with hearing loss yields diverse results. According to one website (<https://infoguides.rit.edu/c.php?g=380750&p=2706325>), an estimated 11 million individuals in the United States have hearing loss. According to Gallaudet University, a university for the deaf and hard of hearing, however, the number of individuals in the United States with hearing loss must be qualified depending on the manner in which a person regards his or her own hearing loss. According to Gallaudet University:

[I]f everyone who has any kind of “trouble” with their hearing is included then anywhere from 37 to 140 out of every 1,000 people in the United States have some kind of hearing loss, with a large share being at least 65 years old.

See Snapshot of Deaf and Hard of Hearing People, Postsecondary Attendance and Unemployment (<https://www.gallaudet.edu/office-of-international-affairs/demographics/deaf-employment-reports>), Gallaudet University.

Hearing “trouble,” then, may include slight, moderate, severe, self-labeled or unnoticed hearing impairment. Indeed, according to the publication by Gallaudet University: “Again, we emphasize that these estimates are based upon self-reported (or informant-reported) hearing trouble and not on independent audiometric measurements.” *Id.*

It is equally challenging to estimate the number of hearing-challenged attorneys in the United States. According to the Deaf and Hard of Hearing Bar Association [DHHBA], in a publication dated Dec. 3, 2019 (<http://www.deafbar.org/2019/12/03/third-group-of-deaf-and-hard-of-hearing-attorneys-to-be-sworn-into-united-states-supreme-court-bar/>), by Dec. 11, 2019, 34 deaf and hard of hearing attorneys, all members of the DHHBA, will have been sworn into the Bar of the U.S. Supreme Court.

The Supreme Court provided American Sign Language (ASL) interpreters and realtime captioning (also known as Communication Access Realtime Translation, or CART) for the swearing-in ceremony.

So significant was the admission of the deaf and hard of hearing attorneys that, according to a publication in US News on April 20, 2016 (<https://www.usnews.com/news/articles/2016-04-20/john-roberts-uses-sign-language-to-swear-in-deaf-and-hard-of-hearing-lawyers>):

CHIEF JUSTICE JOHN Roberts made history today—and he didn’t have to say a word.

From the Supreme Court bench, Roberts signed, “Your motion is granted” in American Sign Language to welcome a dozen deaf and hard-of-hearing lawyers Tuesday to the Supreme Court bar, Reuters (<http://www.reuters.com/article/us-usa-court-deaf-idUSKCN0XG2TH>) reports.

As expressed by Rachel Arfa, President of the DHHBA, in the Dec. 3, 2019 publication (<http://www.deafbar.org/2019/12/03/third-group-of-deaf-and-hard-of-hearing-attorneys-to-be-sworn-into-united-states-supreme-court-bar/>) of the DHHBA:

“Deaf and hard of hearing attorneys often have to navigate through barriers to succeed in their careers, and having them stand up in front of the greatest court of the land to be admitted is a significant and symbolic gesture for our members.”

Among those formidable barriers are those in the courtroom.

A hearing-challenged attorney may be assisted, and communicate by, lip reading, ASL, CART, hearing aids, cochlear implants or enhanced auditory tools. The manner by which a hearing-challenged individual experiences, and adapts to daily life activities is as diverse as the hearing disability itself; even the drafters of the ADA could not have envisioned the variability of this disability. In turn, there is no “one-size-fits all” manner by which to accommodate the hearing-challenged attorney.

Within the courtroom, the hearing-challenged attorney faces enormous obstacles. During oral argument, at a counsel table positioned far from the bench, the hearing-challenged attorney will often not hear the judge. This struggle is further compounded by the judge’s level of articulation, presence of facial hair [for those who lip-read], the current requirement of facial coverings due to the COVID-19 crisis, accents and speech volume. Indeed, there are also instances where the judge may be hearing-challenged.

For the attorney who does not communicate by ASL, the recourse is to continuously request repetition by the judge, often to the frustration of the court, which deals with volume and time limitations each day; sometimes, despite repetition, the attorney will still not be able to hear. Where the attorney communicates by ASL, interpreters may not be readily available, thereby delaying court proceedings.

Where a hearing-challenged attorney is conducting a trial, difficulty may be presented if the witness box is far away from where the hearing-challenged attorney is seated. The hearing-challenged attorney must simultaneously work to “hear” and mentally process what the witness is saying, take notes, be able to quickly voice objections to inappropriate questioning by opposing counsel and block out distractions from the gallery. For the attorney who is assisted by ASL, there is an added task of keeping eyes on the interpreter. For the attorney who does not use ASL, questioning and testimony is sometimes interrupted by a request for repetition.

During oral arguments before the Appellate Term and Appellate Division, the hearing-challenged attorney must focus on hearing and processing questioning by a panel of Justices, often at a fast-paced speed with overlapping communication, with the added pressure of the assignment of time slots designated for oral arguments.

Where an attorney relies upon hearing aids, background noise, such as the slight flipping of a legal pad page, can pose a significant distraction. The hearing-challenged attorney, who is trained to advocate, anticipate, perform and observe the courtroom, often becomes frustrated with the distractions and hindrances in the courtroom. Also not to be discounted is the hearing-challenged attorney’s perception of stigma attached to the disability and the necessity to balance personal insecurity with the need to mask this insecurity. This frustration often extends to the court staff, witnesses, other attorneys and juries who must adapt to, and accommodate, the hearing-challenged attorney’s unusual presentation. The term “unusual,” is not intended to disparage the hearing-challenged attorney; rather, it is unusual, if not uncommon, to have a significant number of hearing-challenged attorneys in the courtroom at a given time, making the legal experience extraordinary if not challenging.

The foregoing does not represent every challenge faced by the hearing-challenged attorney; it does, however, reinforce the notion that not every current, recognized accommodation [such as ASL interpreters, CART or enhanced auditory tools] will always be effective. In addition, although the New York State Court System readily accommodates those with disabilities, even the currently recognized accommodations may

not always be readily available to the courtroom attorney due to, for instance, available supply of the accommodation or time constraints in procuring the accommodation. See New York Unified Court System, About the Americans With Disabilities Act (<http://ww2.nycourts.gov/Accessibility/index.shtml>).

Further, according to the New York State Unified Court System:

Many accommodations can be made based on the information you give in your request. If the court can provide the accommodation you requested, you will be notified by court personnel, or by the judge or judicial officer hearing your case.

Sometimes, however, the court may need to know more about your disability to help it understand what a reasonable accommodation might be. If so, you may be asked to provide additional information. To the extent possible, your accommodation request and any information you provide will remain confidential."

See New York State Unified Court System, How Court Users Can Obtain Accommodations (http://www.nycourts.gov/accessibility/courtusers_guidelines.shtml) (emphasis added).

Thus, although accommodation within the court system is provided, the court may require additional information about the extent of the disability. The court should be informed, for instance, if the attorney utilizes ASL or CART, if certain courtrooms provide better acoustic settings (microphones, reductions in echoes) or if the hearing-challenged attorney requires additional time during oral arguments (for instance, an additional minute or two allocated into the oral argument time in order to account for delays in ASL and CART transcription). On the day of the legal proceeding, at the outset, the hearing-challenged attorney should advise the judge and the court staff of his or her hearing impairment in order to raise awareness of anticipated requests for repetition or lags in time while the attorney is processing communication(s).

There should also be innovation in the manner by which the court, its staff and opposing counsel independently appreciates the hearing-challenged attorney's obstacles. Often, the solution may be as simple as allowing the hearing-challenged attorney to sit closer to the bench, witness box or jury box; at other times, affording the hearing-challenged attorney an extra few seconds to process communications may make the difference.

For many hearing-challenged attorneys, legal proceedings are a gamble, akin to a card game. A hearing-challenged attorney may "risk it all," without accommodation, hoping that the courtroom acoustics are just right, that a judge will be reasonable and sensitive to the disability, that witnesses are articulate and that opposing counsel is empathetic. For those who choose to gamble, the intention is to draw as little attention to the disability as possible.

Other hearing-challenged attorneys, however, will confidently request accommodation, be upfront with their disability and requirements but still, based on the mechanism and nature of the disability, struggle.

Ultimately, the best manner of accommodation may vary based on the individual attorney; still, the effectiveness of accommodation is dependent on trial and error. For this reason, courts may benefit from training or continuing legal education classes on accommodation or annual forums where hearing-challenged attorneys, ADA coordinators, judges and court staff can openly discuss issues faced in the courtroom and suggest improved procedures. In addition, organizations for the deaf and hard of hearing may be able to provide invaluable insight to the court system because these organizations possess heightened awareness of challenges specific to the hearing-challenged [for example, mandatory mask-wearing as a result of the COVID-19 crisis has impeded those who rely on lip-reading; perhaps a clear facial covering may be used instead].

The best accommodation is acceptance of the disability and sensitivity to the hearing-challenged attorney's personal regard to the disability and willingness to refine the manner in which the disability is acclimatized as the extent of the disability continues to manifest itself and evolve in different factual circumstances. For the hearing-challenged attorney, the desire is to mainstream into the legal system through accommodation. The hearing-challenged attorney does not seek to be defined by the disability or garner sympathy; rather, the hearing-challenged attorney seeks to be on equal footing with all attorneys and the court.

David B. Saxe served on the Appellate Division, First Department for 19 years until his retirement in 2017. He practices law at Morrison Cohen and can be reached at david27mad@aol.com. **Giovanna Tuttolomondo** is a No-Fault Arbitrator, affiliated as an Independent Contractor with the American Arbitration Association. Ms. Tuttolomondo is a deaf attorney who relies upon her Cochlear Implant and lip-reading for communication. She can be reached at gmtuttolomondoesq@gmail.com.

Copyright 2020. ALM Media Properties, LLC. All rights reserved.