

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

SUFFOLK, SS

NO. SJC-10609

COMMONWEALTH OF MASSACHUSETTS,  
Respondent-Appellee

V.

KOFI AGANA,  
Respondent-Appellee

RUBY MCDONOUGH.  
Petitioner-Appellant

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ON RESERVATION AND REPORT BY A SINGLE JUSTICE OF A  
PETITION FOR GENERAL SUPERINTENDENCE PURSUANT  
TO G.L. 211, § 3.

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BRIEF OF NATIONAL APHASIA ASSOCIATION, NATIONAL  
DISABILITY RIGHTS NETWORK, JUDGE DAVID L. BAZELON CENTER  
FOR MENTAL HEALTH LAW, HEARING LOSS ASSOCIATION OF  
AMERICA, CENTER FOR PUBLIC REPRESENTATION, MENTAL HEALTH  
LEGAL ADVISORS COMMITTEE AND THE DISABILITY LAW CENTER AS  
AMICI CURIAE IN SUPPORT OF APPELLANT RUBY MCDONOUGH.

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### **Interest of Amici**

The **National Aphasia Association** (NAA) has since its establishment in 1987 been the only national consumer-focused, not for profit organization advocating for and responding to the needs of people with aphasia and their families. The mission of the organization is twofold. The first is to educate the public that aphasia describes an impairment of the ability to communicate, not an impairment of intellect. This effort is directed in part to government officials, particularly law enforcement personnel, to stress that people with aphasia have not suffered any impairment in their intelligence, only a communication impairment. In accordance with carrying out its program to educate the public, Congress has declared June "Aphasia Awareness Month."

Second, NAA works to make all people with aphasia, their families, support systems and health care professionals aware of resources to recover lost skills to the extent possible, to compensate for skills that will not be recovered and to minimize the psychosocial impact of the language impairment. The NAA envisions a society in which aphasia is commonly understood and where all persons with aphasia have

access to appropriate education and resources and in all respects have the benefit of equal protection of the law.

The **National Disability Rights Network** (NDRN) is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. All P&A agency members of NDRN advocate for the protection of persons with disabilities who are victims of abuse, including ensuring the rights of

people with disabilities to have equal access to the judicial system.

The **Judge David L. Bazelon Center for Mental Health Law** (Bazelon Center) is the nation's leading legal advocate for people with mental disabilities. The mission of the Bazelon Center is to protect and advance the rights of adults and children who have mental disabilities. The Bazelon Center envisions an America where people who have mental illnesses or developmental disabilities exercise their own life choices and have access to the resources that enable them to participate fully in their communities. The resolution of the issues raised in this case will have an impact on the abilities of persons with mental disabilities to have equal access to the courts.

The **Hearing Loss Association of America** (HLAA), a non-profit 501(c)(3) membership organization, is the nation's leading consumer organization representing people with hearing loss. There are least 36 million Americans with hearing loss, and 93 percent of the members of HLAA are so affected. The HLAA impacts accessibility, public policy, research, public awareness, and service delivery related to hearing loss on a national and global level. HLAA's national

support network includes an office in the Washington D.C. area, 14 state organizations, and 200 local chapters. The HLAA mission is to open the world of communication to people with hearing loss through information, education, advocacy, and support.

HLAA actively advocates public policies to protect the rights of people with hearing loss and to provide access to affordable technology that enables persons with hearing loss to function in their daily lives, including having full access to all places of public accommodation. HLAA has a strong interest in seeing that people with hearing and speech disabilities are not subject to discrimination that causes them to be improperly excluded from full participation in courts of law. These millions of individuals are entitled to full and equal access to the courts and the opportunity to be heard as witnesses in the interest of justice.

The **Center for Public Representation** (the Center) is a national public interest law firm with offices in Northampton and Newton that advocates for the rights of individuals with disabilities, including those in nursing homes and other staffed facilities and programs. The Center represents the plaintiffs in two

class actions alleging that individuals with disabilities have been unnecessarily placed in nursing homes. Rolland v. Cellucci, 191 F.R.D. 3 (D. Mass. 2000) (Order Approving Settlement Agreement)(class of individuals with mental retardation) and Hutchinson v. Patrick, C.A. No. 07-cv-30084-MAP(class of individuals with brain injuries).

The **Mental Health Legal Advisors Committee** (MHLAC) was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. MHLAC provides advice and assistance to individuals with mental illness, to their families and to other attorneys. One aspect of its obligations is to monitor legal issues before the courts affecting the interests of individuals with mental disabilities.

The **Disability Law Center** (DLC), a private non-profit organization, is Massachusetts' designated protection and advocacy agency for people with disabilities, pursuant to federal statutory authority. See, e.g., 42 U.S.C. § 15001 (people with developmental disabilities), 42 U.S.C. § 10801 (people with mental illness), 29 U.S.C. § 794e (other persons with disabilities) and 29 U.S.C. § 3004 (people with

disabilities in need of assistive technology). DLC's core mission involves advocacy on issues of abuse and neglect as well as non-discrimination in the provision of government services.

The agency members of NDRN, as well as the Center, Bazelon, MHLAC and DLC have all represented many individuals with disabilities who have been victims of abuse by their caretakers or others. Frequently, these individuals have been frustrated in their efforts to seek redress of their complaints.

For more than twenty years, the Center, DLC and MHLAC have advocated in Massachusetts for increased protections for their clients who are victims of crime. They have partnered with Massachusetts state agencies to increase awareness of the ability of people with disabilities to assist and participate in the arrest and prosecution of their abusers. NAA, NDRN, HLAA and the Bazelon Center have similarly advocated in Congress, state legislatures and the courts to increase protections for persons with disabilities who are victims of abuse.

Amici have particular knowledge about the frequency of crimes against individuals with disabilities, about the application of federal

disability discrimination laws to the courts and about resources, including the variety of accommodations, available to the courts to assist victims with disabilities. The outcome of this action is likely to have a profound impact on the ability of many of amici's clients, members and constituents to have access to the courts, and by virtue of that access, to be protected from further abuse, assaults and injuries.

#### **Statement of the Issues**

In his Reservation and Report, the Single Justice framed the issues to "include" the following:

(1) Does the petitioner, Ruby McDonough, have standing to invoke the court's jurisdiction under G. L. c. 211, § 3, to seek, in the first instance, accommodation under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (Act)?

(2) If the answer to the first question is "No," how may a witness seek accommodation under the Act during the pendency of a trial; and if not successful how may a witness obtain review of an order denying accommodation?

#### **Statement of the Case**

Appellant Ruby McDonough seeks relief from an order a District Court judge that she is incompetent

to testify at the criminal trial of the individual charged with sexually assaulting her. Commonwealth v. Agana, Framingham Div. District Court Dep't, No. 0949CR534, (hereafter "the District Court case"), Findings and Order (Sept. 11, 2009), Record Appendix ("R.A.") pp. 11-12. The instant case was initiated as a petition for a writ of general superintendence under G.L. c. 211, § 3. Petition for Relief Pursuant to G.L. c. 211, § 3. ("Petition"), R.A. pp. 1-10.

The Single Justice reserved decision and reported questions to the Supreme Judicial Court for the Commonwealth on November 10, 2009. In his order the Single Justice also stayed proceedings in the District Court case until further order of the Court.

#### **Statement of Facts**

Approximately eight years ago, Ms. McDonough suffered a stroke that left her partly immobilized and suffering from a disability often known as "expressive aphasia."<sup>1</sup> Petition ¶ 1, R.A. p. 2. Ms. McDonough, 62, lives in a nursing home. Id. There is no indication in the record that, except for the trial judge's finding

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<sup>1</sup>Aphasia is "a nerve defect in which there are problems with speaking or speech is lost.... There are many forms and degrees of aphasia." Mosby Medical Encyclopedia, Rev. Ed. 55 (1992).

in the District Court case, Ms. McDonough has ever been adjudicated incompetent for any purpose.<sup>2</sup>

In early 2009, Ms. McDonough alleged to her family, nursing home staff, and law enforcement officials that Kofi Agana ("Mr. Agana"), an aide at the nursing home, had sexually assaulted her. Ms. McDonough described the incident to nursing home staff answering "yes" and "no" questions and using hand gestures. Petition ¶ 2, R.A. p. 3.

Although she has difficulty communicating, Ms. McDonough does not have receptive aphasia.<sup>3</sup> The forensic psychologist appointed to examine her, Rosemary Klein, Ph.D., reported no difficulty in Ms. McDonough's understanding of the questions put to her. Section 19 Evaluation, Examination of a Party or Witness Before the Court, Sept. 10, 2009, p. 5 ("Klein

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<sup>2</sup> Ms. McDonough's expressive aphasia alone could not be grounds for appointment of a guardian under the provisions of the newly adopted Massachusetts Uniform Probate Code which recognizes that a person's inability to communicate may be remediated by "appropriate technological assistance" such that the individual is not incapacitated. G.L. c. 190B § 5-101(9) inserted by St. 2008, c. 521.

<sup>3</sup> The lack of ability to understand or process language is usually known as receptive or sensory aphasia. It is defined as an inability to understand spoken and/or written words. See, 19<sup>th</sup> Ed., Taber's Cyclopedic Medical Dictionary, 142 (2001)

Report") R.A. p. 17. Ms. McDonough's ability to communicate, though limited, was sufficient for Framingham police and the District Attorney to charge Mr. Agana with "indecent assault and battery on a person over the age of 60 or with a disability." Petition ¶ 3, R.A. pp. 3-4.

During pretrial proceedings in the District Court case, the defense requested a competency evaluation of Ms. McDonough pursuant to G.L. c. 123, § 19.<sup>4</sup> Psychologist Klein concluded that Ms. McDonough was competent to testify. Klein Report pp. 5-6, R.A. pp. 17-18. Dr. Klein makes it clear in her report that she adapted her methods of interviewing to Ms. McDonough's condition; that is, she accommodated the condition in order to ensure that the evaluation was completed as effectively and accurately as possible.

For example, the psychologist reported that she waited for Ms. McDonough to formulate an answer to a question and indicate she was finished with her answer before she asked the next question. Klein Report p. 5, R.A. p.17. In addition, Dr. Klein wrote, "I did not

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<sup>4</sup> G.L. c. 123, § 19 authorizes a judge to request the Department of Mental Health to assign a psychologist or psychiatrist to determine the mental condition of a witness.

perceive there to be any significant problem with understanding the witness's meaning, so long as I could ask yes or no questions, allow her occasionally to point to a picture or her own body, or to gesture with her hands or make a frown or smile with her face." Klein Report p. 4, R.A. p. 17.

In addition, Dr. Klein wrote that she asked Ms. McDonough what might help her to testify in more detail, and Ms. McDonough

indicated that she was willing to tolerate the difficult emotions and physical limitations she has to try to speak in longer sentences during whatever portion of the interview it was absolutely essential...She indicated she would like to be warned if she needed to present a fuller answer.

Klein Report p. 5, R.A. p. 18. Ms. McDonough could speak in fuller sentences if necessary, but as Dr. Klein noted, "It was my impression that the effort to speak in fuller sentences was very taxing and one needed to be very patient while she developed a short phrase before she spoke." Id.

Apparently, before the submission of Dr. Klein's written report, but after her evaluation of the witness, the District Court conducted a competency

hearing. Ms. McDonough and Dr. Klein testified.<sup>5</sup> There is no indication that the hearing judge followed the psychologist's recommendations of accommodations to the witness.<sup>6</sup> According to the Petition, during the 90-minute hearing, the judge did not ask any questions of Ms. McDonough nor did he make any effort to structure the hearing to allow Ms. McDonough to answer questions effectively. The defense spent about an hour mostly using a traditional narrative question approach designed to elicit contradictions in testimony. The prosecution's questions were brief. Petition ¶¶ 8-11, R.A. pp. 6-8.

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<sup>5</sup> The record does not indicate the date of the competency hearing. Dr. Klein wrote that she had access to further documents after her testimony and she relies, in part on those sources in her written report. Klein Report p. 3, R.A. p. 15. The judge wrote his Findings and Order on September 11, 2009, one day after the date of Dr. Klein's report. He does not refer to either Dr. Klein's testimony or to her report. Commonwealth v. Agana, Framingham Div., District Court Dept. No. 0949CR534, Findings and Order, (Sept. 11, 2009) ("Findings and Order"), pp. 1-2, R.A. pp. 11-12.

<sup>6</sup> Any suggestion that the court accommodated Ms. McDonough by "allow[ing] her to write her answers," Findings and Order p. 1, R.A. p. 11, to the defense attorney's questions is unavailing. The court made no inquiry whether her expressive aphasia manifested itself, as it does for most people with the disability, in written as well as oral language limitations.

As a result, Ms. McDonough was deemed incompetent to testify despite the court-appointed expert's opinion. No jury could hear her story, whether accommodations were available or not. Instead of the chance to offer her testimony with the aid of accommodations, Ms. McDonough was barred from testifying at all.

### **Summary of Argument**

The fundamental error committed by the District Court judge was that he determined that a witness with a disability was incompetent to testify on the basis of her disability without first determining whether any accommodations existed that would enable her to testify competently. This violated Ms. McDonough's rights under the United States and Massachusetts Constitutions and Title II of the Americans with Disabilities Act (hereafter "the ADA").

Because Ms. McDonough's rights were violated in a way that could not be redressed through recourse to any appellate process, the G.L. c. 211, § 3 petition process was the only avenue available to vindicate her right to testify at the trial of the man accused of sexually assaulting her.

Only witnesses need to have recourse to the G.L. c. 211, § 3 process to protect their right of access to the judicial system, since the appellate process sufficiently protects the rights of the litigants. Therefore, the answer to the Single Justice's first question is "yes."

The underlying issue in this case is actually neither new nor particularly difficult for the court system. Witnesses and litigants have always presented courts with a variety of needs for accommodations-- children and the elderly, people who cannot speak English, people who are deaf or mobility-impaired--and judges have always had the discretion to alter court proceedings or order accommodations to ensure that justice is served.

The difference here is that Ms. McDonough's disability, expressive aphasia, was likely not as familiar to the judge as hearing impairments or difficulties with speaking English. While the judge appropriately appointed an expert to assist him on the question of whether the witness was competent, he did not appoint an expert with specialization in communication disorders; he did not ask the expert to investigate potential accommodations; he failed to

address the expert's conclusion that the witness was completely competent; and, he ignored the expert's suggestion that the witness could benefit from certain alterations in the form of questioning to allow her to tell her story. These actions are not simply failures to appropriately use judicial discretion, they violate Ms. McDonough's rights as a person with a disability under the ADA.

This Court should take the opportunity presented by this case to underscore that judges are required to consider whether accommodations will be necessary when a witness or litigant with disabilities presents to the court, and to order reasonable accommodations as necessary. In response to the Single Judge's second question, amici suggest a protocol or framework for judges to follow in to determine whether and, if so, what accommodations are appropriate for witnesses and litigants with disabilities. The proposed protocol is based on amici's review of plans from other states, numerous court rulings, and materials from the National Judicial College, the American Bar Association, and the National Center on State Courts.

The witness's disability in this case presents an unusual degree of complexity, and the amici's proposed

protocol is intended to be useful in complex cases. However, under most circumstances, both the disability and the accommodation will be readily apparent.

### **Argument**

#### **I. PEOPLE WITH DISABILITIES ARE DISPROPORTIONATELY AFFECTED BY VIOLENT AND OFTEN UNREPORTED CRIME.**

The charges in this case are unfortunately neither rare nor anomalous. People with disabilities are more often crime victims than people who are not disabled. Crimes against people with disabilities are commonly committed by caretakers exploiting the individual's disability, vulnerability, isolation and the barriers created by the criminal justice system to redress. Often, complaints do not even reach the police or the courts.

In October 2009, the Department of Justice (DOJ) released the first comprehensive national report on crime against persons with disabilities. Dep't of Justice, Bureau of Justice Statistics, Crime Against Persons with Disabilities, 2007. Amici's Addendum (Amici's Add.) pp. 1-12. The DOJ confirmed in striking detail what amici and other disability advocates have long warned -- crimes against people with disabilities occur at much higher rates (twice as high in some age

groups) than against people without disabilities.<sup>7</sup> Id. at 2, Table 2, Amici's Add. p. 2. The most frequent crimes are simple assault, aggravated assault and robbery. Id. at 4, Table 4, Amici's Add. p.4. Women with disabilities are victimized at twice the rate of women without disabilities. Id. at 3. Amici's Add. p. 3.

Other studies show that in nursing homes, abuse of residents with disabilities occurs frequently because of a convergence of factors. First, motivated offenders are able to carry out criminal inclinations; second, suitable targets are available to the offender; and third, targets are often unguarded or inadequately protected.<sup>8</sup>

Other research has concluded that caregiver-perpetrated victimization, in particular sexual

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<sup>7</sup> The DOJ reports that the rate of crime against people with disabilities in Ms. McDonough's age group (50-65 years old) is only slightly higher than the rate against persons without disabilities. Id. at 2, Table 2, Amici's Add. p. 2.

<sup>8</sup> Diana K. Harris, Michael L. Benson, *Maltreatment of Patients in Nursing Homes: There Is No Safe Place*, 28 (2006).

assault, goes unreported because of fear of reprisal.<sup>9</sup> This fear tends to correlate with the proximity of the relationship -- the likelihood of reporting a rape is less if the perpetrator and victim are acquainted.<sup>10</sup> Perpetrators often carefully select targets who, because of their disabilities, confront obstacles in voicing complaints and reports of sexual assault.

If the case goes to trial, barring Ms. McDonough's testimony means that her accused assailant, if he so chooses, may tell his story to the jury, but that Ms. McDonough may not tell hers. Barring the testimony of victims with disabilities who are competent to testify with or without assistance or accommodations, will mean such victims do not get their day in court. This barrier is a further disincentive to coming forward and sends a signal that perpetrators can act with relative impunity.

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<sup>9</sup> Richard McLeary, Douglas J. Wiebe, *Measuring the Victimization Risk of the Developmentally Disabled: Methodological Problems and Solutions* 10 (1999).

<sup>10</sup> Id.

**II. THE AMERICANS WITH DISABILITIES ACT REQUIRES JUDGES TO ACCOMMODATE LITIGANTS AND WITNESSES WITH DISABILITIES TO PERMIT ACCESS TO THE JUDICIAL PROCESS.**

A. Witnesses with Disabilities Have the Right to Reasonable Accommodations to Enable Them to Testify in Court.

It is well established that individuals are presumed competent to testify, and that marginal cases should be decided in favor of permitting the individual to be heard. The Evidence Guidelines establish a two part test: whether the witness has (1) the "general ability or capacity to observe, remember, and give expression to what he or she has seen, heard or experienced," and (2) an understanding of the difference between truth and falsehood. Mass. G. Evid. § 601(b) (2008-2009). See, also, Demoulas v. Demoulas, 428 Mass. 555, 564 (1998) ("under the modern trend, a judge may accept as competent for testimony a witness whose reliability is, in her judgment, at most marginally sufficient") (citing cases). Thus, children as young as four have been found competent to testify, Commonwealth v. LaMontagne, 42 Mass. App. Ct. 213, 215-17 (1997), as well as people who are "insane," and have "limited intelligence." See, Guardianship of Zaltman, 65 Mass. App. Ct. 678, 688, n. 13

(2006) (collecting cases). "The tendency, moreover, except in quite clear cases of incompetency, is to let the witness testify and have the triers make any proper discount for the quality of her 'understanding.'" Commonwealth v. Whitehead, 379 Mass. 640, 656 (1980).

Some people, such as individuals who are deaf, or who speak a language other than English, are completely competent to testify (that is, their reliability is not at issue) if they receive appropriate accommodations, yet they cannot understand the proceedings or be understood by the fact-finder without those accommodations. See, United States v. Carrion, 488 F.2d 12, 14 (1<sup>st</sup> Cir. 1973) (criminal defendant with imperfect command of English constitutionally entitled to interpreter).

As noted, Ms. McDonough's expressive aphasia does not limit her understanding of the questions asked her, or her competence to perceive and recall Mr. Agana's conduct; rather, it impairs her ability to tell her story on direct examination in the narrative style to which judges and juries are accustomed. However, unlike cases where the witness is deaf or speaks a language other than English, the assistance

or accommodations required by a person with aphasia is not always immediately obvious.

B. Judges Have Long Had the Discretion and Now Have the Obligation to Determine Feasible and Effective Ways for Witnesses with Impairments to Present Their Testimony and Tell Their Stories.

The right to accommodations in order to have meaningful access to and the opportunity to be heard in court is a fundamental right protected by the United States and Massachusetts Constitutions, as well as federal law. Sixth Amendment to the United States Constitution; Pt. 1, art. 11 of the Constitution of the Commonwealth (the "open courts clause"). See, Tennessee v. Lane, 541 U.S. 509, 532 (2004) (holding that the ADA's "duty to accommodate" applies to courts at least insofar as the claim implicates "the well established due process principle that 'within the limits of practicability a State must afford to all individuals a meaningful opportunity to be heard' in its courts") and Old Colony R. Co. v. Assessors of Boston, 309 Mass. 439, 449-50 (1941) (describing Article 11 as a provision that guarantees equal protection, which "implies that all litigants similarly situated may appeal to the courts both for

relief and for defense under like conditions and with like protection and without discrimination”).

Accordingly, courts recognized the right to accommodations, at least for criminal defendants with disabilities, long before Congress enacted anti-discrimination laws for people with disabilities. See, e.g., Terry v. Alabama, 21 Ala. App. 100(1925), Lankton v. United States, 18 App. D.C. 348 (1901) (witness “testified by signs and these were interpreted by a servant who was familiar with them and could communicate with her”).

In 1973, Congress extended the right to accommodation to all witnesses with hearing and speaking disabilities in § 504 of the Rehabilitation Act, 29 U.S.C. 794, and delegated regulatory authority to the Department of Justice. DOJ’s guidance to its § 504 regulations provided that:

[c]ourt systems receiving Federal financial assistance shall provide for the availability of qualified interpreters for civil and criminal court proceedings involving persons with hearing or speaking impairments...court witnesses with hearing or speaking impairments have the right, independent of the rights of defendants, to have interpreters available to them for their testimony.

45 Fed. Reg. 37,630-31 (June 3,1980).

In 1990, Congress greatly extended the scope of protection from discrimination to persons with disabilities in the ADA. The regulatory authority for implementing the part of the ADA, Title II, which applies to public entities (i.e., state and local governments and their programs and services) fell again to the DOJ. In its regulations, DOJ again elaborated on the obligations of public entities such as state courts to individuals with disabilities that impaired their ability to communicate:

A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public are as effective as communications with others.

A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in and enjoy the benefits of, a service, program or activity conducted by a public entity.

28 C.F.R. §§ 36.160 and 36.160(a).

The right to accommodations is not unlimited. Accommodations, for example, must be "reasonable" and they are not reasonable if they constitute a "fundamental alteration" of the program. 28 C.F.R. § 35.164. For example, Ms. McDonough could not receive accommodations that violated Mr. Agana's constitutional right to a fair trial. Hussey v. Chase-

Manhattan Bank, 2005 WL 1787571 at \*\* 3-6 (E.D.Pa. July 27, 2005) (rejecting request of plaintiff with aphasia to testify on direct but not be cross-examined). Amici's Add. pp. 15-18. Nor is Ms. McDonough entitled to the accommodation of her choice if another accommodation would be equally effective in ensuring her right of access to courts. Motto v. City of Union, 177 F.R.D. 308 (D.N.J. 1998) (court not required to appoint an assistant for a person with a disability to understand proceedings when lawyers could be instructed to rephrase their questions).

However, the regulations make it clear that the conclusion that a proposed accommodation would be a "fundamental alteration" should not be reached lightly. The public entity, here the District Court, must find that providing an accommodation to ensure effective communication would require a fundamental alteration of the judicial system, taking into consideration "all the resources available for use in the funding and operation of the service, program, or activity." 28 C.F.R. § 35.164. If the decisionmaker still believes that the accommodation would be a fundamental alteration, the regulation requires "a written statement of the reasons for reaching that

conclusion.” Id. See, Chisholm v. McManimon, 275 F.3d 315, 330-32 (3<sup>rd</sup> Cir. 2001)(reversing summary judgment for a court system that denied accommodations while failing to comply with these requirements); Gregory v. Administrative Office of the Courts, 168 F.Supp.2d 319 (D.N.J. 2001)(permitting an amended complaint against court system that had not made any efforts to show that requested accommodation was fundamental alteration). Furthermore, the court remains obligated to take any other action that would not result in such an alteration but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities received the benefits or services provided by the public entity. Id.

Since the enactment of the ADA twenty years ago, state courts have had available a plethora of guidance, trainings, and materials on how to comply with the requirements of the ADA.<sup>11</sup> Amici have reviewed as many of these resources as possible and nearly all emphasized that “[c]ourts must provide access in a way that integrates individuals with disabilities as much

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<sup>11</sup> For example, extensive materials are available to any state court judge at no cost from the National Center for State Courts.

as possible into the mainstream of court activities,"<sup>12</sup> and that "[t]hese mandates on the courts require that the system, as a whole, must change to allow greater accessibility. In addition, judges must be flexible to individuals who need modification. These changes affect the manner of administration of our court system."<sup>13</sup>

C. The Trial Court Violated Ms. McDonough's Rights by Finding Her Incompetent to Testify Without Determining Whether Accommodations Existed that Would Have Enabled Her to Testify.

1. Courts have long had the authority to adjust procedures and accommodate witnesses to assure fairness.

Judges have the authority to adjust court procedures and practices to ensure fairness.

Commonwealth v. Brusgulis, 398 Mass. 325, 332

(1986) ("Judges have considerable latitude in devising procedures and modifying the usual rules of trial to accommodate...witnesses with special needs, so long as the defendant's fair trial rights are not violated").

See, also, Mass. G. Evid. § 611(a) (2008-2009) ("The

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<sup>12</sup> Jeanne Dooley, Naomi Karp, and Naomi Wood, *Opening the Courthouse Door: An ADA Access Guide for State Courts*, (American Bar Association 1992).

<sup>13</sup> National Judicial College, *The Americans with Disabilities Act: An Instructional Guide for Judges and Court Administrators*, p. 1 (1994).

court shall exercise reasonable control over the manner and order of interrogating witnesses...so as to (1) make the interrogation and presentation effective for the ascertainment of the truth,...and(3)protect witnesses from harassment or undue embarrassment.”).

Although the precise issue of whether a person with aphasia may testify appears to be one of first impression for this Court, courts in some other states have been addressing the issue for almost a century. For example, a court recognized that aphasia does not equate with incompetence as early as 1910. See, Magaw v. Huntley, 36 App. D.C. 26, 32 (1910) (physician testified that while aphasia made it difficult for decedent to express herself coherently at times, she was in full possession of her faculties); Hogg v. Hohmann, 323 Ill. 545, 552-554, 557 (1926) (detailed discussion of effects of aphasia; holding that aphasia did not affect decedent’s mental capacity); McDonald v. Standard Gas Engine, 8 Cal. App. 2d 464, 474 (1935) (a witness with aphasia “understood our language but was unable for at least two or three weeks to express himself”).

Likewise, appellate courts reversed trial court decisions that witnesses with aphasia were incompetent

to testify long before the ADA or even § 504 were enacted, see, e.g., Schneiderman v. Interstate Transit Lines, 394 Ill. 569, 573-78(1946), and continue to understand that expressive aphasia “does not affect[ ] intellect.” Estate of Wrigley v. Wrigley, 104 Ill. App. 3d 1008, 1014 (1982).

2. Since the enactment of the ADA and § 504 courts have considered and made accommodations to witnesses with disabilities.

As the cases cited above demonstrate, courts have often found that a person with aphasia could be competent to understand questions and events. But prior to § 504 and the ADA, most witnesses with expressive aphasia were left to struggle to make themselves understood as best they could, or to hope for a judge to devise the accommodations to enable them to testify.

With the enactment of § 504 and ADA accommodating witness’s disability is no longer only a discretionary expression of the judge’s commitment to equality and fairness. It is now required by law.<sup>14</sup>

Accommodations for witnesses with expressive aphasia like Ms. McDonough generally involve

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<sup>14</sup> Ms. McDonough is an individual with a disability as defined by the ADA. 42 U.S.C. § 12101(2).

alterations of the trial process that neither impair the defendant's rights nor entail expensive outlays of money for technical equipment. See, e.g., Eisenberg v. Gagnon, 766 F.2d 770, 787 (3<sup>rd</sup> Cir. 1985) (testimony of witness with aphasia presented in summarized form to jury). A New York trial court recently required a comprehensive pre-trial conference to ensure that accommodations were in place for a defendant with aphasia. People v. Phillips, 836 N.Y.S. 2d 488, n. 2, (N.Y. Sup. Ct. 2007). See, also, Brusgulis, 398 Mass. at 357 (1986) (discussing accommodations to child witness's limited stamina and instructing that where accommodation are necessary, they should be discussed in pretrial conference). In the Phillips case, the judge instructed that "should the defendant choose to testify, attorneys should restate their questions to him in different ways, to assure that he has used the word intended in responding to their questions," and granted breaks in testimony to allow the witness to rest. Phillips, 836 N.Y.S. 2d at 488 n.2.

In her report to the judge, Dr. Klein noted that she learned to make accommodations to Ms. McDonough in the course of her interview with her. Klein Report p. 5, R.A. p. 17. Interestingly, her methods are similar to

accommodations granted by courts to people with disabilities such as expressive aphasia.

For example: (1) Dr. Klein permitted Ms. McDonough's daughter to be present, compare with, State v. Vaughn, 226 Ga. App. 318, 319-20(1997); (2) she asked a question and then waited patiently while Ms. McDonough both formed the answer and indicated that she was finished with her answer prior to asking the next question, compare with Ward v. Sternes, 334 F.3d 696, 706 (7<sup>th</sup> Cir. 2003) ("extraordinary patience" required of judge to determine whether defendant with aphasia knowingly waived his right to testify); (3) she asked "yes" or "no" questions as much as possible, compare with U.S. v. Brown, 603 F.3d 1022, 1025 (1<sup>st</sup> Cir. 1979) (no error to ask leading question of witness whose apparent lapses of memory, failure to understand what he had said on prior occasions and general confusion made his testimony difficult to comprehend), and U.S. v. Mulinelli-Navas, 111 F.3d 983, 990 (1<sup>st</sup> Cir. 1997) (no error to ask leading questions of witness who showed lack of understanding when it assisted in developing coherent testimony), see, also, Mass. G. Evid. § 611(c) (2008-2009) (permitting leading questions on direct examination "when necessary to

develop the witness' testimony"<sup>15</sup>); (4) she permitted Ms. McDonough to point to her own body and make gestures with her hands, compare with Whalen v. Shivek, 326 Mass. 142, 147-148 (1950) (allowing jurors to consider gestures as evidence); and (5) she gave Ms. McDonough advance notice of a question which would require a longer answer.

In other cases, courts have accommodated victims with communication disabilities by allowing them to communicate through assistive technology. Commonwealth v. Tavares, 382 Pa. Super. 317 (1989) (victim of abuse with cerebral palsy permitted to testify through "speak and spell" device). See, also, G.L. c. 233, § 23E(b)(1)(ii) regarding testimony by witnesses with mental retardation.<sup>16</sup>

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<sup>15</sup> This approach may be warranted in the present case. The use of leading questions on direct examination to elicit testimony from a person with a disability does not implicate a criminal defendant's rights to confrontation and due process. People v. Augustin, 112 Cal. App. 4<sup>th</sup> 444, 451-452 (2003).

<sup>16</sup> G.L. c. 233, § 23E(b)(1)(ii) permits a court to accommodate a witness with mental retardation by permitting the person to testify in court but off the witness stand; provided, however, that if the proceeding is a bench proceeding, testimony may be taken at another location within the courthouse but outside the courtroom; and, provided further, that if the proceeding is a jury trial, testimony may be taken on videotape out of the presence of the jury or in a

Accommodations are individualized, of course, and, so far as we know from the record, neither Ms. McDonough nor anyone else was asked by the judge what accommodations might assist her in testifying.<sup>17</sup> Instead, even though the judge had before him a report from a psychologist indicating that it was difficult, both physically and emotionally, for Ms. McDonough to “develop a short phrase before she spoke” and “the effort to speak in fuller sentences was very taxing,” Klein Report p. 6, R.A. p. 18, the judge did not provide, or even consider, any accommodations for extensive and complex questions by Mr. Agana’s defense attorney.

In other words, the judge was fully aware that Ms. McDonough had a disability that significantly

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location chosen by the court or by agreement of the parties.

<sup>17</sup> The ADA regulations sensibly require first asking the person with the disability what accommodations might work best for him or her, since the individual’s experience of his or her own disability and what has assisted in the past is often very helpful. See 28 C.F.R. § 35.160 The judge is not bound by the individual’s preferences, and can also seek assistance from experts or other sources on accommodations for speech and communication disorders, which include computer-based aids, communications books, and numerous other possibilities. See Academy of Neurologic Communications Disorders and Sciences, Table of Research on Alternative Communication Studies. Amici’s Add. pp. 25-32.

impaired her ability to respond to ordinary questioning, and, despite the interest in Ms. McDonough's being able to relate her testimony as fully as possible, made no inquiries into whether accommodations existed that would enable her to do so.

According to the psychologist who evaluated her, Ms. McDonough worked hard to form one sentence. She said, "I want to testify." Klein Report p. 5, R.A. p. 17.

**III. THIS COURT SHOULD RESPOND TO THE SINGLE JUSTICE'S REPORTED QUESTIONS BY CLARIFYING THE PROCESS BY WHICH PEOPLE WITH DISABILITIES CAN ACCESS THE COURT SYSTEM.**

A. Ms. McDonough Has Standing to Proceed by Chapter 211, Section 3.

As discussed above, Ms. McDonough has constitutional and statutory rights as a person with a disability to have access to courts through accommodations that will permit her to testify. As a crime victim with a disability currently barred from testifying at the trial of her assailant because a judge mistook her disability for incompetence, she and others in her situation need prompt relief if both their rights and those of the defendant are to be protected.

Unlike Commonwealth v. Oliveira, 425 Mass. 1004 (1997) and Cargill v. Commonwealth, 430 Mass. 1006, 1007 (1998), where defendants appealed findings that

they were competent to stand trial, and this Court held that any errors could be undone by vacating their convictions, the lower court's error here cannot be cured through ordinary appellate process. If Mr. Agana is acquitted, his right to avoid double jeopardy will preclude retrial even if an appellate court finds that Ms. McDonough should have been allowed to testify.

Ms. McDonough's position, like that of the child in Care and Protection of Zita, 455 Mass. 272 (2009), is one where although the lower court judge has broad discretion, it is subject to constitutional and statutory limits. Ms. McDonough has no appeal rights that would safeguard important constitutional rights, id. at 284, and her situation reflects that of many vulnerable crime victims with disabilities, especially those who are in nursing homes or have disabilities that make it difficult for them to communicate.

B. The Rights of Ms. McDonough and Others Like Her Can Be Vindicated While Protecting the Rights of Defendants.

As noted above, the question of altering or accommodating court practices to meet the needs of witnesses and litigants may generally be left to the trial courts. However, trial courts may benefit from the guidance of this Court that, in the case of individuals with disabilities, such inquiries and accommodations are mandatory, not discretionary. Other than obtaining interpreters,<sup>18</sup> amici could find no consistent instruction to Massachusetts trial courts on how to structure inquiries into the need for accommodations.

There are many available resources to guide such an endeavor. Shortly after the ADA was passed, the National Judicial College published a 446 page manual, *The Americans with Disabilities Act: An Instructional Guide for Judges and Court Administrators* (1994) (“NJC Manual”), to assist judges and court administrators in fulfilling their obligations under the ADA. Many state court systems have developed ADA plans, and added

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<sup>18</sup> See Mass. R. Crim. P. 41, 378 Mass. 918 (1979), Mass. R. Civ. P. 43(f), 365 Mass. 806 (1974), and Standards and Procedures of the Office of Court Interpreter Services, 973 Mass. Reg. 3-70 (May 2003).

court rules regarding witnesses, litigants, attorneys, and members of the public with disabilities.<sup>19</sup> The scope of the ADA's requirements has also been the subject of a number of court cases<sup>20</sup> and investigations by the DOJ.<sup>21</sup> Based on these sources and on the experience of amici collectively in representing or assisting thousands of individuals with a variety of physical and mental disabilities in hundreds of court cases and elsewhere, we suggest for the court's consideration the following process as a structure for handling potential needs for accommodations by

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<sup>19</sup> See, e.g., Oregon Uniform Trial Court Rules 7.060 and Maryland Rules of Procedure 1-332 (setting out examples of accommodations, such as a quiet room, recesses at intervals, scheduling changes, etc). See also Maryland Guardianship Benchbook, 2001, Court Accessibility for Specific Populations, MGB MD-CLE 77 at 10 (discussing accommodations for people with speech related disabilities, including altering witness boxes to accommodate assistive devices, eliminating background noise, listening without interrupting and providing auxiliary aids.)

<sup>20</sup> See, e.g., Tennessee v. Lane, 541 U.S. 509 (2004); Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6<sup>th</sup> Cir. 2002) (en banc); Chisholm v. McManimon, 275 F.3d 315 (3<sup>rd</sup> Cir. 2001); Galloway v. Superior Court of the District of Columbia, 816 F.Supp. 12 (D.D.C. 1993); Gregory v. Administrative Office of the Courts, 168 F.Supp.2d 319 (D.N.J. 2001).

<sup>21</sup> See, e.g., U.S. v. Massachusetts, C.A. No. 03-CV-10246 (PBS) (D. Mass.) (Settlement Agreement Jan. 8, 2004) (access to services, programs and activities of courts and registry of deeds). Amici's Add. pp. 33-47.

witnesses and litigants with disabilities, especially in cases where the need for accommodations may conflict with a defendant's fair trial rights:

1. Upon notice from attorneys, the individual with a disability, or otherwise, that a litigant or witness has a disability that may affect the individual's ability to equally and effectively access the judicial system,<sup>22</sup> including any motion to evaluate an individual or to exclude his or her participation or testimony, and prior to ruling on any such motion, the court will make inquiry on the record of the litigant through his or her attorney or of the witness directly as to whether he or she has a disability that requires an accommodation, and, if so, what accommodations might enable him or her to have effective access to the judicial system. If the individual indicates that there is no need for accommodations, no further inquiry into the disability for purposes of accommodations will be made.

NOTE: In many cases, both the disability and the corresponding reasonable accommodation will be obvious, and will not affect the rights of other parties. In those cases, the court will order the accommodation and the process will end after this step.

2. If the inquiry referred to in (1) cannot be made without accommodations, the judge will order the provision of any reasonable accommodations necessary to make the inquiry.

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<sup>22</sup> Many of the materials promulgated to assist courts in complying with the requirements of the ADA suggest that the court enact uniform rules requiring attorneys to notify the court immediately, if they represent a litigant or intend to call a witness who may require courtroom accommodations. See, e.g., NJC Manual pp. 106.

3. In support of his or her request for accommodations, an individual may submit documentation such as a report from his or her own treating physician or examining expert, served on the court and all parties.
4. When necessary to determine whether a witness or litigant has a disability and/or what accommodations are necessary to enable the individual to have equal and effective access to the judicial system, the court may appoint an independent expert to assess the individual's impairment and its impact on the individual's ability to access the judicial system, as well as the accommodation[s], if any, which would provide equal and effective access to the judicial system, including any accommodations requested by the individual.
5. The purpose of the assessment must be explained to the individual, and that the assessment may not be confidential, if any other party's rights are implicated by the accommodations. The individual may refuse to participate in the assessment. In that case, the expert will make the report based on the facts in the record, including the individual's documentation, if any.
6. After completion and distribution to the parties of the expert report, or if no expert is appointed, the court will ask all affected parties to either (a) agree to the proposed accommodations or (b) file memoranda in response to the request for accommodations, addressing any issues presented by the individual's disability and/or request for accommodations.
7. If necessary, the court will hold a hearing for all affected parties, take evidence, and make findings of fact and conclusions of law on the following issues:
  - a. whether the individual has a disability;

- b. whether the individual needs an accommodation to have equal and effective access to the judicial system;
- c. whether the accommodation requested by the individual and any alternatives proposed by the expert will provide effective access to the judicial system;
- d. whether the accommodations will have an impact on the parties' rights to a fair trial;
- e. if there is any means of providing access while not violating fair trial rights; and
- f. a decision on which accommodations, if any, will be provided.

8. If accommodations are provided that will be obvious to a jury, the judge will ask the parties to provide any proposed instructions to the jury explaining the nature of the accommodations prior to beginning the trial, rule on the instructions, and provide any clarifying explanation or instructions to the jury prior to trial.

9. When devising accommodations, the court will take into consideration the necessity of preserving a record for appeal; e.g. if an individual is allowed to point or gesture, this will either be videotaped or described on the record.<sup>23</sup>

10. A party aggrieved by the court's decision may pursue the usual avenues of appeal. A witness aggrieved by the court's decision may pursue a petition under G.L. c. 211, § 3.

In Ms. McDonough's case the court was apparently first made aware of the existence of a witness with a

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<sup>23</sup> This method was suggested in People v. Caldwell, 603 N.Y.S.2d 713-14 (N.Y. City Crim. Ct. 1993) (accommodations for blind juror).

disability upon the filing of Mr. Agana's motion requesting an examination of her competency to testify. At that point, the court should have inquired whether the condition raising the issue of competency to testify was a disability that might require accommodations to access the judicial system, including (but not limited to) the victim's ability to testify, since that inquiry had a central bearing on the motion before the court.

The ADA also required the trial judge to inquire what Ms. McDonough's preferred accommodations, if any, might be. 28 C.F.R. § 35.160(c). Since the judge would likely be ordering an expert evaluation because of the defendant's competence motion, the judge may have appointed an expert in communication disorders to report to the court on the interlocking questions of accommodations and competence, with instructions to the expert to ascertain Ms. McDonough's preferred accommodations. The expert would be instructed to disclose to Ms. McDonough, as Dr. Klein did, the purpose of the evaluation and the fact that the results of the report would not be confidential.

The judge would have received a report suggesting potential accommodations for Ms. McDonough, and would

hold the competence hearing while relying on the suggested accommodations. This process would operate as a "trial run" for the accommodations. If the judge found Ms. McDonough competent to testify with the accommodations, he would have solicited the response of the parties to these proposed accommodations for trial. If Mr. Agana objected and his objections were denied, he would have preserved his objection for appeal.

If the judge found Ms. McDonough incompetent to testify, he would make written findings about her disability, the proposed accommodations, and his reasons for finding her incompetent to testify despite the attempt to accommodate her disability, as well as any proposed alternative accommodations that had been considered and rejected. Ms. McDonough would be free to appeal this decision through G.L. c. 211, § 3.

### **Conclusion**

Amici therefore suggest that the appropriate relief is for this court to remand this case to the Single Justice to enter an order with instructions regarding the process which the trial court is to follow to inquire regarding potential accommodations that do not violate the rights of the defendant, and

to ensure that Ms. McDonough receives those accommodations which enable her to have as equal and effective access to the judicial system as possible to vindicate her right to be heard in court.

Respectfully submitted,

NATIONAL APHASIA ASSOCIATION, NATIONAL  
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## ADDENDUM

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# Bureau of Justice Statistics Special Report

October 2009, NCJ 227814

## *National Crime Victimization Survey*

# Crime Against People with Disabilities, 2007

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*BJS Statisticians*

Persons age 12 or older with disabilities experienced approximately 716,000 nonfatal violent crimes and 2.3 million property crimes in 2007 as measured by the National Crime Victimization Survey (NCVS). Nonfatal violent crimes include rape, sexual assault, robbery, aggravated assault, and simple assault. Property crimes include household burglary, motor vehicle theft, and property theft.\*

About one third (34%) of the crimes against persons with or without a disability in 2007 were serious violent crimes (rape/sexual assault, robbery, or aggravated assault). Persons with disabilities were victims of about 47,000 rapes, 79,000 robberies, 114,000 aggravated assaults, and 476,000 simple assaults.

Findings in this report are the first estimates of crime against people with disabilities measured by the NCVS, administered by the Bureau of Justice Statistics (BJS). The NCVS adopted questions from the U.S. Census Bureau's American Community Survey (ACS) to identify respondents who had a disability. Disability is defined as a long-lasting (six months or more) sensory, physical, mental, or emotional condition that makes it difficult for a person to perform daily living activities. The NCVS questions identified six types of disabilities: sensory, physical, cognitive functioning, self-care, go-outside-the-home, and employment (see box, page 3).

This report focuses on the victimization experiences of persons with disabilities, including comparisons to persons without disabilities, disability types, victim characteristics, and crime characteristics, such as reporting crime to the police and the presence of weapons during the crime.

\*Estimates of property crimes against households with persons with disabilities may be an undercount due to the survey methodology (see box, page 7).

### *Findings from the NCVS include—*

- Age-adjusted rate of nonfatal violent crime against persons with disabilities was 1.5 times higher than the rate for persons without disabilities.
- Persons with a disability had an age-adjusted rate of rape or sexual assault that was more than twice the rate for persons without a disability.
- Females with a disability had a higher victimization rate than males with a disability; males had a higher rate than females among those without a disability.
- Persons with a cognitive functioning disability had a higher risk of violent victimization than persons with any other type of disability.
- Persons with more than one type of disability accounted for about 56% of all violent crime victimizations against those with any disability.
- Nearly 1 in 5 violent crime victims with a disability believed that they became a victim because of their disability.
- Victims with a disability perceived offenders to be under the influence of either alcohol or drugs in about a third of all violent crimes against them.
- Violent crime victims with or without a disability were equally as likely to face an armed offender, report the crime to the police, or suffer an injury.

**Table 1. Numbers and rates of violent victimization among persons with and without disabilities, by type of crime, 2007**

Type of crime	Number	Persons with disabilities			Persons without disabilities		
		Percent	Rate per 1,000 <sup>a</sup>		Number	Percent	Rate per 1,000 <sup>a</sup>
			Age-adjusted <sup>b</sup>	Unadjusted			
<b>Total violent crime</b>	716,320	100.0%	32.4*	18.1	4,432,460	100.0%	21.3
<b>Serious violent crime</b>	240,070	33.5%	11.1*	6.1	1,460,450	32.9%	7.0
Rape/sexual assault	47,440	6.6	2.4*	1.2	185,600	4.2	0.9
Robbery	78,990	11.0	3.2**	2.0	516,000	11.6	2.5
Aggravated assault	113,640	15.9	5.5*	2.9	758,900	17.1	3.6
<b>Simple assault</b>	476,250	66.5%	21.3*	12.0	2,972,020	67.1%	14.3

Note: Rates are based on the noninstitutional U.S. resident population age 12 or older, in the American Community Survey, 2007, U.S. Census Bureau. In 2007 approximately 39,566,790 persons age 12 or older in the U.S. had a disability. See *Methodology*.  
 \*Difference between the age-adjusted rate for persons with disabilities and the unadjusted rate for those without disabilities is significant at the 95%-confidence level.  
 \*\*Difference between the age-adjusted rate for persons with disabilities and the unadjusted rate for those without disabilities is significant at the 90%-confidence level.  
<sup>a</sup>Rates are per 1,000 persons age 12 or older.  
<sup>b</sup>The age-adjusted victimization rate for persons with disabilities is calculated by multiplying the unadjusted rate for each age group with disabilities by the ratio of the number of people in that age group without disabilities, divided by the total population without disabilities. The sum of these weighted estimates represent the overall age-adjusted rate.

**When adjusted for age variation, people with disabilities experienced higher rates of violence than people without a disability**

The population with disabilities is generally older than those without disabilities. Also the victimization rate generally decreases as age increases. To compare crimes against people with disabilities to those without disabilities, the rates were adjusted to account for the differences in the age distribution between the two groups and the declining rates of violence against people as they age (see *Methodology* for more information on age-adjusted rates).

The NCVS showed an unadjusted rate of violent crime against people with disabilities (18 per 1,000 persons age 12 or older) that was slightly lower than the rate against those without disabilities (21 per 1,000 persons) (table 1). When the rate was adjusted to account for the age differences between the two groups, the adjusted rate for people with disabilities was about 1.5 times higher than the unadjusted rate for those without disabilities. The age-adjusted rate of violence for persons with disabilities was 32 per 1,000 persons age 12 or older, compared to 21 per 1,000 persons age 12 or older without disabilities.

The age-adjusted rate of serious violence against persons with disabilities was higher than the unadjusted rate for those without disabilities. For rape or sexual assault, the age-adjusted rate for persons with disabilities was more than twice the rate for persons without disabilities. Age-adjusted rates of robbery were slightly higher for those with disabilities than the rates for persons without disabilities. For aggravated and simple assault, the age-adjusted rate of violence against persons with disabilities was higher than the rate against persons without disabilities.

**Youth ages 12 to 19 with a disability experienced violence at nearly twice the rate as those without a disability**

In general youth experience the highest rates of violence and seniors experience the lowest rates. Using unadjusted rates of violence to compare age characteristics of victims with and without disabilities, youth ages 12 to 19 with a disability experienced violence at nearly twice the rate as those ages 12 to 19 without a disability (table 2). Additionally, persons ages 35 to 49 with disabilities experienced higher rates of violent crime than persons of this age group without disabilities. The risk of violent crime did not differ by disability status for persons ages 50 to 64. Persons age 65 or older experienced the lowest rates of violent crime, regardless of disability status.

**Table 2. Violent victimization of persons with and without disabilities, by age, 2007**

Victim characteristics	Unadjusted rate per 1,000 persons age 12 or older	
	Persons with disabilities	Persons without disabilities
<b>Age</b>		
12-15	81.2*	40.0
16-19	82.7*	47.0
20-24	35.1	35.4
25-34	30.9	24.9
35-49	31.2*	16.1
50-64	12.2	11.6
65 or older	2.1	3.0

Note: Rates are based on the noninstitutional U.S. resident population age 12 or older, in the American Community Survey, 2007, U.S. Census Bureau. In 2007 approximately 39,566,790 persons age 12 or older in the U.S. had a disability. See *Methodology*.  
 \*Difference is significant at the 95%-confidence level.

**Table 3. Rate of violent victimization for persons with and without disabilities, by gender, race, and Hispanic origin, 2007**

Victim characteristics	Rate per 1,000 persons age 12 or older		
	Persons with disabilities		Persons without disabilities
	Age-adjusted <sup>a</sup>	Unadjusted	
<b>Total</b>	32.4*	18.1	21.3
<b>Gender</b>			
Male	29.5*	18.5	23.7
Female	34.8*	17.8	18.9
<b>Race<sup>b</sup></b>			
White	34.1*	18.4	22.4
Black/African American	31.2	18.3	25.8
Other race <sup>c</sup>	2.3 <sup>^</sup>	3.5 <sup>^</sup>	12.3
Two or more races	91.0*	70.7	51.6
<b>Hispanic origin<sup>d</sup></b>			
Hispanic	19.0	12.2	19.1
Non-Hispanic	33.9*	18.8	21.6

Note: Rates are based on the noninstitutional U.S. resident population age 12 or older, in the American Community Survey, 2007, U.S. Census Bureau. In 2007 approximately 39,566,790 persons age 12 or older in the U.S. had a disability. See *Methodology*.

<sup>^</sup>Based on 10 or fewer sample cases.

\*Difference between the age-adjusted rate for persons with disabilities and the unadjusted rate for those without disabilities is significant at the 95%-confidence level.

<sup>a</sup>The age-adjusted victimization rate for people with disabilities is calculated by multiplying the unadjusted rate for each age group with disabilities by the ratio of the number of people in that age group without disabilities, divided by the total population without disabilities. The sum of these weighted estimates represent the overall age-adjusted rate.

<sup>b</sup>Includes persons of Hispanic or Latino origin.

<sup>c</sup>Includes American Indians, Alaska Natives, Asians, Native Hawaiians, and other Pacific Islanders.

<sup>d</sup>Includes all races.

### Adopting questions from the ACS helped identify victims with disabilities in the NCVS

The NCVS collects information on crimes of violence and theft, reported and not reported to the police, against persons age 12 or older and their household. In 2007 the NCVS adopted questions from the U.S. Census Bureau's American Community Survey (ACS) to measure the rate of victimization against people with disabilities.

The ACS defines disability as a long-lasting (six months or more) sensory, physical, mental, or emotional condition that makes it difficult to perform activities of daily living, such as walking, climbing stairs, dressing, bathing, learning, or remembering. NCVS respondents were asked whether they had any health conditions, impairments, or disabilities. Using the limitations defined by the ACS, the NCVS survey identified six types of disabilities:

- *Cognitive functioning limitation* is a physical, mental, or emotional condition that makes learning, remembering, or concentrating difficult.
- *Sensory limitation* is a long-lasting condition, such as blindness, deafness, or a severe vision or hearing impairment.
- *Physical limitation* is a condition that substantially limits one or more basic physical activities, such as walking, climbing stairs, reaching, lifting, or carrying.
- *Self-care limitation* is a condition that makes dressing, bathing, or getting around the home difficult.
- *Going-outside-home limitation* is a condition that makes going outside the home alone to shop or visit a doctor's office difficult.
- *Employment limitation* is a physical, mental, or emotional condition that makes it difficult to work at a job or business.

For more detailed definitions of the types of disabilities measured, see U.S. Census Bureau, *American Community Survey, 2005 Subject Definitions*. Retrieved August 10, 2009, from <[http://www.census.gov/acs/www/Downloads/2005/usedata/Subject\\_Definitions.pdf#page=32](http://www.census.gov/acs/www/Downloads/2005/usedata/Subject_Definitions.pdf#page=32)>.

### Females with a disability had a higher victimization rate than males with a disability

Among persons with disabilities, females had a higher risk of violence than males (table 3). Age-adjusted rates of violence for males and females with a disability were higher than the rates for males and females without a disability. The age-adjusted rate of violent crime against females with a disability (35 per 1,000 age 12 or older) was almost twice the unadjusted rate for females without a disability (19 per 1,000 age 12 or older).

Both whites and blacks with a disability experienced higher rates of violence than persons of other races with a disability. Whites with a disability experienced violence at a higher age-adjusted rate than whites without disabilities. No statistically significant difference emerged between the age-adjusted rate of violence for blacks with a disability and the rate for blacks without a disability.

After adjusting for age, non-Hispanic persons with disabilities (34 per 1,000) had a higher risk of violence than Hispanics with disabilities (19 per 1,000). The risk of being victimized did not vary by Hispanic origin among persons without disabilities.

### Comparison of persons with and without disabilities using unadjusted estimates

While age-adjusted rates account for variations in age and risk of victimization among those with and without disabilities, unadjusted rates are used to compare the two groups throughout the remainder of the report. Unadjusted victimization estimates are presented by victim and crime characteristics, including type of disability, victim and offender relationship, offender weapon use, victim injuries, and crimes reported to the police.

### More than half of violent crimes against people with a disability were against those with multiple disabilities

The NCVS questions allowed victims to report more than one type of disability. Of the violent victimizations against people with disabilities, 56% were committed against people who reported having more than one disability. Across the types of violent crimes measured by the NCVS, victims who reported having more than one disability were 60% of rape or sexual assault victims, 45% of robbery victims, 61% of aggravated assault victims, and 56% of simple assault victims (not shown in table).

### Persons with a cognitive disability experienced violent crime at a rate higher than persons with other types of disabilities

People who reported having a cognitive disability had a higher rate of total violent crime (about 28 per 1,000 persons age 12 or older) than people who reported having any other type of disability (table 4). Persons with a cognitive disability experienced higher rates of rape or sexual assault, robbery, and aggravated assault than those with a sensory disability. They also had a somewhat higher rate of robbery than persons with a physical, self-care, or employment disability. For simple assault, persons with a cognitive disability had a higher victimization rate than those having any other type of disability. Few other differences emerged because the amount of data available for analysis by type of crime and type of disability were not sufficient to enable a full examination.

In evaluating the rate of violence by gender for persons with disabilities, males and females with a cognitive disability experienced higher or somewhat higher rates of violent crime than persons reporting other types of disabilities, with the following exception: no significant differences emerged between the victimization rates for males with a cognitive disability and males with a self-care disability (text table 1). The rate of violence against females with a cognitive disability was higher than the rates against females with other types of disabilities. Among those with a self-care disability, males were more vulnerable to violent crime victimization than females.

Text table 1. Violent victimization rate of persons with disabilities, by type of disability and gender, 2007

Disability type	Rate of violent victimization per 1,000 persons age 12 or older with disabilities	
	Male	Female
Sensory	13.4	9.8
Physical	15.3	12.2
Cognitive	24.1	31.3
Self-care	17.1	6.0 <sup>A</sup>
Go-outside-home	13.9	10.5
Employment	16.0	15.2

Note: Rates include victims with more than one disability. Definitions of the types of disabilities are available from the U.S. Census Bureau, *American Community Survey, 2005 Subject Definitions*. Retrieved August 10, 2009, from <[http://www.census.gov/acs/www/Downloads/2005/usedata/Subject\\_Definitions.pdf#page=31](http://www.census.gov/acs/www/Downloads/2005/usedata/Subject_Definitions.pdf#page=31)>.

<sup>A</sup>Based on 10 or fewer sample cases.

### Almost a fifth of violent crime victims with disabilities believed that they had been victimized because of their disability

In 2007 about 19% of violent crime victims with a disability believed that they were victimized because of their disability. Seventy-nine percent of violent crime victims with a disability did not believe that being victimized was related to their disability, while about 2% did not know whether their victimization was related to their disability (not shown in table).

Table 4. Violent victimization rate, by type of disability and type of crime, 2007.

Type of crime	Rate per 1,000 persons age 12 or older						
	Total	Sensory	Physical	Cognitive	Self-care	Go-outside-home	Employment
<b>Total violent crime</b>	18.1	11.8	13.5	27.8	10.5	11.8	15.6
<b>Serious violent crime</b>	6.1	1.5 <sup>A</sup>	5.0	9.6	3.8 <sup>A</sup>	5.0	5.1
Rape/sexual assault	1.2	0.4 <sup>A</sup>	1.2 <sup>A</sup>	2.0 <sup>A</sup>	0.6 <sup>A</sup>	0.7 <sup>A</sup>	0.8 <sup>A</sup>
Robbery	2.0	0.2 <sup>A</sup>	1.5	3.3	1.1 <sup>A</sup>	1.7 <sup>A</sup>	1.3 <sup>A</sup>
Aggravated assault	2.9	1.0 <sup>A</sup>	2.4	4.3	2.1 <sup>A</sup>	2.6 <sup>A</sup>	2.9
<b>Simple assault</b>	12.0	10.2	8.5	18.2	6.7	6.8	10.5

Note: Rates include victims with more than one disability. Definitions of the types of disabilities are available from the U.S. Census Bureau, *American Community Survey, 2005 Subject Definitions*. Retrieved August 10, 2009, from <[http://www.census.gov/acs/www/Downloads/2005/usedata/Subject\\_Definitions.pdf#page=31](http://www.census.gov/acs/www/Downloads/2005/usedata/Subject_Definitions.pdf#page=31)>.

<sup>A</sup>Based on 10 or fewer sample cases.

**Among victims of violent crime, females were more likely than males to have been victimized by an intimate partner, regardless of disability status**

Overall, the percentage of violent crimes committed by an intimate partner against females was higher than that for males. While this pattern held true for persons with disabilities in 2007, differences between the percentages of intimate partner violence committed against males and females was greater for persons without disabilities. The NCVS defines intimate partner as a current or former spouse, boyfriend, or girlfriend.

Intimate partners were responsible for 16% of nonfatal violence against females with disabilities, compared to 5% against males with disabilities (table 5). Among persons without disabilities, intimate partners were responsible for 27% of nonfatal violence against females and 3% of nonfatal violence against males. The percentage of violence by a non-intimate relative was higher for females than males, regardless of disability status. The NCVS defines other or non-intimate relatives as parents, siblings, or cousins.

Regardless of a victim's disability status, strangers were responsible for a higher percentage of violence against males than females. Victimization by a stranger made up a slightly higher percentage of crimes against females with a disability, compared to females without a disability.

**Victims with disabilities perceived offenders to be under the influence of either alcohol or drugs in about a third of all violent crimes against them**

In 2007 the victim perceived the offender to be under the influence of either alcohol or drugs in about 35% of all violence against people with disabilities (text table 2). This is similar to the percentage for victims without disabilities. An estimated 36% of violent crime victims with a disability said that they did not know if the offender was under the influence of alcohol or drugs.

**Text table 2. Percent of violence, by perceived offender alcohol or drug use and victim's disability status, 2007**

Offender drug use	Percent of violent crime victims	
	Persons with disabilities	Persons without disabilities
<b>Victim perceived offender to be—</b>		
Using alcohol or drugs	34.8%	29.4%
Not using alcohol or drugs	28.9	32.5
<b>Victim did not know if offender was using alcohol or drugs</b>	36.3%	38.0%

**Taking action to resist the attacker did not vary by a victim's disability status**

Similar percentages of victims of violent crime with disabilities (58%) and without disabilities (60%) resisted their attackers (table 6). Similar percentages of victims with or without a disability defended themselves by threatening or attacking an offender with a firearm or other weapon or by using nonconfrontational tactics, such as running, yelling, or arguing. Victims with disabilities were less likely to resist by threatening or attacking an offender without a weapon compared to victims without disabilities.

**Table 5. Victim/offender relationship of violent crime victims with and without disabilities, by gender, 2007**

Victim/offender relationship	Percent of violent victimization					
	Persons with disabilities			Persons without disabilities		
	Total	Male	Female	Total	Male	Female
<b>Total</b>	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Intimate partner <sup>a</sup>	10.7	5.4 <sup>^</sup>	16.1	13.3	3.0	26.9
Other relatives <sup>b</sup>	7.8	3.0 <sup>^</sup>	12.5	6.1	5.0	8.7
Well known/casual acquaintance	33.2	39.1	31.6	30.8	34.1	34.1
Stranger	39.8	40.4	33.5	41.3	45.2	24.2
Did not know relationship	8.5 <sup>^</sup>	12.2 <sup>^</sup>	6.3 <sup>^</sup>	8.5	12.7	6.0

Note: Detail may not sum to 100% due to rounding.

<sup>^</sup>Based on 10 or fewer sample cases.

<sup>a</sup>Defined as current or former spouses, boyfriends, or girlfriends.

<sup>b</sup>Defined as parents, siblings, or cousins.

**Table 6. Victim resistance during a violent crime, by victim's disability status and type of resistance, 2007**

Type of resistance	Percent of violent crime victims	
	Persons with disabilities	Persons without disabilities
<b>Total</b>	100.0%	100.0%
<b>Victim offered no resistance</b>	41.3%	40.1%
<b>Victim offered resistance by—</b>	58.1%	59.8%
Threatening or attacking—		
With a firearm	2.0 <sup>^</sup>	1.4
With other weapon	0.5 <sup>^</sup>	1.2
Without a weapon	19.5	26.1
Using nonconfrontational tactics*	31.2	27.0
Other reaction	4.9	4.0
<b>Unknown reaction</b>	0.6% <sup>^</sup>	0.1% <sup>^</sup>

<sup>^</sup>Based on 10 or fewer sample cases.

\*Includes yelling, running, and arguing.

**Victims faced an armed offender in nearly 1 in every 5 violent crimes in 2007**

Persons with disabilities faced an armed offender in about 18% of violent crimes against them in 2007, and persons without disabilities faced an armed offender in about 22% of violent crimes (table 7). Victims with disabilities (4%) were less likely to face an offender armed with a firearm, compared to victims without disabilities (9%).

**About a quarter of all victims of violent crime with disabilities were injured**

About 26% of violent crime victims with disabilities sustained injuries during the crime, a percentage identical to that for victims without disabilities (table 8). No differences emerged by disability status in the percentage of violent crime victims who sought treatment or in the place where treatment was received.

About 13% of violent crime victims with a disability sought treatment for their injuries. Violent crime victims with or without a disability were most often treated at the crime scene, by a neighbor or friend, or at a hospital without being admitted. Regardless of a victim's disability status, less than 1% of violent crime victims were admitted to a hospital for an overnight stay because of their injuries.

**Table 7. Violent crime, by offender weapon use against persons with and without disabilities, 2007**

	Percent of violent crime victims	
	Persons with disabilities	Persons without disabilities
<b>Total</b>	100.0%	100.0%
<b>No weapon</b>	72.5%	70.4%
<b>Weapon</b>	18.4	21.9
Firearm	4.2 <sup>^</sup>	8.5
Knife	5.7	7.0
Other	7.5	5.1
Unknown	1.0 <sup>^</sup>	1.2
<b>Did not know if offender had weapon</b>	9.1%	7.8%

Note: Detail may not sum to 100% due to rounding.  
<sup>^</sup>Based on 10 or fewer sample cases.

**Violent crimes against persons with or without disabilities were equally likely to be reported to police**

Violent crimes reported to the police did not vary by disability status. Violence against persons with a disability were reported in about 43% of violent crimes. Of these violent crimes, robbery was the most likely to be reported to the police.

Violence against persons without a disability were reported in about 47% of violent crimes (table 9). The percent of aggravated assault reported to the police was slightly lower for persons with a disability, compared to those without a disability. For rape or sexual assault, robbery, and simple assault, the percent reported to the police was similar for persons with or without a disability.

**Table 8. Injury and medical treatment of victims of violent crime, by disability status, 2007**

	Percent of violent crime victims	
	Persons with disabilities	Persons without disabilities
<b>Total</b>	100.0%	100.0%
<b>Not injured</b>	74.5%	74.3%
<b>Injured</b>	25.5%	25.7%
Not treated	12.4	15.1
Treated	13.0	10.6
At scene, home, neighbors, or friends	5.4	3.8 <sup>^</sup>
Medical doctor's office/clinic, health unit, stadium, park	1.8 <sup>^</sup>	1.8
Hospital, not admitted	5.4 <sup>^</sup>	4.6 <sup>^</sup>
Stayed overnight in hospital	0.5 <sup>^</sup>	0.4 <sup>^</sup>
<b>Did not know if victim was injured or treated</b>	--%	0.1% <sup>^</sup>

Note: Detail may not sum to 100% due to rounding.  
<sup>^</sup>Based on 10 or fewer sample cases.  
 --No cases were present for this category.

**Table 9. Percent of violent crime reported to police, by victim's disability status and type of crime, 2007**

	Persons with disabilities	Persons without disabilities
<b>Total violent crime</b>	43.0%	46.5%
<b>Serious violent crime</b>	51.7%	59.0%
Rape/sexual assault	43.0 <sup>^</sup>	43.1
Robbery	73.7	66.2
Aggravated assault	40.0	57.9
<b>Simple assault</b>	38.7%	40.4%

<sup>^</sup>Based on 10 or fewer sample cases.

**Police responded to about three-quarters of reported violence against victims with a disability**

The percentage of victims with a disability who said that the police responded to the reported crime was lower than the percentage for those without a disability. Seven in 10 victims with a disability, compared to 8 in 10 without a disability, said that the police responded to the reported crime. Police did not respond to about 23% of reported violent crimes against persons with disabilities, compared to about 10% of reported violent crimes against victims without disabilities (text table 3).

**Text table 3. Percent of reported violent crime, by police response and victim's disability status, 2007**

Police response	Victims with disabilities	Victims without disabilities
<b>Police responded to reported violence</b>		
Yes	74.1%	84.2%
No	22.9	9.8
Did not know	—	1.1 <sup>^</sup>
<b>Respondent went to police</b>	3.0% <sup>^</sup>	4.9%

<sup>^</sup>Based on 10 or fewer sample cases.  
 --No cases were present for this category.

**Equal percentages of violent crime victims with and without disabilities made use of victim assistance agencies**

When violent crime victims were asked whether they or someone in their household received any help or advice from any office or agency (other than the police) that works with crime victims, about 9% of those with a disability said they received assistance. An equal percentage of violent crime victims without a disability said they used the services of a victim assistance agency other than the police (text table 4).

**Text table 4. Percent of violent crime victims that used a victim assistance agency other than the police, by victim disability status and agency type, 2007**

Type of agency	Victims with disabilities	Victims without disabilities
<b>Used victim agency</b>	9.4%	8.6%
Government agency	5.7	5.4
Private agency	2.8 <sup>^</sup>	2.5
Did not know type of agency	0.9 <sup>^</sup>	0.6 <sup>^</sup>

Note: Detail may not sum to total due to rounding.  
<sup>^</sup>Based on 10 or fewer sample cases.

**Theft accounted for over 70% of all property crime against people with or without disabilities**

People age 12 or over with a disability reported to the NCVS that their households experienced approximately 2.3 million property crimes in 2007 (table 10). Property crimes include household burglary, motor vehicle theft, and property theft.

The NCVS measure of property crime is a household-based measure. As described in the *Methodology* on page 9, the NCVS questions used to identify whether a person had a disability were asked only of those respondents who reported that they had been victimized. If the person who reported the property crime was a household member with a disability, then the NCVS identified the property crime as one against a household with a person with a disability. If a household member without a disability reported the

property crime during the survey, the NCVS did not ask whether any other household member had a disability. For this reason the estimate of property crime against people with disabilities may be an undercount of such crimes.

Theft accounted for over 70% of property crimes against all households, regardless of disability status. Burglary accounted for about 23% of all property crimes against households with a person with a disability, compared to 18% against households without a person with a disability. Motor vehicle theft accounted for about 5% of property crimes against households with a person with a disability.

**Table 10. Household property victimization for persons with and without disabilities, by type of crime, 2007**

Type of crime	Persons with disabilities		Persons without disabilities	
	Number	Percent	Number	Percent
<b>Total property crime</b>	2,320,360	100.0%	14,739,140	100.0%
Household burglary	527,040	22.7	2,619,960	17.8
Motor vehicle theft	107,260	4.6	845,060	5.7
Theft	1,686,070	72.7	11,274,120	76.5

Note: In 2007 about 29,977,270 households in the U.S. included a person age 12 or older with a disability as measured by the American Community Survey, 2007. See *Methodology*.

**The Crime Victims with Disabilities Awareness Act mandated that the NCVS include statistics on crimes against people with disabilities and the characteristics of the victims of those crimes**

The Crime Victims with Disabilities Awareness Act (Public Law 105-301), 1998, mandated that the National Crime Victimization Survey (NCVS) measure the victimization of people with disabilities. Section 5 of the Act directed the Department of Justice to include statistics relating to "the nature of crimes against people with developmental disabilities; and the specific characteristics of the victims of those crimes" in the NCVS.

In partnership with the U.S. Census Bureau, the Bureau of Justice Statistics (BJS) initiated a number of activities that would lay the foundation for incorporating disability-related questions into the ongoing NCVS. In October 1999 BJS and the Census Bureau convened a workshop on crime and disabilities, bringing together researchers, advocates, and representatives from other federal agencies to assist with identifying and measuring crime victimization of people with disabilities.

The complex and subjective concepts used in defining disability made it difficult to develop disability-related survey questions. As codified by 42 U.S. Code 6001, a developmental disability consists of many elements, including age of onset, duration, types of functional limitation, and evaluation of the severity and duration of the disability. Health-related surveys, such as the Health Interview Survey\* conducted by the Centers for Disease Control and Prevention, use a lengthy, comprehensive set of questions to determine whether

\*For more information on the Health Interview Survey, see <<http://www.cdc.gov/nchs/nhis.htm>>. (Last accessed August 27, 2009).

a person has a disability and to identify the nature of the disability. A long battery of questions was deemed too burdensome for the NCVS, a crime victimization survey that measures the characteristics of crime.

BJS and the Census Bureau tested a number of questionnaire modules between 2000 and 2004. Each set of questions proved problematic, either because the modules were too long and burdensome or because the questions did not adequately distinguish health conditions from disabling conditions according to the federal definitions.

In 2007 BJS incorporated the disability-related questions developed for the American Community Survey (ACS) with the crime incident reporting section of the NCVS. The questions produced reliable estimates and allowed BJS to use population estimates from the ACS to calculate rates of victimization for people with disabilities. This report presents findings based on the analysis of the responses to the disability-related questions in the NCVS.

For a more detailed discussion of the initial work undertaken by BJS, see *Developing the Capability to Measure Crime Victimization of People with Disabilities*, pp. 24-37, in Sirken, M.G. *Integrating Measurements of Disability in Federal Surveys: Seminar Proceedings*. National Center for Health Statistics. *Vital Health Stat* 4(32). 2002. Retrieved August 26, 2009, from <[http://www.cdc.gov/nchs/data/series/sr\\_04/sr04\\_032.pdf](http://www.cdc.gov/nchs/data/series/sr_04/sr04_032.pdf)>.

## Methodology

### Data sources

*Crime Against People with Disabilities, 2007*, presents data on violent and property crimes against people with disabilities age 12 or older as measured by the National Crime Victimization Survey (NCVS). Violent crimes include rape, sexual assault, robbery, aggravated assault, and simple assault. Property crimes include household burglary, motor vehicle theft, and theft.

The NCVS collects information on crimes against persons age 12 or older, reported and not reported to the police, from a nationally representative sample of U.S. households. The survey provides information on victims (age, gender, race, Hispanic origin, marital status, income, and educational level), offenders (gender, race, approximate age, and victim-offender relationship), and the nature of the crime (time and place of occurrence, use of weapons, nature of injury, and economic consequences).

To identify people with disabilities in the NCVS, BJS adopted questions from the U.S. Census Bureau's American Community Survey (ACS). The ACS is conducted in all U.S. counties and Puerto Rico. It provides economic, social, demographic, and housing information that was previously available only when the Census Bureau conducted its population census every 10 years. Included in the information collected by the ACS are disability status, income, age, housing, race, and Hispanic origin.

The American Community Survey Subcommittee on Disability Questions developed the 2007 ACS disability questions based on questions used in the 2000 Decennial Census and earlier versions of the ACS. The questions identify persons who may require assistance to maintain their independence, be at risk for discrimination, or lack opportunities available to the general population because of limitations due to a long-lasting sensory, physical, mental, or emotional condition. The questions were designed to address six specific disability domains: sensory, physical, cognitive functioning, self-care, go-outside-the-home, and employment. For more information about the ACS and the disability questions, see <<http://www.census.gov/acs/www/>>. (Last accessed August 27, 2009).

### Calculation of rates using the NCVS and the ACS

The disability-related questions were not administered to each person in the NCVS sample in 2007. Questions were administered as part of the crime incident report to people who reported being a victim of one of the measured offenses. To calculate rates of victimization for people with and without disabilities, BJS obtained data from the Census

Bureau's 2007 report of the ACS. Because the NCVS questions are the same as those in the ACS, the NCVS estimates of crime victims with disabilities is, by definition, identical to the population estimates of people with disabilities from the ACS.

### Age-adjusted violent victimization rates

In general the population with disabilities is older than the population without disabilities. For that reason, many comparisons between the victimization experiences of people with and without disabilities use age-adjusted victimization rates. Age-adjusted rates account for differences in the age distributions between both populations. Without this adjustment, the differences between the rates for people with disabilities and those without disabilities would be confounded by differences that may be attributed to the age distributions rather than disability status.

Direct standardization of populations was used to calculate the age-adjusted violent victimization rates. Other federal agencies use similar methods to calculate the age-adjusted rates of diseases and mortality.

First, the population with disabilities was taken from the ACS and divided into seven age categories: 12 to 15, 16 to 19, 20 to 24, 25 to 34, 35 to 49, 50 to 64, and 65 or older. For each age category, the original unadjusted rate of violent crime was calculated by dividing the number of violent victimizations for people in that age group in the NCVS by the number of people in the same age group from the ACS.

Next, a weight for each age group was computed by dividing the number of all persons in an age group without disabilities by the total number of persons without a disability. The weight computed for a particular age group was multiplied by the original unadjusted violent victimization rate for the same age group. This procedure was done for each age group.

Results were summed across all age groups to obtain the age-adjusted rate of violent victimization against persons with disabilities. This procedure was used to produce the age-adjusted rates of violent victimization of persons with disabilities by gender, race, Hispanic origin, and type of violent crime.

For more information on direct standardization of populations, see Curtin, Ph.D. and R.J. Klein, M.P.H., *Direct Standardization (Age-adjusted Death Rates)*. Centers for Disease Control and Prevention. National Center for Health Statistics. No. 6 (March 1995). Retrieved August 27, 2009, from <<http://www.cdc.gov/nchs/data/statnt/statnt06rv.pdf>>.

### *Limitations of the estimates*

While a large national sample and the ongoing nature of the NCVS enhance its ability to produce estimates of people with disabilities, some attributes in the survey's design limit the estimates it can produce. The survey was designed to measure the incidence of crime against the U.S. civilian noninstitutional population. A significant number of people with disabilities, especially those with the most profound and severe conditions, live in institutional settings. The measures of crime against persons with disabilities as measured by the NCVS covers only those people with disabilities living among the general population in household settings.

In addition, the instruments, modes of interview, and interviewing protocols used in the NCVS may not be suited for interviewing people with difficulty communicating, especially by telephone. Currently, about 70% of the interviews conducted for the NCVS are by telephone. Some people have disabilities that limit their verbal communication and use technology to enhance their ability to communicate, but many people do not have access to such technology. Additionally, the survey questionnaire, while avoiding legal terminology, incorporates some complex concepts and language that may not be easily understood by people with cognitive disabilities.

The survey also requires direct interviews with eligible respondents and allows the use of proxy interviews in a limited set of circumstances. One circumstance under which proxy interviews are allowed is if the respondent is physically or mentally incapable of responding. The survey restrictions on proxy interviews were instituted because someone else may not know about the victimization experiences of the respondent and because the person providing the information via proxy may be the perpetrator of the abuse or violence experienced by the respondent.

At a national level, the effects on the estimates due to proxy responses are probably small. When measuring victimization of people with disabilities, the use of proxies could be a larger issue. About 1% of the crimes reported to

the NCVS in 2007 were obtained from proxy interviews. Of the crimes reported against persons with disabilities, about 2% were obtained from proxy interviews. Since proxy respondents may be more likely to omit crime incidents or may not know some details about reported crime incidents, the number of crimes against persons with disabilities may have been undercounted.

While the NCVS and ACS disability questions are identical, other factors associated with the programs may impact either the NCVS or ACS estimates and the comparison of those estimates. In turn, this would effect the calculation of victimization rates of people with and without disabilities. Some possible factors include the effects of non-interview biases and interview modes. The NCVS is conducted by personal visit and telephone interviews, while the ACS is a self-administered survey. These possible effects have not been studied.

For most variables used in this report, there was very low item non-response and no imputation of data.

### *Standard error computations*

Comparisons of percentages and rates made in this report were tested to determine if observed differences were statistically significant. Differences described as higher, lower, or different passed a hypothesis test at the 0.05 level of statistical significance (95%-confidence level). The tested difference was greater than twice the standard error of that difference. For comparisons that were statistically significant at the 0.10 level (90%-confidence level), "somewhat," "slightly," or "marginally" is used to note the nature of the difference.

Significance-testing calculations were conducted at BJS using statistical programs developed specifically for the NCVS by the U.S. Census Bureau. These programs take into consideration many aspects of the complex NCVS sample design when calculating estimates. Estimates based on 10 or fewer sample cases have high relative standard errors. Care should be taken when comparing such estimates to other estimates when both are based on 10 or fewer sample cases.

**Disability-related questions included in the National Crime Victimization Survey in 2007**

168. Research has shown that people with disabilities may be more vulnerable to crime victimization. The next questions ask about any health conditions, impairments, or disabilities you may have.
169. Do you have any of the following long-lasting conditions:
- (a) Blindness, deafness, or a severe vision or hearing impairment?
  - (b) A condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying?
170. Because of a physical, mental, or emotional condition lasting 6 months or more, do you have any difficulty in doing any of the following activities:
- (a) Learning, remembering, or concentrating?
  - (b) Dressing, bathing, or getting around inside the home?
  - (c) Going outside the home alone to shop or visit a doctor's office?
  - (d) Working at a job or business?
171. Is "Yes" marked in any of 169a-170d? (That is, has the respondent indicated that he/she has a health condition or disability?)
172. During the incident you just told me about, do you have reason to suspect you were victimized because of your health condition(s), impairment(s), or disability(ies)? (If yes, ask 173).
173. Which of your health conditions, impairments, or disabilities do you believe caused you to be targeted for this incident?

The full NCVS questionnaire and additional methodology are available at the BJS Website at <http://www.ojp.usdoj.gov/bjs/cvict.htm#ncvs>.

**Appendix table 1. U.S. population by disability status, by gender, race, Hispanic origin, and age, 2007**

Characteristics	Persons with disabilities	Persons without disabilities
<b>Total</b>	39,566,790	208,393,120
<b>Gender</b>		
Male	18,263,970	102,024,330
Female	21,302,820	106,368,790
<b>Race<sup>a,b</sup></b>		
White	30,316,700	156,737,160
Black/African American	5,406,650	23,695,680
Other race <sup>c</sup>	1,464,200	11,608,000
Two or more races	770,690	3,339,540
<b>Hispanic origin<sup>d</sup></b>		
Hispanic	3,970,500	30,152,410
Non-Hispanic	35,596,300	178,240,710
<b>Age<sup>d</sup></b>		
12-15	1,125,600	15,547,100
16-19	1,182,790	16,117,890
20-24	1,333,440	18,930,460
25-34	2,720,770	36,233,590
35-49	7,346,740	57,853,950
50-64	11,122,480	42,178,430
65 or older	14,734,980	21,531,710

Note: Rates are based on the noninstitutional U.S. resident population age 12 or older, in the American Community Survey, 2007, U.S. Census Bureau.

<sup>a</sup>Includes persons of Hispanic or Latino origin.

<sup>b</sup>About 1.6 million persons with disabilities and about 13 million persons without disabilities did not report information on race to the ACS that matched one of the NCVS racial categories. Persons whose race could not be matched by racial categories in the NCVS were excluded from the analyses by racial groups.

<sup>c</sup>Includes American Indians, Alaska Natives, Asians, Native Hawaiians, and other Pacific Islanders.

<sup>d</sup>Detail may not sum to total due to rounding.

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The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Michael D. Sinclair is Acting Director.

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United States District Court,  
E.D. Pennsylvania.  
Joseph HUSSEY  
v.  
CHASE MANHATTAN BANK, et al.  
No. Civ.A. 02-7099.

July 27, 2005.

MEMORANDUM & ORDER

SURRICK, J.

\*1 Presently before the Court is Defendants Chase Manhattan Bank, Chase Manhattan Mortgage Corporation, JP Morgan Chase & Co., and Director of Human Resources, Chase Manhattan Bank's (collectively "Defendants") Motion In Limine To Exclude The Testimony Of Joseph Hussey And Maureen Hussey (Doc. No. 52). For the following reasons, Defendants' Motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff Joseph Hussey joined Chase Manhattan Mortgage Corporation ("CMMC") in June, 1997. Plaintiff joined CMMC as an executive sales manager and loan officer. Upon arriving at CMMC, Plaintiff's supervisor, Greta Huegel, gave Plaintiff a "Welcome to Chase" binder, which contained information about employee benefits, including the Long Term Disability ("LTD") Plan and the LTD Excess Plan.

The LTD Plan, administered by Liberty Life Assurance Company of Boston and

Liberty Mutual Group (collectively "Liberty"),<sup>FN1</sup> provided employees who became totally or permanently disabled with benefits following twenty-six weeks of absence from work. In 1997, employees had the option of choosing among three levels of benefit payments from the LTD Plan: 50% of annual salary with a maximum monthly benefit of \$6,250; 60% of annual salary with a maximum monthly benefit of \$7,500; and 70% of annual salary with a maximum monthly benefit of \$8,750. (Berliner Aff. Ex. 1 at B-46.) The benefits were capped at incomes up to \$150,000. (*Id.*) For employees with an annual Benefit Eligible Compensation ("BEC") exceeding \$150,000, CMMC provided the option of enrolling in the LTD Excess Plan. (*Id.*) The LTD Excess Plan essentially raised the earning cap on the LTD Plan and allowed participants to choose from the same 50%, 60%, or 70% levels of payment up to a maximum BEC of \$600,000. All of this information was included in Plaintiff's "Welcome to Chase" binder.<sup>FN2</sup>

FN1. On December 31, 2003, we granted summary judgment in favor of Defendants Liberty Life Assurance Company of Boston and Liberty Mutual Group, concluding that they were not fiduciaries under ERISA with respect to Plaintiff's claim. (Doc. No. 42 at 7-10.)

FN2. The "Welcome to Chase" binder described the LTD Excess Plan as follows:

Long-Term Disability Excess Plan

CHASEChoice Excess LTD coverage applies to eligible compens-

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ation above \$150,000. If your eligible compensation is more than \$150,000 and you elect to participate in the Long-Term Disability Plan, you may also choose to enroll in the LTD Excess Plan.... The same level of coverage you elected in the LTD Plan (i.e., 50%, 60%, or 70%) will apply to eligible compensation above \$150,000 up to a maximum of \$600,000.

#### Costs

The contribution rates for the LTD Excess Plan will be higher than those for the LTD Plan. See the "Enrolling in CHASEChoice" section.

(Huegel Dep. Ex. 5 at B-48.)

On June 2, 1997, Plaintiff elected the 70% coverage under the LTD Plan. When he joined CMMC, Plaintiff was not yet eligible for the LTD Excess Plan because his salary was commission-based and, as a new employee, he had no earning history to calculate his annual income.<sup>FN3</sup> (Huegel Dep. at 24.) If Plaintiff's BEC in his first year exceeded \$150,000, he would then be eligible to elect the LTD Excess Plan during the next enrollment period, which ran for several weeks every October and November. Changes made during the enrollment period would become effective at the start of the new plan year on January 1.

FN3. Upon joining CMMC, Plaintiff's initial BEC was set at \$50,000. (Huegel Dep. Ex. 3.)

The enrollment period for 1999 ran from October 14, 1998, through November 4, 1998. (Doc. No. 26 at 7 (citing Huegel Dep.

cl. Ex. 6 at CMMC0001191).) After one year of service, Plaintiff had a BEC of \$204,378.72, making him eligible to enroll in the LTD Excess Plan for the 1999 plan year. (Huegel Dep. Ex. 6 at CMMC000512.) Plaintiff, however, did not enroll in the LTD Excess Plan for 1999.

The parties dispute whether Plaintiff received any information from Chase in October and November, 1998, regarding his eligibility for the LTD Excess Plan. Plaintiff asserts that he did not receive any materials during the enrollment period for the 1999 calendar year. Defendants claim that Plaintiff received the annual enrollment materials and a Personalized Fact Sheet ("PFS"), which is an "individualized document[ ] that show[s] each employee's Benefits Eligible Compensation ("BEC"), the employee's current level of benefits and the cost of that level of benefit for the next year." (Doc. No. 26 at 7.) Defendants also contend that Plaintiff received the 1999 Enrollment Guide, which explained how to add or remove benefits for the upcoming year:

#### \*2 II. How to Use Your Enrollment Materials

Your Personalized Fact Sheet and Enrollment Guide are valuable materials that can help make your coverage decision-making process and your one CHASE enrollment phone call as streamlined as possible. Here's how to use your materials:

1. On your Personalized Fact Sheet, review your current coverages and the cost to continue them for 1999.
2. Decide which coverages you want to keep and which ones you want to change for 1999.

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3. At the end of each benefit section in this Enrollment Guide, you'll find a "Making Your Elections" box. This box outlines the available options, what you should complete on your Worksheet to make a change, and the next steps.
4. To make a change, turn to the Worksheet in the back of this Enrollment Guide (or on your Personalized Fact Sheet) and fill in the box(es) to the right of the coverage(s) you want to change....
5. After you complete your Worksheet, call oneCHASE ... and enter your elections as they appear on your Worksheet.

(*Id.* at 8.)

In October, 1999, Plaintiff became totally disabled due to a severe stroke. (Compl. ¶ 18.) For twenty-six weeks following the stroke, Plaintiff received short-term disability benefits. (*Id.*) In April, 2000, Plaintiff became eligible for benefits under the terms of his LTD Plan. Plaintiff was initially informed that he would be eligible for \$9,333.00 per month, which was 70% of the maximum (\$160,000) allowed at that time under the regular LTD Plan. (Glidden Dep. Ex. 2 at CMMC000420.) When Plaintiff's wife, Maureen Hussey, received Liberty's letter explaining Plaintiff's benefits, she questioned why Plaintiff was not eligible for benefits equal to 70% of his total salary for 1999, which would have been \$18,305.03 per month.<sup>FN4</sup> (Maureen Hussey Aff. ¶ 7.) CMMC thereafter informed Liberty that Plaintiff was eligible for benefits under the LTD Excess Plan. Plaintiff then began receiving payments of \$18,305.00 per month, which was equal to 70% of his total salary for 1999, in May, 2000. (Glidden Dep. Ex. 3.) On October 27, 2000, however, Liberty informed Plaintiff that an audit had revealed that he

was only eligible for benefits equal to 70% of the salary cap of \$160,000 under the LTD Plan, and reduced his monthly disability benefit payments to \$9,333.<sup>FN5</sup> (*Id.* Ex. 4; *see also* Compl. ¶ 24.)

FN4. Plaintiff's BEC in 1999 was \$313,800.47. (Huegel Dep. Ex. 6 at CMMC000512.)

FN5. Liberty also initially requested repayment of the overpayment totaling \$46,355.00, but later withdrew that demand. (Glidden Dep. Ex. 4; Compl. ¶ 23.)

On August 30, 2002, Plaintiff filed a Complaint, alleging that Defendants breached their fiduciary duty under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, Pub.L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. § 1132(a)(3)) by failing "to convey to Plaintiff complete and accurate information regarding the benefits for which he was eligible, and complete and accurate information as to steps to be taken to enroll in those benefits." (Compl. ¶ 31.)

On July 1, 2005, Defendants filed the instant Motion In Limine, seeking to exclude Plaintiff's testimony. (Doc. No. 52 at 3-6.) The Motion In Limine also seeks to exclude testimony from Maureen Hussey, Plaintiff's wife, regarding Plaintiff's statements and beliefs regarding his long-term disability coverage at CMMC. (*Id.* at 6-9.)

## II. DISCUSSION

### A. Plaintiff's Testimony

\*3 First, Defendants seek to exclude Plaintiff's testimony based on prior representations by Plaintiff's counsel that Plaintiff would be unable to understand or

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respond to counsel's questions in a deposition or trial format due to his stroke. (Doc. No. 52 at 1-5.)

At the commencement of litigation, Joseph Hussey was listed as the sole Plaintiff in this action. (Doc. No. 1.) On April 8, 2003, Plaintiff filed a Motion To Substitute Parties Pursuant To Federal Rule of Civil Procedure 25(b).<sup>FN6</sup> (Doc. No. 19.) In that Motion, Plaintiff (acting through his counsel) requested the substitution of his wife, Maureen Hussey, as Plaintiff in this case pursuant to Federal Rule of Procedure 25(b). (*Id.*) Specifically, counsel for Mr. Hussey represented that Mrs. Hussey should be substituted as Plaintiff due to Mr. Hussey's incompetency:

FN6. On May 15, 2003, we dismissed Plaintiff's Motion To Substitute Parties, but indicated that Plaintiff could request reinstatement and a hearing on the Motion by letter. (Doc. No. 25 ¶ 6.) As of the date of this Memorandum and Order, Plaintiff's counsel had not made such a request.

Mr. Hussey's treating neurologist and speech therapist state that [Mr. Hussey] cannot communicate effectively and[,] in particular, he cannot respond properly to questions and cannot express himself reliably. *Mr. Hussey cannot effectively understand or respond to questions in a deposition or trial format*, as his physicians advise that he cannot process the questions or provide answers due to the residual expressive and receptive aphasia<sup>FN7</sup> caused by his severe stroke.

FN7. Aphasia is defined as "[i]mpaired or absent comprehension or production of, or communication by, speech, writing, or signs,

due to an acquired lesion of the dominant cerebral hemisphere." Thomas Lathrop Stedman, *Stedman's Medical Dictionary* 110 (27th ed.2000); *see also* Joseph R. Nolan & Jacqueline M. Nolan-Henry, *Black's Law Dictionary* 95 (6th ed.1990) (defining aphasia as "loss of the faculty or power or articulate speech").

(*Id.* at unnumbered 3 (emphasis added).) This representation was supported by the opinions of Plaintiff's speech-language pathologist, Ms. Sharon W. Milner, and his neurologist, Dr. Michael J. Carunchio, Jr. In support of Plaintiff's Motion to Substitute Parties, Milner stated that Plaintiff was not competent to understand or answer questions at a trial:

I have been treating Mr. Hussey for cognitive-communication deficits resulting from a stroke sustained on October 28th, 1999. He has been my patient for 2 1/2 years. It is my professional opinion that Mr. Hussey is not competent to answer questions presented to him as a witness in a deposition or trial format. Mr. Hussey has difficulty responding to rapid input from unfamiliar conversation partners and is often confused by multi-step directions, lengthy information, pronoun references, and temporal concepts.... Mr. Hussey's expressive communication deficits parallel his receptive language status.

(*Id.* Ex. A.) Similarly, Dr. Carunchio stated that, in his assessment, Plaintiff would not be able to effectively communicate as a witness:

[Plaintiff] had a left hemisphere cerebrovascular accident in October 1999 and still has a residual expressive and receptive aphasia. This limits his ability to respond to questions and significantly has

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limited his ability to express himself. Mrs. Hussey informs me that her husband is now involved in legal action and this may require his answering various questions. I think that his residual difficulties with the aphasic disturbance will greatly impair his ability to effectively engage in such.

(*Id.* Ex. B.)

On September 30, 2003, Plaintiff's counsel sought to submit an affidavit by Plaintiff in support of his Combined Response in Opposition to Defendants' Motion for Summary Judgment. (Doc. No. 32 Ex. 7.) Defendants filed a motion to strike Plaintiff's affidavit based on the representations and evidence submitted in Plaintiff's Motion to Substitute Parties. (Doc. No. 40.) On January 13, 2004, we granted Defendants' motion to strike based on Plaintiff's "unambiguous represent[ation] that he will be unable to withstand the rigors of testifying and being cross-examined." (Doc. No. 45 at 4.)

\*4 Despite this, on July 15, 2005, Plaintiff's counsel listed Plaintiff as a potential trial witness in their pretrial submissions. Defendants filed a Motion In Limine to preclude Plaintiff from testifying. (Doc. No. 52 at 3-5.) In response to Defendants' Motion, Plaintiff responded that "[t]he parties are in agreement that Mr. Hussey's infirmities would most likely prevent him from being subject to cross-examination as in the usual course of a trial." (Doc. No. 55 at 1.) Plaintiff, however, appears to assert that, despite his acknowledged inability to be cross-examined, he may be called to testify on *direct* examination alone. (*Id.* at 1-3.) We disagree.

"[T]he right of cross-examination ... [is] a right traditionally relied upon expansively

to test credibility as well as to seek the truth." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 259, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983). "[T]he policy of the Anglo-American system of evidence has been to regard the necessity of testing [of evidence] by cross-examination as a vital feature of the law." 5 John Henry Wigmore, *Evidence* § 1367 (Chadbourn rev. ed.1974); see also Fed.R.Evid. art. VIII advisory committee's note ("[T]he Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.").

The Federal Rules of Evidence clearly contemplate that a witness who takes the stand and testifies on direct examination must also be subject to cross-examination by opposing counsel. Under Rule 607, "[t]he credibility of a witness may be attacked by any party...." Fed.R.Evid. 607. This "attack" is often accomplished through cross-examination of the witness on various matters, including veracity, perception, memory, and bias. As the Supreme Court has noted,

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.

*Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); see also *Thomas v. Scully*, 854 F.Supp. 944, 959-60 (E.D.N.Y.1994) ("Subject to cer-

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tain limitations, any witness is subject to probing cross-examination that is designed to test the witness's credibility."). In fact, the most common form of impeachment, the use of a witness's prior inconsistent statement, 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6094, at 515 (1990), is usually conducted through cross-examination. See *United States v. Schnapp*, 322 F.3d 564, 571 (8th Cir.2003) ("Impeachment of a witness by a prior inconsistent statement is normally allowed only when the witness is first provided an opportunity to explain or deny the statement."); see also Fed.R.Evid. 613(b). Similarly, in the criminal context, the Supreme Court has held that impeachment of a witness's bias and motivation in testifying "is a proper and important function of the constitutionally protected right of cross-examination." <sup>FNS</sup> *Davis*, 415 U.S. at 316-17.

FN8. The Court's holding in *Davis* relied on the Confrontation Clause of the Sixth Amendment, which applies only in criminal trials. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him..."). "There is no absolute right of confrontation in civil cases." *Van Harken v. City of Chicago*, 103 F.3d 1346, 1352 (7th Cir.1997) (citing *Richardson v. Perales*, 402 U.S. 389, 402, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971)). At least one Court of Appeals has recognized, however, that "in particular [civil] cases, live testimony and cross-examination might be so important as to be required by [constitutional] due process...." *Id.*

\*5 Under Federal Rule of Evidence 611, the trial court is granted the discretion to "exercise reasonable control over the mode and order of interrogating witnesses ... so as to ... make the interrogation and presentation effective for the ascertainment of the truth...." Fed.R.Evid. 611(a). As discussed above, cross-examination is the primary method of testing a witness's credibility and ascertaining the truth of his or her testimony. *Conboy*, 459 U.S. at 259; see also *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (stating that cross-examination is the "greatest legal engine ever invented for the discovery of truth" (internal quotation and citation omitted)). "Since effective cross examination is generally assumed to be an indispensable means of discovering the truth," Rule 611(a) "gives courts the power to strike [a witness's] direct examination testimony where the witness is non-responsive on cross-examination" or "has refused to be cross-examined." 28 Wright & Gold § 6164, at 350.

Here, Plaintiff concedes that his mental and physical condition would prevent him from being subject to cross-examination at trial. (Doc. No. 55 at 1.) Consequently, Plaintiff would, at best, be able to testify only on direct examination. This situation, however, would fundamentally undermine the truth-seeking process of trial, as it would deprive Defendants of cross-examination of Plaintiff on any aspect of his testimony. For example, if Plaintiff testified that he never received a calculation of his BEC indicating his eligibility to participate in the LTD Excess Plan in 1999 (*Joseph Hussey Aff.* ¶ 5), Defendants would be unable to cross-examine Plaintiff regarding whether he was aware through other means, such as his annual compensation, pay stubs, or W-2 returns, that he was

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eligible to participate in the LTD Excess Plan.

This situation is analogous to cases where a witness testifies on direct, then refuses to answer questions regarding the subject of his direct testimony on cross-examination. In such cases, courts have held that, under Rule 611(a), the trial court may strike the witness's direct testimony. 28 Wright & Gold § 6164, at 350; *see also Denham v. Deeds*, 954 F.2d 1501, 1503 (9th Cir.1992) ("If the witness ... precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part." (internal quotation and citation omitted)); *United States v. Humphrey*, 696 F.2d 72, 75 (8th Cir.1982) (holding that a district court may strike all or part of a witness's testimony if the witness refuses to answer questions on cross examination, particularly if those questions seek to directly assail the truth of the witness's testimony); *United States v. Toner*, 173 F.2d 140, 144 (3d Cir.1949) ("Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination ... his direct testimony should be struck out." (quoting 5 Wigmore, Evidence § 1391)). Plaintiff has represented that he will not be able to be cross-examined on any subject raised in his direct testimony at trial. We believe that cross-examination of Plaintiff is necessary to promote the truth-seeking process at trial. Accordingly, we conclude that Plaintiff is precluded from testifying at trial.

\*6 In addition, we note that Defendants would be unfairly prejudiced by permitting Plaintiff to testify at trial. Prior to trial, Plaintiff "unambiguously represented that

he will be unable to withstand the rigors of testifying and being cross-examined." (Doc. No. 45 at 4.) Based on this representation, Defendants reasonably elected not to depose Plaintiff, believing that he would not be available as a trial witness. Permitting Plaintiff to take the stand now would unfairly deprive Defendants of the opportunity to depose Plaintiff and to prepare for his trial testimony.

#### B. Maureen Hussey's Testimony

Defendants request that we exclude anticipated testimony by Maureen Hussey, Plaintiff's wife, as inadmissible hearsay. Specifically, Defendants seek to exclude Mrs. Hussey's expected testimony that Plaintiff told her that: (1) he did not receive any enrollment materials for plan year 1999; (2) Chase informed him that he had the maximum disability coverage available; and (3) he considered disability coverage to be a very important benefit.<sup>FN9</sup> (Doc. No. 52 at 6.)

FN9. In addition, Defendants seek to exclude Mrs. Hussey's testimony that Greta Huegel, Plaintiff's supervisor at CMMC, told her that she (Huegel) also did not receive any benefit enrollment information for plan year 1999, on the grounds that this statement is irrelevant. (Doc. Nos. 52 at 6, 9; 57 at 7.) We disagree. Information that Defendants' other employees did not receive benefit enrollment materials for 1999 would provide circumstantial evidence in support of Plaintiff's assertion that he also did not receive such materials.

Federal Rule of Evidence 801 provides that "hearsay is a statement, other than one

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made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801. Hearsay is not admissible unless an established exception or exclusion to the hearsay rule applies. Fed.R.Evid. 802.

### 1. Truth of the Matter Asserted

Plaintiff first asserts that his out-of-court statement to Mrs. Hussey that he was informed by Defendants that he had as much disability coverage as he was eligible to receive is admissible because it is not being offered for the truth of the matter asserted. (Doc. No. 55 at 4.) Instead, Plaintiff offers it as evidence of Defendants' alleged "administrative dysfunction" with respect to employee benefits and "to demonstrate how the Defendants exhibited and communicated their confusion concerning the excess LTD benefit at issue in this case." (*Id.*)

Statements offered "to establish a foundation for later showing, through other evidence, that [such statements] were false" are not hearsay. *Anderson v. United States*, 417 U.S. 211, 220, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974); see also *United States v. Adkins*, 741 F.2d 744, 746 (5th Cir.1984) ("When statements are introduced to prove the falsity of the matter asserted, they are not inadmissible as hearsay."). Here, Plaintiff is not offering the statement as evidence that he actually elected the LTD Excess plan for 1999, nor is he offering it to prove that Defendants included him in the LTD Excess plan. Rather, Plaintiff offers it to establish that Defendants communicated to him a "fact" that, knowingly or unknowingly to Defendants, was false. According to Plaintiff, this false statement is evidence of Defendants' purported "administrative dys-

function," which he asserts is responsible for "why critical information [regarding long-term disability benefits] was not provided to Mr. Hussey" in violation of ERISA's fiduciary duty requirements. (Doc. No. 56 at 8.) Accordingly, we conclude that this statement is not hearsay because it is not offered to prove the truth of the matter asserted.

### 2. Federal Rule of Evidence 803(3)

\*7 Next, Defendants assert that Mrs. Hussey's proposed testimony that Plaintiff told her that he did not receive any benefit enrollment information from Defendants for plan year 1999 is inadmissible hearsay. Plaintiff contends that this statement is admissible under the "state of mind" exception in Federal Rule of Evidence 803(3).

Rule 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" may be admissible as a hearsay exception. Fed.R.Evid. 803(3). Rule 803(3) also provides, however, that the "state of mind" exception does not include "statement[s] of memory or belief to prove the fact remembered or believed." <sup>FN10</sup> As the advisory committee notes to Rule 803 explain:

FN10. The rule has an exception, not applicable in this case, for statements relating to the execution, revocation, identification, or terms of a declarant's will. Fed.R.Evid. 803(3).

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual

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destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference for the happening of the event which produced the state of mind."

*Id.* advisory committee's note. Accordingly, the Third Circuit has held that hearsay statements offered pursuant to Rule 803(3) "cannot be [introduced] to prove the truth of the underlying facts asserted." *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 252 (3d Cir.1999) (quoting *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1274 (3d Cir.1995); see also 5 Jack A. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.05[2][a] (2000).

In this case, Plaintiff seeks to introduce his out-of-court statement that he did not receive benefit information from Defendants to establish that Defendants in fact "failed to provide [him] with the information he needed to determine whether he was eligible to participate in the excess LTD benefit plan for year 1999." (Doc. No. 56 at 8 (citing Affidavit of Maureen Hussey).) This clearly violates Rule 803(3)'s requirement that a hearsay statement cannot be admitted to prove the truth of the fact remembered or believed. Accordingly, it is not admissible under the "state of mind exception."

Plaintiff also asserts that his out-of-court statements that he considered disability insurance to be very important are admissible under the "state of mind" exception. (Doc. No. 55 at 5.) Again, we disagree. A statement falling within the exception of Rule 803(3) must relate to a "then existing state of mind." Fed.R.Evid. 803(3) (emphasis added). A party's "state of mind, if relevant, may be proved by contemporaneous

declarations of feeling or intent." *Shepard v. United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 78 L.Ed. 196 (1933) (emphasis added). For a hearsay statement to be admissible under Rule 803(3), the statement must occur "contemporaneous with the state of mind sought to be proved," and the party "must not have had time to reflect and possibly fabricate or misrepresent his thoughts." *United States v. Reyes*, 239 F.3d 722, 743 (5th Cir.2001) (citing *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir.1986)); see also Fed. R. Evid 803(3) advisory committee's note (noting that the "state of mind" exception to the hearsay rule "is essentially a specialized application" of the present sense impression exception in Rule 803(1), which is based upon the theory "that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation"). Here, there is no evidence that Plaintiff made any statements to Mrs. Hussey regarding his beliefs about disability insurance contemporaneously with his opportunity to enroll in the LTD Excess plan. Further, Plaintiff has had the opportunity to "reflect and possibly fabricate or misrepresent his thoughts," *Reyes*, 239 F.3d at 743, regarding the importance of long-term disability benefits, as Plaintiff obviously has a financial interest in stating that, prior to October, 1999, he considered the disability insurance to be important and would have elected the LTD Excess Plan if he knew it was available. Accordingly, we conclude that testimony regarding Plaintiff's beliefs about the importance of long-term disability benefits does not fall within the "state of mind" exception.

### 3. Federal Rule of Evidence 807

\*8 Plaintiff also claims that his out-of-court statements are admissible under

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the residual hearsay exception, Rule 807.  
 (Doc. No. 55 at 5-8.) Rule 807 provides that:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed.R.Evid. 807. This residual exception is invoked "very rarely, and only in exceptional circumstances." Fed.R.Evid. 803(24) FN11 advisory committee's note; see also *Trs. of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 906 (3d Cir.1987); *Russo v. Abington Mem. Hosp. Healthcare Plan*, Civ. A. No. 94-195, 1998 U.S. Dist. LEXIS 18595, at \*9 (E.D.Pa. Nov. 16, 1998) ("A catch-all rule such as Rule 807 must be sparingly invoked, lest its potential breadth swallow the carefully crafted narrowness of the enumerated exceptions.").

FN11. In 1997, the residual hearsay exceptions in Federal Rules of Evidence 803(24) and 804(b)(5) were combined and transferred to

become Federal Rule of Evidence 807. Fed.R.Evid. 807. No substantive change in the rule was intended. *Id.*; see also *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 112 n. 17 (3d Cir.2001).

In order to be admissible under this exception, a hearsay statement must: (1) have sufficient guarantees of trustworthiness; (2) be evidence of a material fact; (3) have sufficient probative value; (4) serve the interests of justice; and (5) provide sufficient notice to the adverse party. *Coyle v. Kristjan Palusalu Maritime Co.*, 83 F.Supp.2d 535, 545 (E.D.Pa.2000), *aff'd*, 254 F.3d 1077 (3d Cir.2001) (table). In reviewing whether the proffered hearsay statement has sufficient guarantees of trustworthiness, a court must balance the following factors: (1) whether the declarant was under oath when the statement was made; (2) whether the declarant voluntarily made the statement; (3) whether the statement was based on the declarant's personal knowledge; (4) whether the statement contradicted a prior statement; (5) whether the statement was videotaped in order to provide the jury with an opportunity to evaluate the declarant's demeanor; (6) the ability of an adverse party to cross-examine the declarant; (7) the proximity in time between the statement and the events described; (8) whether the statement is corroborated; (9) the declarant's motivation to fabricate the contents of the statement; (10) whether the statement was prepared in anticipation of litigation; (11) the statement's spontaneity; and (12) whether the declarant's memory or perception was faulty. *Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 112-13 (3d Cir.2001).

\*9 After balancing these factors, we con-

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clude that Plaintiff's statements do not have sufficient guarantees of trustworthiness to be admitted under the residual hearsay exception. Plaintiff was not under oath when the statements were made, nor were his statements videotaped to provide the factfinder with an opportunity to evaluate his demeanor. More importantly, Plaintiff has never been subject to cross-examination regarding these statements. The Supreme Court has stated that a court should not admit a hearsay statement that was not subject to cross-examination unless it is "so trustworthy that adversarial testing would add little to its reliability." *Idaho v. Wright*, 497 U.S. 805, 821, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1991). Here, Plaintiff's statement that he did not receive any benefit enrollment information from Defendants for 1999 is not so clearly trustworthy that cross-examination would add little to its reliability. Cross-examination would be useful to evaluate Plaintiff's memory and recollection on this issue. Furthermore, other evidence in the record, such as testimony from Huegel, Plaintiff's supervisor, appears to contradict Plaintiff's statements. (Huegel Dep. at 48-49.) Similarly, cross-examination would be useful to assess the circumstances surrounding Plaintiff's out-of-court declarations that he believed long-term disability insurance was important, such as when, where, and to whom such statements were made; how much insurance he believed was necessary for proper coverage of his family; and whether he acted upon his belief by, for example, inquiring with Defendants about long-term disability benefits for plan year 1999 after he allegedly did not receive any information about them from Defendants. In addition, other than his wife's proposed testimony, Plaintiff offers no corroborating evidence for his statements. Nor does Plaintiff offer any information regarding the timing of his

statements or their proximity to the events at issue in this litigation. <sup>FN12</sup> Finally, as previously mentioned, Plaintiff has a motive for fabricating the statements, as they would be favorable evidence in his fiduciary duty claim. Accordingly, we conclude that Plaintiff's hearsay statements are not admissible under Rule 807 as well. An appropriate Order follows.

FN12. For this reason, we are also unable to determine whether these statements may have been made in anticipation of litigation, which is another factor in the Rule 807 balancing test.

#### ORDER

AND NOW, this 27<sup>th</sup> day of July, 2005, upon consideration of Defendants' Motion In Limine To Exclude The Testimony Of Joseph Hussey And Maureen Hussey (Doc. No. 52), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Defendants' Motion is GRANTED with respect to the testimony of Plaintiff.
2. Defendants' Motion is GRANTED with respect to the proposed testimony of Maureen Hussey that Plaintiff told her that (1) he did not receive benefit enrollment information from Defendants, and that (2) he believed long-term disability insurance was important;
3. Defendants' Motion is DENIED with respect to the proposed testimony of Maureen Hussey that (1) Plaintiff told her that Defendants informed him he had the maximum amount of disability coverage available and that (2) Greta Huegel told her that she (Huegel) also did not receive any benefit information for 1999

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**\*10 IT IS SO ORDERED.**

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END OF DOCUMENT

ANCDS

**Academy of Neurologic  
Communication Disorders & Sciences**

Overall Language  
Performance

Alternative Communication Studies (see abbreviations table as needed for treatments)

Lexical Retrieval

Syntax

Speech Production/  
Fluency

Reading

Writing

Alternative  
Communication

Abbreviations

Home

Year	Reference (in chronological order)	Design	N	Class	Phase	Treatment
1968	Sarno, M. T. (1968). Preliminary report; A study of recovery in severe aphasia using programmed instruction. In J. W. Black & E. G. Jancosek (Eds.), Proceedings of the Conference on Language Retraining for Aphasics. Washington, D.C.: Department of Health,	G b/t	29	2	1	Programmed instruction vs. trad tx vs. no tx
1974	Oradei, D. M., Waite, N. S. (1974). Group psychotherapy with stroke patients during the immediate recovery phase. American Journal of Orthopsychiatry, 44, 386-395.	CS	8	3	1	Group Therapy
1976	Gardner, H., Zurif, E. B., Berry, T., & Baker, E. (1976). Visual communication in aphasia. Neuropsychologia, 14, 275-292. ( <a href="#">link to abstract</a> )	SS	5	3	1	Visual Communication System
1978	Rao, P. R., & Horner, J. (1978). Gesture as a deblocking modality in a severe aphasic patient. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 8 (pp. 180-187). Minneapolis, MN: BRK Publishers. ( <a href="#">link to article</a> )	CS	1	3	1	Gesture Therapy
1979	Dunham, M. J., & NewHoff, M. (1979). Melodic intonation therapy: rewriting the song. In R.H. Brookshire (Ed.), Clinical Aphasiology: Vol. 9 (pp. 286-294). Minneapolis, MN: BRK Publishers. ( <a href="#">link to article</a> )	CS	2	3	1	MIT
1979	Simmons, N. N., & Zorthian, A. (1979). Use of symbolic gestures in a case of fluent aphasia. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 9 (pp. 278-285). Minneapolis, MN: BRK Publishers. ( <a href="#">link to article</a> )	CS	1	3	2	Gesture tx using Amerind signs
1981	Newhoff, M., Bugbee, J. K., & Ferreira, A. (1981). A change of PACE: Spouses as treatment targets. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 11 (pp. 234-243) Minneapolis, MN: BRK Publishers. ( <a href="#">link to article</a> )	SS	4	3	1	Spouse tx using PACE
1982	Aten, J. L., Caligiuri, M. P., & Holland, A. L. (1982). The efficacy of functional communication therapy for chronic aphasic patients. Journal of Speech and Hearing Disorders, 47, 93-96. ( <a href="#">link to abstract</a> )	SS	7	3	1	Functional Communication Therapy
1982	Doyle, P. J., Holland, A. L. (1982). Clinical management of a patient	CS	1	3	1	Sign language (receptive) for

	with pure word deafness. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 12 (pp. 138-147). Minneapolis, MN: BRK Publishers. (link to article)					word deafness
1982	Helm-Estabrooks, N., Fitzpatrick, P. M., & Barresi, B. (1982). Visual action therapy for global aphasia. Journal of Speech and Hearing Disorders, 47, 385-389. (link to abstract)	G w/in	8	3	1	Visual Action Therapy
1982	Kearns, K. P., Simmons, N. N., & Sisterhen, C. (1982). Gestural sign (Amer-Ind) as a facilitator of verbalization in patients with aphasia. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 12 (pp. 183-191). Minneapolis, MN: BRK Publishers. (link to article)	SS	2	3	1	Gestural sign to cue verbalization
1982	Salvatore, A. P. (1982). Artificial language learning in brain damaged adults using a matrix-training procedure. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 12 (pp. 298-308). Minneapolis, MN: BRK Publishers. (link to article)	SS	6	3	1	Matrix training
1982	Tonkovich, J. D., & Loverso, F. L. (1982). A training matrix approach for gestural acquisition by the agrammatic patient. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 12 (pp. 283-288). Minneapolis, MN: BRK Publishers. (link to article)	SS	4	2	1	Matrix training
1983	Holland, A. L., Swindell, C. S., & Fromm, D. (1983). A model treatment approach for the acutely aphasic patient. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 13 (pp. 44-51). Minneapolis, MN: BRK Publishers. (link to article)	G b/t	12	2	1	Conversational vs. didactic + conversational
1983	Potter, R. E., Goodman, N. J. (1983). The implementation of laughter as a therapy facilitator with adult aphasics. Journal of Communication Disorders, 16, 41-48. (link to abstract)	SS	2	3	1	Laughter
1984	Thompson, C. K., & Byrne, M. E. (1984). Across setting generalization of social conventions in aphasia: An experimental analysis of "loose training." In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 14 (pp. 132-144). Minneapolis, MN: BRK Publishers.	SS	3	2	1	"Loose Training"
1985	Johannsen-Horbach, H., Cegla, B., Mager, U., Schempp, B., & Wallesch, C-W. (1985). Treatment of chronic global aphasia with a nonverbal communication system. Brain and Language, 24, 74-82.	CS	4	3	1	Blissymbols; Nonverbal Comm System

1986	Helm-Estabrooks, N., & Ramsberger, G. (1986a). Aphasia treatment delivered by telephone. Archives of Physical Medicine and Rehabilitation, 67, 51-53.	SS	1	3	2	HELPSS by telephone
1986	Lesser, R., Bryan, K., Anderson, J., & Rose, H. (1986). Involving relatives in aphasia therapy: An application of Language Enrichment Therapy. International Journal of Rehabilitation Research, 9, 259-267.	SS	9	3	2	Language Enrichment Therapy
1987	Borenstein, P., Linell, S., & Währborg, P. (1987). An innovative therapeutic program for aphasia patients and their relatives. Scandinavian Journal of Rehabilitation Medicine, 19, 51-56.	CS	9	3	1	Group Therapy
1987	Morgan, A. L. R., & Helm-Estabrooks, N. (1987). Back to the drawing board: a treatment program for nonverbal aphasic patients. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 17 (pp. 64-72). Minneapolis, MN: BRK Publishers.	SS	2	3	1	Drawing
1987	Simmons, N. N., Kearns, K. P., & Potechin, G. (1987). Treatment of aphasia through family member training. In R. H. Brookshire (Ed.), Clinical Aphasiology: Vol. 17 (pp. 106-142). Minneapolis, MN: BRK Publishers.	SS	1	3	1	Spouse Training Program
1987	Steele, R.D., Weinrich, M., Kleczewska, M.K., Carlson, G.S., & Wertz, R.T. (1987). Evaluating performance of severely aphasic patients on a computer-aided visual communication system. In R.H. Brookshire (Ed.), Clinical Aphasiology: Vol. 17 (pp. 46-54).	SS	1	3	1	C-VIC
1988	Petheram, B. (1988). Enabling stroke victims to interact with a microcomputer: a comparison of input devices. International Disabilities Studies, 10, 73-80.	SS	12	3	1	Facilitation: Input device type
1989	Garrett, K. L., Beukelman, D. R., & Low-Morrow, D. (1989). A comprehensive augmentative communication system for an adult with Broca's aphasia. AAC: Augmentative and Alternative Communication, 55-61.	CS	1	3	1	Multimodal
1989	Lyon, J. G., & Sims, E. (1989). Drawing: Its use as a communicative aid with aphasic and normal adults. In T. E. Prescott (Ed.), Clinical Aphasiology: Vol. 18 (pp. 339-356). Austin, TX: PRO-ED.	G b/t	16	2	2	Drawing
1989	Marshall, R. C. et al. (1989). Home Treatment for Aphasic Patients by Trained Nonprofessionals. Journal of Speech and Hearing Disorders, 54, 462-470.	G b/t	94	1	2	Trained Home Therapy
1989	Steele, R. D., Weinrich, M., Wertz, R. T., Kleczewska, M. K., & Carlson, G. S. (1989). Computer-based visual	SS	5	3	2	C-VIC

	communication in aphasia. <i>Neuropsychologia</i> , 27, 409-426.					
1990	Zhanjun, Z., & Chun, Z. (1990). Comparative observations on the curative results of the treatment of central aphasia by puncturing the yumen point versus conventional acupuncture methods. <i>Journal of Traditional Chinese Medicine</i> , 10, 260-263.	G b/t	450	1	1	Acupuncture
1991	Bellaire, K. J., Georges, J. B., & Thompson, C. K. (1991). Establishing functional communication board use for nonverbal aphasic subjects. In T. E. Prescott (Ed.), <i>Clinical Aphasiology: Vol. 19</i> (pp. 219-228). Austin, TX: PRO-ED.		2			Communication Board
1991	Coelho, C. A. (1991). Manual sign acquisition and use in two aphasic subjects. In T. E. Prescott (Ed.), <i>Clinical Aphasiology: Vol 19</i> (pp. 209-218). Austin, TX: PRO-ED.	SS	2	3	2	Acquisition & use of manual signs
1991	Conlon, C. P., & McNeil, M. R. (1991). The efficacy of treatment for two globally aphasic adults using visual action therapy. In T. E. Prescott (Ed.), <i>Clinical Aphasiology: Vol. 19</i> (pp. 185-196). Austin, TX: PRO-ED.		2			Visual Action Therapy
1991	Petheram, B. (1991). Microcomputers as a supplement to aphasia therapy. <i>Journal of Neurolinguistics</i> , 6, 177-195.		10			Computer homework
1991	Radonjic, V., & Rakuscek, N. (1991). Group therapy to encourage communication ability in aphasic patients. <i>Aphasiology</i> , 4-5, 451-455.	G w/in				Group
1991	Springer, L., Glindemann, R., Huber, W., & Willmes, K. (1991). How efficacious is PACE-therapy when 'Language Systematic Training' is incorporated? <i>Aphasiology</i> , 5, 391-399.	SS	4	3	2	PACE vs PACE + semantic tx
1992	Anderson, S. W., Damasio, H., Damasio, A. R., Klima, E., Bellugi, U., & Brandt, J. P. (1992). Acquisition of signs from American Sign Language in hearing individuals following left hemisphere damage and aphasia. <i>Neuropsychologia</i> , 30, 329-340.		3		1	American Sign Language
1993	Alexander, M. P., & Loverso, F. L. (1993). A specific treatment for global aphasia. In M. L. Lemme (Ed.), <i>Clinical Aphasiology: Vol. 21</i> (pp. 277-290). Austin, TX: PRO-ED.					
1994	Naeser, M.A., Palumbo, C.L., Baker, E.H., & Nicholas, M.L. (1994). CT scan lesion site analysis in severe aphasia: relationship to no recovery of speech and treatment with the nonverbal computer-assisted visual communication program (C-VIC).	G b/t	7	2	2	C-VIC

1995	Garrett, K. L., & Beukelman, D. R. (1995). Changes in the interaction patterns of an individual with severe aphasia given three types of partner support. In M. L. Lemme (Ed.), <i>Clinical Aphasiology</i> : Vol. 23 (pp. ), Austin, Texas: Pro-Ed.		1			
1995	King, J.M. & Hux, K. (1995). Intervention using talking word processing software: an aphasia case study. <i>Augmentative and Alternative Communication</i> , 11, 187-192.	SS	1	3	1	Talking word processing software
1995	Rao, P. R. (1995). Drawing and gesture as communication options in a person with severe aphasia. <i>Topics in Stroke Rehabilitation</i> , 2, 49-56.	CS	1			Drawing & gesture
1995	Rao, P. R. (1995). Drawing conclusions on the efficacy of 'drawing' as a treatment option for persons with severe aphasia. <i>Aphasiology</i> , 9, 59-62.					Drawing
1995	Sorin-Peters, R., & Behrmann, (1995). Change in perception of communication abilities of aphasic patients and their families. <i>Aphasiology</i> , 9, 565-575.	G w/in				
1995	Ward-Lonergan, J. M., & Nicholas, M. (1995). Drawing to communicate: A case report of an adult with global aphasia. <i>European Journal of Disorders of Communication</i> , 30, 475-491.	CS	1	3	1	Drawing
1995	Weinrich, M., McCall, D., Weber, C., Thomas, K., & Thornburg, L. (1995). Training on an iconic communication system for severe aphasia can improve natural language production. <i>Aphasiology</i> , 9, 323-364.	SS	2			Iconic communication system
1996	Girelli, L., Delazer, M., Semenza, C., & Denes, G. (1996). The representation of arithmetical facts: evidence from two rehabilitation studies. <i>Cortex</i> , 32, 49-66.					
1996	Petheram, B. (1996). Exploring the home-based use of microcomputers in aphasia therapy. <i>Aphasiology</i> , 10, 267-282.	G w/in	10			
1996	Rostron, A., Ward, S. & Plant, R. (1996). Computerised augmentative communication devices for people with dysphasia: design and evaluation.	SS	1	3	1	Computer AAC
1996	Schneider, S. L., Thompson, C. K., & Luring, B. (1996). Effects of verbal plus gestural matrix training on sentence production in a patient with primary progressive aphasia. <i>Aphasiology</i> , 10, 297-317.	SS	1	3	1	Verbal & gestural matrix training
1997	Aftonomos, L.B., Steele, R.D., & Wertz, R.T. (1997). Promoting recovery in chronic aphasia with an interactive technology. <i>Archives of</i>	G b/t	23	2	2	Lingraphica System Training

	Physical Medicine & Rehabilitation, 78, 841-846.					
1997	Lyon, J. G., Cariski, D., Keisler, L., Rosenbek, J., Levine, R., Kumpula, J., Ryff, C., Coyne, S., & Blanc, M. (1997). Communication partners: Enhancing participation in life and communication for adults with aphasia in natural settings. <i>Aphasiology</i> , 11, 693-708.					
1997	Sarno, M. T. & Chambers, N. (1997). A horticultural therapy program for individuals with acquired aphasia. <i>Activities, Adaptation &amp; Aging</i> , 22, 81-90.				1	Horticultural Therapy
1998	Beck, A.R. & Fritz, H. (1998). Can people who have aphasia learn iconic codes? <i>Augmentative and Alternative Communication</i> , 14, 184-196.	G p/t	10	2	2	Minspeak icons
1998	Hopper, T., & Holland, A. (1998). Situation-specific training for adults with aphasia: An example. <i>Aphasiology</i> , 12, 933-44.	SS	2	3	1	Situation-specific training on the telephone
1998	Koul, R.K. & Harding, R. (1998). Identification and production of graphic symbols by individuals with aphasia: efficacy of a software application. <i>Augmentative and Alternative Communication</i> , 14, 11-23.	SS	5	3	1	Talking Screen software
1998	Murray, L.L. (1998). Longitudinal treatment of primary progressive aphasia: a case study. <i>Aphasiology</i> , 12 (7/8), 651-672.	CS	1	3	1	Traditional, drawing, AAC
1998	Naeser, M. A. et al. (1998). Lesion site patterns in severe, nonverbal aphasia to predict outcome with a computer-assisted treatment program. <i>Archives of Neurology</i> , 55, 1438-1448.					
1998	Waller, A., Dennis, F., Brodie, J. & Cairns, A. Y. (1998). Evaluating the use of Talksbac, a predictive communication device for nonfluent adults with aphasia. <i>International Journal of Language and Communication Disorders</i> , 33, 45-70.	SS	4	3	1	Talksbac AAC device
1998	Wilkinson, R., Bryan, K., Lock, K., Bayley, K., Maxim, J., Bruce, C., Edmundson, A., & Moir, D. (1998). Therapy using conversation analysis: helping couples adapt to aphasia in conversation. <i>International Journal of Language and Communication Disorders</i> , 3	SS				Conversational coaching
1999	Booth, S., & Swabey, D. (1999). Group training in communication skills for carers of adults with aphasia. <i>International Journal of Language &amp; Communication Disorders</i> , 34(3), 291-309.					Group therapy
1999	Cress, C.J. & King, J.M. (1999). AAC	SS	2	1	1	Diagnostic

	strategies for people with primary progressive aphasia without dementia: Two case studies. <i>Augmentative and Alternative Communication</i> , 15, 248-259.					therapy: Low-tech AAC
1999	Elman, R. J. & Bernstein-Ellis, E. (1999). Psychosocial aspects of group communication treatment: Preliminary findings. <i>Seminars in Speech and Language</i> , 20, 65-72.					Group therapy
1999	Sacchetti, C., Byng, S., Marshall, J., & Pound, C. (1999). Drawing together: Evaluation of a therapy programme for severe aphasia. <i>International Journal of Language and Communication Disorders</i> , 34, 265-289.	G w/in	7	3	1	Drawing
1999	Tanemura, J. (1999). Aphasia therapy using the deblocking methods and Kanji/Kana issues. <i>Topics in Stroke Rehabilitation</i> , 6, 23-32.					
2000	Beeson, P. M. & Ramage, A. E. (2000). Drawing from experience: The development of alternative communication strategies. <i>Topics in Stroke Rehabilitation</i> , 7, 10-20.	CS	1	3	1	Drawing
2000	McCall, D., Shelton, J. R., Weinrich, M., & Cox, D. (2000). The utility of computerized visual communication for improving natural language in chronic global aphasia: Implications for approaches to treatment in global aphasia. <i>Aphasiology</i> , 14, 795-826.	SS	1	3	2	Diagnostic therapy: C-VIC
2000	Worrall, L. & Yiu, E. (2000). Effectiveness of functional communication therapy by volunteers for people with aphasia following stroke. <i>Aphasiology</i> , 14, 911-924.	Mixed	20	2	1	Volunteers trained to maximize comm
2001	Fox, L. E., Sohlberg, M. M., & Fried-Oken, M. (2001). Effects of conversational topic choice on outcomes of augmentative communication intervention for adults with aphasia. <i>Aphasiology</i> , 15, 171-200.	SS	3	3	2	topic setting using comm aid
2001	Kagan, A., Black, S. E., Duchan, J. F., Simmons-Mackie, N., & Square, P. (2001). Training volunteers as conversation partners using "Supported conversation for adults with aphasia" (SCA): A controlled trial. <i>Journal of Speech, Language, Hearing Research</i> ,					Training conversational partners
2001	Lasker, J.P. & Bedrosian, J.L. (2001). Promoting acceptance of augmentative and alternative communication by adults with acquired communication disorders. <i>Augmentative and Alternative Communication</i> , 17, 141-153.	SS	1	3	1	AAC treatment, clinical & community-based
2002	Hopper, T., Holland, A., & Rewega, M. (2002). Conversational coaching: Treatment outcomes and future	SS	1	2	1	Conversational coaching

	directions. <i>Aphasiology</i> , 16, 745-761.					
2005	Ho, K.M., Weiss, S. J., Garrett, K.L., & Lloyd, L. L. (2005). The effect of remnant and pictographic books on the communicative interaction of individuals with global aphasia. <i>Augmentative and Alternative Communication</i> , 21, 218-232.	SS	2	3	1/2	Communication book
2005	Koul, R., Corwin, M. & Hayes, S. (2005). Production of graphic symbol sentences by individuals with aphasia: Efficacy of a computer-based augmentative and alternative communication intervention. <i>Brain and Language</i> , 92, 58-77.	SS	9	3	1	Training on GUS multimedia speech system software
2005	Lasker, J.P., LaPointe, L.L., & Kodras, J.E. (2005). Helping a professor with aphasia resume teaching through multimodal approaches. <i>Aphasiology</i> , 19, 399-410.	CS	1	3	1	AAC
2005	Simmons-Mackie, N. N., Kearns, K. P., & Potechin, G. (2005). Treatment of aphasia through family member training. <i>Aphasiology</i> , 19(6), 583-593.					Family member training
2005	Van de Sandt-Koenderman, M., Wegers, J., & Hardy, P. (2005). A computerized communication aid for people with aphasia. <i>Disability and Rehabilitation</i> , 27, 529-533.	CS	22	3	2	High-tech AAC device

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

C.A. No. 03-CV-10246 (PBS)

v.

THE COMMONWEALTH OF MASSACHUSETTES,  
THE MASSACHUSETTES TRIAL COURT, THE  
ADMINISTRATIVE OFFICE OF THE TRIAL COURT,  
and THE COUNTY COMMISSIONERS OF BRISTOL  
COUNTY, MASSACHUSETTES,

Defendant.

JOSEPH deMELLO, et al.

Plaintiffs,

v.

C.A. No. 01-CV-11730-(PBS)

HON. ROBERT A. MULLIGAN, et al.,

Defendants.

**SETTLEMENT AGREEMENT**

This agreement is entered into this 8th day of January, 2004, by and between (A) the parties to United States v. Commonwealth of Massachusetts, et al., No. 03-CV-10246 (D. Mass.): (1) the United States of America, acting through the United States Department of Justice, Civil Rights Division, Disability Rights Section ("the United States"); (2) the Commonwealth of Massachusetts, the Massachusetts Trial Court, and the Administrative Office of the Trial Court of the Commonwealth of Massachusetts [hereinafter "the State Defendants"]; and (3) the County Commissioners of Bristol County; and (B) the parties to deMello, et al. v. Mulligan, et al., C.A. No. 01-CV-11730 (D. Mass.): (1) Joseph deMello and Miles Herman [the "Individual Plaintiffs"]; (2) Robert A. Mulligan, in his official capacity as Chief Justice for Administration and Management of the Trial Court of Massachusetts, and David B. Perini, in his official capacity as the Commissioner of the Division of Capital Asset Management of the Commonwealth of Massachusetts [hereinafter, the "Individual State Defendants"]; and (3) Maria F. Lopes, in her official capacity as Chairwoman of the County Commissioners of Bristol County, Massachusetts.

This Agreement resolves the claims in the consolidated matters of Joseph deMello and Miles Herman v. the Hon. Robert A. Mulligan, et al., C.A. No. 01-CV-11730 (D. Mass.) and the United States v. Commonwealth of Massachusetts, et al., C.A. No. 03-10246 (D. Mass.).

**Parties and Complainants in the case of U.S. v. Commonwealth of Massachusetts, et al.**

1. The United States of America, through the Department of Justice has responsibility for administering and enforcing title II of the Americans with Disabilities Act ["ADA"], 42 U.S.C. ' 12132.
2. Joseph deMello, as Complainant, is an attorney licensed to practice law in the Commonwealth of Massachusetts with a principal office located in Taunton, MA. Joseph deMello has muscular dystrophy, a deteriorating nerve condition that substantially limits his ability to use his arms and legs. At all relevant times hereto, deMello is an individual with a disability as defined in the ADA and the Rehabilitation Act of 1973.
3. Miles Herman, as Complainant, is an attorney licensed to practice law in the Commonwealth of Massachusetts with a principal office located in Plymouth, MA. Miles Herman cannot walk and requires the use of a wheelchair. At all relevant times hereto, Herman is an individual with a disability as defined in the ADA and Rehabilitation Act.
4. The Administrative Office of the Trial Court ["AOTC"] and the Massachusetts Trial Court are instrumentalities of the Commonwealth of Massachusetts. The Massachusetts Trial Court consists of the superior court department, the housing court

department, the land court department, the probate and family court department, the Boston municipal court department, the juvenile court department, and the district court department. There is a chief justice for administration and management (the head of AOTC) and a chief justice for each of the departments of the trial court. Mass. Gen. Laws ch. 211B, ' 4. The Massachusetts Trial Court and AOTC are both parts of state government within the meaning of section 201 of the ADA (codified at 42 U.S.C. ' 12131(1)), 28 C.F.R. ' 35.104, and section 504 of the Rehabilitation Act (codified at 29 U.S.C. 794), and are, therefore, public entities subject to title II of the ADA and section 504 of the Rehabilitation Act, and their implementing regulations, 28 C.F.R. Part 35 and Part 42. AOTC accepts responsibility for ensuring that the services, programs, and activities of the Massachusetts Trial Court comply with title II of the ADA. The Massachusetts Trial Court and AOTC receive federal financial assistance from the United States Department of Justice and are, therefore, subject to the Rehabilitation Act (29 U.S.C. ' 794) and the relevant implementing regulations, 28 C.F.R. Part 45.501, et seq.

5. The Commonwealth of Massachusetts is a state government within the meaning of section 201 of the ADA, 28 C.F.R. ' 35.104, and section 504 of the Rehabilitation Act, and is, therefore, a public entity subject to title II of the ADA and section 504 of the Rehabilitation Act, and their implementing regulations, 28 C.F.R. Part 35 and Part 42. Judges and other employees in the trial courts of Bristol County are employees of the Commonwealth of Massachusetts per Mass. Gen. Laws ch. 211B, ' 4.

6. The County Commissioners of Bristol County are the titular heads of a local government within the meaning of section 201 of the ADA (codified at 42 U.S.C. ' 12131(1)) and 28 C.F.R. ' 35.104. They are subject to title II of the ADA, 42 U.S.C. ' 12132, and its implementing regulations, 28 C.F.R. Part 35. The County Commissioners accept responsibility for ensuring that the Bristol County Registries of Deeds comply with the requirements of title II of the ADA. A majority of the Bristol County Commissioners has conferred with the Registrars of Deeds in Bristol County before agreeing to the terms of this Agreement.

#### Parties in *deMello v. Mulligan, et al.*

7. Joseph deMello is an attorney licensed to practice law in the Commonwealth of Massachusetts with a principal office located in Taunton, MA. Joseph deMello has muscular dystrophy, a deteriorating nerve condition that substantially limits his ability to use his arms and legs. At all relevant times hereto, deMello is an individual with a disability as defined in the ADA and the Rehabilitation Act.

8. Miles Herman is an attorney licensed to practice law in the Commonwealth of Massachusetts with a principal office located in Plymouth, MA. Miles Herman cannot walk and requires the use of a wheelchair. At all relevant times hereto, Herman is an individual with a disability as defined in the ADA and the Rehabilitation Act.

9. Robert A. Mulligan is the Chief Justice for Administration and Management of the Massachusetts Trial Court. As such and subject to the superintendence power of the Supreme Judicial Court of the Commonwealth of Massachusetts, he has general superintendence of the administration of the Massachusetts Trial Court, including, without limitation, the improvement of the administration of each constituent trial court and the securing of their proper and efficient administration. He is sued in his official capacity under the principles established in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.

10. David B. Perini is the Commissioner of the Division of Capital Asset Management ("DCAM") of the Commonwealth of Massachusetts. By statute (G.L. c. 7, ' 39B), he is responsible for, among other things, the direction, control, supervision, planning, and oversight of the scheduled maintenance and repair needs, and the design and construction, of capital assets owned by the Commonwealth, subject to appropriation. He is sued in his official capacity under the principles established in *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.

11. Maria F. Lopes is the Chairwoman of the County Commissioners of Bristol County, Massachusetts, and is being sued in her official capacity. Acting in her official capacity, she heads a local government, as that term is defined in section 201 of the ADA and 28 C.F.R. ' 35.104. Bristol County is subject to title II of the ADA, 42 U.S.C. ' 12132, and its implementing regulations, 28 C.F.R. Part 35.

#### Additional Designations

12. As used herein, "the Commonwealth Defendants" shall refer collectively to the Commonwealth of Massachusetts, the Massachusetts Trial Court, the AOTC, and the individual State Defendants. As used herein, "the Bristol County Defendants" shall refer collectively to the Commissioners of Bristol County, Massachusetts and Maria Lopes.

13. As used herein, "the Plaintiffs" shall refer collectively to the United States and the Individual Plaintiffs.

#### Factual Background

14. The Commonwealth of Massachusetts operates, among others, the following state trial courts in Bristol County, MA: Attleboro District Court; Fall River Superior Court; Taunton Superior Court; Taunton Probate and Family Court; Taunton District Court; and New Bedford Superior Court. All of these courts are housed in courthouses that have multiple steps leading to the ground floor and upper floors. These courthouses are owned by Bristol County.

15. The Courts delineated in paragraph 14, and others, provide programs, services, and activities of the trial courts in Bristol County, including all motion hearings, juvenile proceedings, probate proceedings, trials, and other proceedings for criminal and civil matters.

16. At the time the lawsuits were initiated, each courthouse named in paragraph 14 had multiple steps that hindered individuals with mobility impairments from entering the buildings. Even if an individual could get inside a named courthouse, multiple interior steps acted as barriers hindering the individual from gaining access to courtrooms and other services located on the basement level and upper floors.

17. At the time the lawsuits were initiated, none of the named trial courts had established adequate written procedures that would make the programs, services, and activities of the trial courts accessible to and usable by individuals with disabilities.
18. Bristol County maintains Registries of Deeds in Fall River, Taunton, and New Bedford. All of the Registries are in buildings that have multiple steps leading to the first floor.
19. The Registries of Deeds house the only repositories of land records for real property in Bristol County, Massachusetts.
20. At the time the lawsuits were initiated, each Registry had multiple steps that hindered individuals with mobility impairments from entering the buildings.
21. At the time the lawsuits were initiated, none of the Registries had established published procedures that would make the programs, services, and activities of the Registries accessible to and usable by individuals with disabilities.

#### Legal Standards

22. No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, and denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any public entity. 42 U.S.C. 12132, and the implementing regulations at 28 C.F.R. Part 35.130(a).
23. A public entity may not deny an individual with a disability, on the basis of disability, the opportunity to participate in or benefit from its services. 28 C.F.R. Part 35.130(b)(1)(i).
24. A public entity may not afford a qualified individual with a disability, on the basis of disability, an opportunity to participate in or benefit from a service that is not equal to that afforded others. 28 C.F.R. Part 35.130(b)(1)(ii).
25. A public entity may not provide a qualified individual with a disability, on the basis of disability, an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. Part 35.130(b)(1)(iii).
26. A public entity shall make reasonable modifications in policies, practices and procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity. 28 C.F.R. Part 35.130(b)(7).
27. No qualified individual with a disability shall, because the facilities are inaccessible to and unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, and activities of the public entity or be subjected to discrimination by any public entity. 28 C.F.R. Part 35.149.
28. A public entity shall operate each service, program or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities in the most integrated setting appropriate to meet the needs of individuals with disabilities. 28 C.F.R. Part 35.150(a), (b)(1).
29. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section, where changes would threaten or destroy the historic significance of an historic property, or where modifications would fundamentally alter the nature of a service, program, or activity, or would result in undue financial and administrative burdens. 28 C.F.R. Part 35.150(a), (b)(1).
30. No qualified handicapped person shall, solely on the basis of handicap, be excluded from participation in, or denied the benefits of, or otherwise be subjected to discrimination under any program receiving or benefiting from federal financial assistance. 28 C.F.R. Part 42.503(a).
31. A recipient of federal financial assistance may not discriminate against individuals with disabilities on the basis of disability by denying them the opportunity accorded others to participate in the program receiving federal financial assistance. 28 C.F.R. Part 42.503(b)(1)(i).
32. A recipient of federal financial assistance may not discriminate against individuals with disabilities on the basis of disability by denying them an equal opportunity to achieve the same benefits that others achieve in the program receiving federal financial assistance. 28 C.F.R. Part 42.503(b)(1)(ii).
33. A recipient of federal financial assistance shall administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. Part 42.503(d).
34. A recipient of federal financial assistance shall insure that no qualified handicapped person is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under a program receiving federal financial assistance because the recipient's facilities are inaccessible to and unusable by handicapped individuals. 28 C.F.R. Part 42.520.
35. A recipient of federal financial assistance shall operate each program so that the program, when viewed in its entirety, is readily accessible to and usable by handicapped persons. 28 C.F.R. Part 42.521(a).
36. A recipient of federal financial assistance is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with 28 CFR 42.521(a). In choosing among methods, a recipient shall give priority to those methods that offer programs to handicapped persons in the most integrated setting appropriate to obtain the full benefits of the program. 28 C.F.R. 42.521(a), (b).

**Sovereign Immunity of the Commonwealth of Massachusetts**

37. Nothing in this Settlement Agreement constitutes a waiver of the sovereign immunity asserted by the Commonwealth of Massachusetts and its instrumentalities pursuant to the Eleventh Amendment of the United States Constitution and common law, nor a waiver of the United States' assertion that the Americans with Disabilities Act and Section 504 of the Rehabilitation Act properly abrogate the Commonwealth's Eleventh Amendment immunity.

**Obligations Assumed By the Commonwealth Defendants**

38. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will make the structural changes and procedural modifications in the Attleboro District Court courthouse called for in Appendix A.

39. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will make the structural changes and procedural modifications in the New Bedford Superior Court courthouse called for in Appendix B.

40. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will make the structural changes and procedural modifications in the Fall River Superior Court courthouse called for in Appendix C.

41. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will make the structural changes and procedural modifications in the Taunton Superior Court courthouse called for in Appendix D.

42. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will undertake the changes and procedural modifications relating to the operations of the Taunton District Court called for in Appendix E; provided, however, that if the Commonwealth is unable to obtain from the City of Taunton, by December 31, 2003, a multi-year lease or license allowing the Massachusetts Trial Court use of the Cohannet School building for Taunton District Court operations, then paragraph one of Appendix E will be suspended and the parties will meet promptly to negotiate alternative means of making the services of the Taunton District Court physically accessible to and usable by individuals with disabilities by February of 2005, such as modifying the existing Taunton District Court building or using other, state-controlled property. If the parties are unable to reach agreement, any party may invoke the procedures specified in paragraphs 52 or 54, *infra*, to obtain an appropriate order regarding the Taunton District Court.

43. In accordance with the timeframe provisions of paragraph 45, the Commonwealth Defendants will make the structural changes and procedural modifications in the Taunton Probate and Family Court courthouse called for in Appendix F.

44. The Individual State Defendants agree to employ all applicable resources at their disposal, as made available to them by the Massachusetts Legislature, and to seek to obtain any additional necessary resources to provide the physical access, make other necessary structural changes in the named courthouses, and modify existing policies and procedures, as called for in appendices A-F. All parties acknowledge, however, that the Individual State Defendants are not required to make expenditures in excess of the amounts legally available to them under state law. The Individual State Defendants represent that, as of the execution of this Agreement, they have the financial resources, as referenced in a letter from the Commonwealth's Secretary of Administration and Finance to the Governor's Chief Legal Counsel dated November 6, 2003, to make the structural changes and modify existing policies and procedures, as called for in appendices A-F. Nonetheless, nothing in this Agreement limits the United States' or the Individual Plaintiffs' right to seek a court order enforcing the terms of this Agreement through the procedures outlined in paragraphs 52 and 53, *infra*.

45. The Commonwealth's counsel has represented that it is not possible to make all the structural changes delineated in appendices A-F immediately, and the Plaintiffs agree that the changes can be made in accordance with the time tables set forth in appendices A-F. In instances in which only a month and year follow a particular action item in appendices A-F, the Commonwealth Defendants shall have until the last day of the specified month to complete that particular action item. The term "upon execution of the Settlement Agreement" either preceding or immediately following a particular action item shall be construed to mean that that action item shall be accomplished within thirty (30) days of the effective date of this Settlement Agreement, unless it has already been fulfilled.

46. Notwithstanding any unforeseen future contingencies that might impact the construction plans and timetables set forth in appendices A-F, the Commonwealth Defendants agree not to take any action that will diminish the level of physical accessibility, to and within the courthouse facility, achieved through this Settlement Agreement at each named courthouse. This paragraph shall not be read to prohibit the curtailment of a Trial Court program, service, or activity at any named courthouse for reasons unrelated to compliance with the ADA unless such action eliminates the only such accessible program, service, or activity in Bristol County.

47. If approval must be obtained from any state or local historical commission to perform work under this Settlement Agreement, the Individual State Defendants and the Bristol County Commissioners will commence, or support the petition filed in, any administrative or judicial proceedings required to obtain such approval.

**Obligations Assumed By Bristol County**

48. The County Defendants agree to provide the physical access, make the structural changes, and modify existing policies and procedures at the three Registries of Deeds facilities in Bristol County as called for in Appendix G, and make the accessibility accommodations specified in paragraphs 8 and 11 of Appendix G.

**Enforcement and Monitoring**

49. Resolution of the Litigation. Upon execution of this Settlement Agreement, the Agreement shall be filed with and approved by the Court, but not entered as an order, and the Court shall retain jurisdiction to enforce its provisions as set forth below. Upon

approval by the Court of this Agreement, the Parties shall jointly file a motion to dismiss and proposed Order of Dismissal, in the form attached hereto as Exhibit A, dismissing without prejudice all claims asserted in United States v. Commonwealth of Massachusetts, et al., Civil Action No. 03-10246, and Joseph deMello and Miles Herman v. Hon. Robert A. Mulligan, et al., Civil Action No. 01-11730 (hereinafter, the "Referenced Actions"), with each party to bear its own costs, except as provided in paragraph 51.

50. Notwithstanding the filing of the stipulations of dismissal, the Court shall retain jurisdiction over the Referenced Actions for purposes of enforcing this Agreement or resolving any disputes under this Agreement. The Court's jurisdiction shall continue for five (5) years from the date of the Agreement; provided, however, that the Court may maintain jurisdiction beyond that point if, and during the period that, the plaintiffs demonstrate, before the five year period expires, that the defendants have failed to accomplish the structural changes and/or the modifications to existing policies and procedures described in appendices A - G.

51. Upon the filing of the Order of Dismissal in the case of deMello and Herman v. Mulligan, et al., and the delivery to the defendants of fully executed general releases, in substantially the form attached hereto as Exhibit B, the Commonwealth and the County agree to pay all reasonable attorney's fees and costs incurred by the Individual Plaintiffs in this matter up through the effective date of this Settlement Agreement, as that term is defined in paragraph 65, infra. The parties agree to make all reasonable efforts to resolve the specific amount of attorney fees and costs, consistent with the guidelines for attorney's fee awards under 42 U.S.C. section 1988 enunciated by the United States Supreme Court in Blanchard v. Bergeron, 489 U.S. 87 (1989), but if such a resolution is not accomplished by December 31, 2003, or a mutually agreed extension of that deadline, the defendants acknowledge and agree that the Individual Plaintiffs will file a petition to have an appropriate award of such fees and costs determined by the Court. The parties further agree that if the City of Taunton declines to enter into a multi-year lease or license allowing the Massachusetts Trial Court use of the Cohannet School building for Taunton District Court operations and further negotiations or litigation between the parties to reach an agreement or obtain a court order making the services of the Taunton District Court physically accessible to individuals with disabilities become necessary, the Commonwealth will pay any reasonable attorneys' fees and costs incurred by the Individual Plaintiffs as a direct result of the need to develop an alternative accessibility plan for the Taunton District Court pursuant to paragraph 42, supra. While the defendants make no further commitment to pay attorneys' fees or costs incurred by the Individual Plaintiffs after the execution of this Settlement Agreement, nothing in this agreement precludes the Individual Plaintiffs from petitioning the court for reimbursement of post-settlement attorneys' fees or costs should enforcement action pursuant to paragraphs 52-54, infra, become necessary. The United States is not a party to paragraph 51.

52. If any party to this Agreement believes that another party is violating its obligations under this Agreement, or believes a dispute has arisen as to the meaning of the Agreement, then the complaining party shall give written detailed notice describing the claimed violation or dispute to all other affected parties. The complaining party may immediately file the written notice with the Court in the form of a motion and may request a hearing thereon, but the hearing shall not occur sooner than thirty (30) days after service of the notice/motion is completed on all counsel of record. The parties shall then attempt, within this thirty (30) day period or such other time as may be agreed upon in writing, to resolve their differences over the claimed violation or disputed meaning. If successful, the parties shall notify the Court that the matter has been resolved and request that any scheduled hearing be cancelled. If after such time the parties are unable to resolve their differences, then any party may argue a motion before the Court seeking a declaration determining whether there has been a violation, or determining the meaning of a provision of this Settlement Agreement, or both, and may simultaneously seek an appropriate enforcement order. Neither this Settlement Agreement nor any of its specific provisions shall serve as the sole basis for an application for an order of contempt brought in this action. After the expiration of the thirty-day period for mediating differences, the other party(ies) shall respond to any motion filed within the time allowed by the Local Rules, unless the time is extended by agreement or court order. Upon the Court's declaration and any enforcement order, the party(ies) shall have a reasonable time, or such time as the Court may direct, to perform their obligations as declared and ordered.

53. In the event of claimed non-compliance with a party's obligations under the Agreement as declared by the Court, the aggrieved party(ies) may seek an enforcement order, if one has not already issued, by filing a motion after giving notice and attempting to resolve the matter, all as set forth in paragraph 52 above. In the event of claimed non-compliance with an enforcement order, the aggrieved party may seek further relief, including contempt, by filing a motion after giving notice and attempting to resolve the matter, all as set forth in paragraph 52 above. In no event may the plaintiffs sue for damages for any alleged breach of the terms of this Settlement Agreement.

54. If the plaintiffs are not satisfied with the defendants' overall compliance with the obligations they have assumed under the provisions of this Settlement Agreement, the plaintiffs may, on or after July 1, 2004, but no later than July 1, 2008, resume prosecution of the action, provided that the plaintiffs have first given written detailed notice to all affected parties of their dissatisfaction with the defendants' performance under this Agreement and have meaningfully engaged, over the course of at least thirty (30) days, in good-faith discussions and efforts to resolve any dispute over the defendants' performance under this Agreement.

55. The United States District Court for the District of Massachusetts shall have exclusive jurisdiction and venue to construe and enforce this Settlement Agreement, and to resolve any and all disputes arising out of or relating to this Settlement Agreement, which shall be governed by and construed in accordance with the laws of the United States and the Commonwealth of Massachusetts.

56. Each Individual Defendant shall provide to the plaintiffs a bi-monthly report (no less frequently than every 60 days following the execution of this Settlement Agreement) that (a) sets forth their progress in making the structural changes and/or procedural modifications set forth in Appendices A - G, until such time as compliance with the obligations specified therein is achieved, and (b) notifies plaintiffs of any changes in the timetables set forth in the appendices.

57. If at any time the defendants (or one of them) wish to modify any portion of this Settlement Agreement because of changed conditions making performance impossible or impractical, or for any other reason, they will promptly notify the plaintiffs' counsel in writing, setting forth the facts and circumstances thought to justify modification and the substance of the proposed modification, and provide evidence to support their position. Until there is written assent or agreement by the plaintiffs' counsel

to the proposed modification, the proposed modification will not take effect. If the requested modification is not approved within thirty (30) days of the date of written notification of such need, then the defendants may refer the matter to the Article III judge assigned to the case, as provided for in paragraph 52 above.

#### Miscellaneous Provisions

58. The defendants hereby waive any defense under the ADA that the planned modifications to the existing structures or procedures described in appendices A-G fundamentally alter the services, programs, or activities of, or cause undue financial or administrative burden to, the trial courts and registries of deeds delineated in paragraphs 14 and 18. The defendants also waive any defense under the ADA that the planned modifications described in appendices A-G threaten or destroy the historic significance of any of the courthouses and registry buildings referenced in paragraphs 14 and 18.

59. By entering into this Settlement Agreement, no party shall be deemed to have waived any claim or defense not otherwise specifically released in writing, until such time as the Court no longer has jurisdiction over the matters raised in the Referenced Actions.

60. To the fullest extent permitted under their respective grants of statutory authority, the Individual Defendants signing this Agreement represent that they are authorized to bind their respective governmental units. Each signatory to this Settlement Agreement affirms that he or she has consulted with and been advised by counsel in connection with the execution of this Settlement Agreement and that he or she agrees that its terms are fair and reasonable. The Hon. Robert A. Mulligan represents that his counsel has conferred with clerks and judges in the named Bristol County trial courts and they concur in the procedural modifications set forth in Appendices A-F. Maria F. Lopes represents that either she, another Bristol County Commissioner, or their counsel has conferred with each Registrar of Deeds in Bristol County and they concur in the procedural modifications set forth in Appendix G.

61. This Settlement Agreement sets forth the entire agreement between the plaintiffs and the defendants with respect to the subject matters hereof, and supersedes all prior oral and written agreements and discussions with the exception of the Memorandum of Understanding entered into between the Commonwealth Defendants and the Bristol County Defendants ("the Memorandum") and a letter from the Commonwealth's Secretary of Administration and Finance to the Governor's Chief Legal Counsel dated November 6, 2003 ("the Letter"). No other statement, promise, or agreement, either written or oral, made by any party or the agents of any party that is not contained in this written Settlement Agreement, the Memorandum, or the Letter shall be enforceable. The plaintiffs and the defendants represent that none of them relies upon, in entering into this Settlement Agreement, any statement of any other party to this agreement except those statements set forth in this Settlement Agreement, the Memorandum, or the Letter.

62. All notices and other correspondence sent by the Parties to one another relating to this Settlement Agreement (including paragraphs 52-54, 56, and 57 thereof in particular) shall be sent to the Parties at the following addresses or at such other address as the Parties may designate in writing in the future:

#### **For correspondence to the United States:**

John L. Wodatch, Chief  
Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW - NYA  
Washington, DC 20530

#### **For correspondence to the Individual Plaintiffs:**

Carlin Phillips, Esq.  
Phillips & Garcia, LLP  
13 Ventura Drive  
No. Dartmouth, MA 02747

#### **For correspondence to Bristol County and/or the County Commissioners:**

Chairperson, Bristol County Commission  
9 Court Street  
Taunton, MA 02780

#### **For correspondence to the Commonwealth of Massachusetts:**

Stephanie Lovell  
First Assistant Attorney General  
for the Commonwealth of Massachusetts  
One Ashburton Place  
Boston, MA 02108

#### **For correspondence to the Administrative Office of the Trial Court and/or the Chief Justice for Administration and Management:**

Alexander G. Gray, Jr.  
General Counsel

Administrative Office of the Trial Court  
Two Center Plaza, Suite 540  
Boston, MA 02108

**For correspondence to the Commissioner of the Division of Capital Asset Management:**

Robert McGinness  
General Counsel  
Division of Capital Asset Management  
One Ashburton Place, 15th floor  
Boston, MA 02108

63. This Settlement Agreement is a public document. A copy of this document, or any information contained herein, may be made available to any person upon request.

64. This Settlement Agreement shall be binding on the Parties, and their elected or appointed successors in interest.

65. This Settlement Agreement shall become effective once signed by all Parties and the effective date will be the date of the last signature affixed hereto.

IN WITNESS WHEREOF, the plaintiffs and the defendants in the above-captioned actions have caused this Settlement Agreement to be executed as of the dates subscribed below:

**For the United States of America:**

\_\_\_\_\_  
John L. Wodatch, Chief  
Disability Rights Section  
Phillip L. Breen  
Allison Nichol  
Laura F. Einstein  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW - NYA  
Washington, DC 20530

Date 1/0/04

**The Individual Plaintiffs:**

\_\_\_\_\_  
Joseph deMello, Esq.  
71 Main Street  
Taunton, MA 02780

Date 12-23-03

\_\_\_\_\_  
Miles D. Herman, Esq.  
2 Cod Road, Suite One  
Plymouth, MA 02360

Date 12-31-03

**For Bristol County and the County Commissioners:**

\_\_\_\_\_  
Maria F. Lopes  
Chairperson, Bristol County Commission  
9 Court Street  
Taunton, MA 02780

Date: 12/15/03

For the Commonwealth of Massachusetts:

Stephanie Lovell  
Deputy First Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Date: 1-8-04

The Chief Justice for Administration and Management, on behalf of himself, the Massachusetts Trial Court, and the Administrative Office of the Trial Court:

The Hon. Robert A. Mulligan  
Administrative Office of the Trial Court  
Two Center Plaza, Suite 540  
Boston, MA 02108

Date: 12/05/03

The Commissioner of the Division of Capital Asset Management:

David B. Perini  
Commissioner  
Division of Capital Asset Management  
One Ashburton Place, 15th floor  
Boston, MA 02108

Date: 12/11/03

## Appendix A

### A. Attleboro District Court

- 1.) A temporary ramp will be installed at the side door and will be in place until a permanent ramp is constructed for the front entrance. [Upon execution of the Settlement Agreement]
- 2.) A permanent ramp will be installed at the main entrance to this courthouse. [April 2004]
- 3.) Accessible parking spaces restricted to persons with disabilities will be provided in an appropriate location. [temporarily: Upon execution of the Settlement Agreement; permanently: April 2004]
- 4.) Accessible paths of travel will connect the permanent ramp to these parking spaces and the public sidewalk. [April 2004]
- 5.) The courtroom on the first floor will be made accessible for spectators, witnesses, and attorneys. [Upon execution of the Settlement Agreement]
- 6.) A permanent accessible bathroom will be constructed on the first floor and DCAM will instruct the contractor to prioritize this action item. [March 2004]
- 7.) A temporary or portable accessible toilet will be in place by the time the temporary ramp is functional. [Upon execution of the Settlement Agreement]
- 8.) Appropriate door hardware, usable by persons with disabilities, will be installed wherever needed on the first floor. [Upon execution of the Settlement Agreement]
- 9.) Stair railings and nosings on public stairs will be brought into compliance with the Americans with Disabilities Act

Accessibility Guidelines ("ADAAG") and Title 521 of the Code of Massachusetts Regulations ("521 CMR"). [February 2004]

10.) Public counters on the first floor of the Attleboro courthouse will be lowered, or a folding counter will be added, or an accessible counter or table will be provided. [February 2004]

11.) An assistive listening system will be installed in the first floor courtroom. [Upon execution of the Settlement Agreement]

12.) An accessible public telephone and a text telephone ("TTY") device will be installed on the first floor. [Upon execution of the Settlement Agreement]

13.) An accessible drinking fountain will be installed on the first floor. [Upon execution of the Settlement Agreement]

14.) Appropriate signage will be installed directing people to the accessible entrance and to the ADA coordinator. [Upon execution of the Settlement Agreement]

15.) Civil, Criminal and Juvenile proceedings will be scheduled in the first floor courtroom when necessary to accommodate attorneys, parties, or witnesses with mobility impairments. [Upon execution of the Settlement Agreement]

16.) Individuals with mobility impairments who are summoned to the Attleboro District Court for jury duty will be notified that the courthouse is not accessible to persons with disabilities and these individuals will be reassigned, if they choose, to another District Court in Bristol County for jury duty. [Upon execution of the Settlement Agreement]

17.) Any individual who enters the courthouse who cannot directly or personally access programs or services on the second floor or the basement level will be assisted by the court officer or the associate court officer at the security station to contact the ADA coordinator who will make the necessary arrangement for the services to be provided on the first floor. [Upon execution of the Settlement Agreement]

18.) An individual who needs to access the services of the small claims clerk or the civil transaction counter located on the second floor will be accommodated in the Clerk-Magistrate's office on the first floor. [Upon execution of the Settlement Agreement]

19.) A criminal defendant who is mobility impaired will be arraigned in an accessible courtroom located in this courthouse. [Upon execution of the Settlement Agreement]

20.) An individual with a mobility impairment who cannot gain access to the Juvenile Court probation office located in the basement will be accommodated in the District Court probation office located on the first floor. [Upon execution of the Settlement Agreement]

21.) An individual with a mobility impairment who cannot gain access to the Juvenile Court clerk's office located in the basement will be accommodated in the District Court Clerk-Magistrate's office located on the first floor. [Upon execution of the Settlement Agreement]

22.) Individuals with mobility impairment who have business with the Juvenile Court will be directed to call the ADA coordinator to obtain assistance in arranging for any necessary accommodation, including being met at the back-door entrance by an associate court officer. [Upon execution of the Settlement Agreement]

23.) A notice, printed on colored paper, will be included in every piece of mail sent from the Attleboro District Court (including the Probation Department, the Juvenile Probation Department, the Clerk-Magistrate, the Juvenile Court Clerk, and the judges' lobbies), announcing that anyone who needs accommodation at the Attleboro District Court should call the ADA Coordinator to make the necessary arrangements. In addition, the notice will be posted on the appropriate Trial Court web site, and will be placed on the courthouse's automated telephone system. [Upon execution of the Settlement Agreement]

24.) If an individual with a mobility impairment chooses or is required to attend a court proceeding at the Attleboro District Court, that proceeding will be scheduled to be held in the first floor courtroom provided that at least 48 hours' advance notice has been given to the ADA coordinator requesting such an accommodation. [Upon execution of the Settlement Agreement]

25.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor courtroom is not available, the proceeding will be rescheduled until a date when it can be conducted in the first floor court room. [Upon execution of the Settlement Agreement]

## Appendix B

### B. New Bedford Superior Court

1.) A temporary ramp will be installed at the front of the building and will be in place until such time as a permanent accessible entrance is constructed. [February 2004]

2.) An accessible restroom will be provided on the first floor. [June 2004] The Commonwealth official overseeing this

project will instruct the contractor to give this action item top priority.

3.) The Commonwealth's agents will work with the County's agents to create, in an appropriate location, accessible parking spaces restricted to persons with disabilities. [February 2004]

4.) The courtroom on the first floor will be made accessible for spectators, witnesses, attorneys, and jurors. [Upon execution of the Settlement Agreement]

5.) An assistive listening system will be installed in the first floor courtroom. [Upon execution of the Settlement Agreement]

6.) An accessible public telephone and TTY device will be installed on the first floor. [Upon execution of the Settlement Agreement]

7.) An accessible path of travel to the Clerk's Office will be provided. [February 2004]

8.) The transactional counters in the Clerk's Office will be lowered, or a folding counter will be added, or an accessible counter or table will be provided. [Upon execution of the Settlement Agreement]

9.) Appropriate signage will be installed directing people to the accessible entrance and to the ADA coordinator. [No later than the date the temporary ramp is opened for use by the general public.]

10.) Any individual who enters the courthouse who cannot directly or personally access programs or services on the second floor or the basement level will be assisted by the court officer or the associate court officer to contact the ADA coordinator who will make the necessary arrangements for the services to be provided on the first floor. [Upon execution of this Settlement Agreement]

11.) Civil and criminal proceedings will be scheduled in the first floor courtroom when necessary to accommodate attorneys, parties (except criminal defendants), witnesses or jurors with mobility impairments. Prospective jurors will be requested to respond to the Jury Commissioner indicating that they will need accommodations to fulfill their jury obligations at the New Bedford Superior Court at least seven days in advance of the date they are called for service. [Upon execution of the Settlement Agreement]

12.) Until a ramp is installed permitting individuals with a mobility impairment to gain entrance to this courthouse, civil and criminal proceedings will be scheduled to be heard in the New Bedford Housing Court whenever necessary to accommodate attorneys, parties, or witnesses with mobility impairments. [Upon execution of the Settlement Agreement]

13.) As soon as a ramp is installed permitting individuals with a mobility impairment to gain entrance to this courthouse, the court room on the first floor will be used as the jury pool when a juror with a mobility impairment has been summoned for jury duty.

14.) As soon as a ramp is installed permitting individuals with a mobility impairment to gain entrance to this courthouse, the room currently used by the law clerk of Justice Jacob will be used as the jury deliberation room when a juror with a mobility impairment has been empaneled on a jury.

15.) As soon as a ramp is installed permitting individuals with a mobility impairment to gain entrance to this courthouse, the room currently used by the law clerk of Justice Jacob will be used when an individual with a mobility impairment needs to access services provided in the basement, such as the Victim Witness Program or Community Services. Until the ramp is installed, special arrangements will be made to provide Victim Witness program and Community Services program services to mobility-impaired individuals in an accessible location. [Upon execution of the Settlement Agreement]

16.) The room currently used by the law clerk of Justice Jacob will be used when an individual with a mobility impairment needs to access the law library services provided on the second floor. A computer terminal that has access to electronic research material will be located in this room. A telephone will also be available in this room to contact the law librarian directly. [Upon execution of the Settlement Agreement]

17.) A notice that anyone who needs accommodation at the New Bedford Superior Court should call the ADA Coordinator to make the necessary arrangements will be printed on the standard tracking form generated by the ForeCourt computer system. A similar notice will appear on all court-generated notices of pre-trial conferences and motion hearings. In addition, the notice will be posted on the appropriate Trial Court web site, and will be placed on the courthouse's automated telephone system. [Upon execution of the Settlement Agreement]

18.) If an individual with a mobility impairment chooses or is required to attend a court proceeding at the New Bedford Superior Court, that proceeding will be scheduled to be held in the first floor courtroom provided that at least 48 hours' advance notice has been given to the ADA coordinator requesting such an accommodation. If the requesting individual is unable to gain entrance to this courthouse (in the interim period prior to installation of a ramp to the side entrance of the building), special arrangements will be made to reschedule the proceeding in an accessible location. [Upon execution of the Settlement Agreement]

19.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor courtroom is not available, the proceeding will be rescheduled until a date when it can be conducted in the first floor court room or an accessible location. [Upon execution of the Settlement Agreement]

## Appendix C

## C. Fall River Superior Court

- 1.) A temporary accessible ramp will be installed at the side entrance of the building. [February 2004]. An accessible entrance will be maintained until such time as the Trial Court vacates the building.
- 2.) An accessible path of travel will connect the ramp to nearby accessible parking. [Within 60 days of the completion of the ramp]
- 3.) The Commonwealth's agents will work with the County's agents to create, in an appropriate location, accessible parking spaces restricted to persons with disabilities. [Within 60 days of the completion of the ramp]
- 4.) Any individual who enters the courthouse who cannot directly or personally access programs or services on the second floor or third floors, will be assisted by the court officer or the associate court officer to contact the ADA coordinator, who will make the necessary arrangements for the services to be provided on the first floor or an appropriate accessible location. [Upon execution of the Settlement Agreement]
- 5.) A courtroom on the first floor will be made internally accessible for spectators, witnesses, attorneys, and jurors. [Upon execution of the Settlement Agreement]
- 6.) An accessible restroom will be provided on the first floor. [Upon execution of the Settlement Agreement]
- 7.) An assistive listening system will be installed in the accessible courtroom. [Upon execution of the Settlement Agreement]
- 8.) An accessible public telephone and TTY device will be installed on the first floor. [Upon execution of the Settlement Agreement]
- 9.) Appropriate signage will be installed directing people to the accessible entrance and to the ADA coordinator. [No later than the date the temporary ramp is opened for use by the general public.]
- 10.) Civil proceedings will be scheduled in the first floor courtroom when necessary to accommodate attorneys, parties, witnesses or jurors with mobility impairments. [Upon execution of the Settlement Agreement]
- 11.) A court room on the first floor will be used as the jury pool when a juror with a mobility impairment has been summoned for jury duty and as the jury deliberation room when a juror with a mobility impairment has been empaneled on a jury. Prospective jurors will be requested to respond to the Jury Commissioner indicating that they will need accommodations to fulfill their jury obligations at the Fall River Superior Court at least seven days in advance of the date they are called for service. [Upon execution of the Settlement Agreement]
- 12.) Doors in the path of travel to public spaces on the first floor will be made usable by persons with disabilities. [Upon execution of the Settlement Agreement]
- 13.) Public counters on the first floor of the Fall River courthouse will be lowered, or a folding counter will be added, or an accessible counter or table will be provided. [Upon execution of the Settlement Agreement]
- 14.) The room currently used by the law clerks or the unused judge's lobby will be used when an individual with a mobility impairment needs to access services provided on the second or third floor, including probation services. [Upon execution of the Settlement Agreement]
- 15.) The room currently used by the law clerks or the unused judge's lobby will be used when an individual with a mobility impairment needs to access the law library services provided on the second floor of the Registry of Deeds building. A computer terminal that has access to electronic research material will be located in this room. A telephone will also be available in this room to contact the law librarian directly. [Upon execution of the Settlement Agreement]
- 16.) A notice that anyone who needs accommodation at the Fall River Superior Court should call the ADA Coordinator to make the necessary arrangements will be printed on the standard tracking form generated by the ForeCourt computer system. A similar notice will appear on all court-generated notices of pre-trial conferences and motion hearings. In addition, the notice will be posted on the appropriate Trial Court Web Site, and will be placed on the courthouse's automated telephone system. [Upon execution of the Settlement Agreement]
- 17.) If an individual with a mobility impairment chooses or is required to attend a court proceeding at the Fall River Superior Court, that proceeding will be scheduled to be held in the first floor courtroom provided that at least 48 hours advance notice has been given to the ADA coordinator requesting such an accommodation. If the requesting individual is unable to gain entrance to this courthouse (in the interim period prior to installation of a ramp to the side entrance of the building), special arrangements will be made to reschedule the proceeding in an accessible location. [Upon execution of the Settlement Agreement]
- 18.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor courtroom is not available, the proceeding will be rescheduled until a date when it can be conducted in the first floor courtroom or another accessible location. [Upon execution of the Settlement Agreement]

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### Appendix D

#### D. Taunton Superior Court

- 1.) A durable, long-term ramp will provide access to the front entrance of the building and the entrance doors will be modified to allow for easy access by persons with disabilities. [June 2004]
- 2.) An accessible restroom will be provided on the first floor. [June 2004] The Commonwealth official overseeing this project will instruct the contractor to give this action item top priority.
- 3.) As soon as the long-term ramp is installed, accessible parking spaces restricted to persons with disabilities will be provided near the end of the ramp and the walkway between the parking spaces and the ramp will be made accessible.
- 4.) Any individual who enters the courthouse who cannot directly or personally access programs or services on the second floor or third floors will be assisted by the court officer or the associate court officer to contact the ADA coordinator who will make the necessary arrangements for the services to be provided on the first floor. [Upon execution of this Settlement Agreement]
- 5.) The Juvenile Court courtroom on the first floor will be made accessible for spectators, witnesses, attorneys, and jurors. [Upon execution of the Settlement Agreement]
- 6.) An accessible public telephone and TTY device will be installed on the first floor. [Upon execution of the Settlement Agreement]
- 7.) Appropriate signage will be installed directing people to the ADA coordinator. [Upon execution of the Settlement Agreement] Appropriate permanent signage will be installed directing people to the accessible entrance. [June 2004]
- 8.) An elevator providing access to the basement, first, and second floors will be installed. [October 2004]
- 9.) Until the new elevator is installed providing access to the second floor, civil proceedings will be scheduled in the first floor Juvenile Court courtroom when necessary to accommodate attorneys, parties, witnesses, or jurors with mobility impairments. [Upon execution of the Settlement Agreement]
- 10.) Until the new elevator is installed providing access to the second floor, the Juvenile Court courtroom on the first floor will be used as the jury pool when a juror with a mobility impairment has been summoned for jury duty. A designated room on the first floor will be used as the jury deliberation room when a juror with a mobility impairment has been empaneled on a jury. Once the new elevator is installed, the courtroom on the second floor will serve as the jury pool when a juror with a mobility impairment has been summoned for jury duty. At that time, the room behind the courtroom will be used as the jury deliberation room when a juror with a mobility impairment has been empaneled. Prospective jurors will be requested to respond to the Jury Commissioner indicating that they will need accommodations to fulfill their jury obligations at the Taunton Superior Court at least seven days in advance of the date they are called for service. [Upon execution of the Settlement Agreement]
- 11.) A designated room on the first floor will be used when an individual with a mobility impairment needs to access services provided on the second or third floors, including probation services. [Upon execution of the Settlement Agreement]
- 12.) Until the new elevator is installed providing access to the second floor, the designated room on the first floor will be used when an individual with a mobility impairment needs to access the law library services provided on the second floor. A computer terminal that has access to Internet legal research material will be located in this room. A telephone will also be available in this room to contact the law librarian directly. [Upon execution of the Settlement Agreement]
- 13.) A notice that anyone who needs accommodation at the Taunton Superior Court should call the ADA Coordinator to make the necessary arrangements will be printed on the standard tracking form generated by the ForeCourt computer system. In addition, the notice will be posted on the appropriate Trial Court Web Site, and will be placed on the courthouse's automated telephone system. [Upon full execution of the Settlement Agreement]
- 14.) Until the new elevator is installed providing access to the second floor, if an individual with a mobility impairment chooses or is required to attend a court proceeding at the Taunton Superior Court, that proceeding will be scheduled to be held in the first floor Juvenile Court courtroom, provided that at least 48 hours' advance notice has been given to the ADA coordinator requesting such an accommodation. [Upon execution of the Settlement Agreement]
- 15.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor Juvenile Court courtroom is not available, the proceeding will be rescheduled until a date when it can be conducted in the first floor court room. [Upon execution of the Settlement Agreement]

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### Appendix E

#### E. Taunton District Court

- 1.) All Taunton District Court programs, services, and judicial proceedings will be moved to accessible facilities in the Cohannet School in Taunton. [February 2005]
- 2.) Until the District Court is operating in an accessible facility, appropriate signage will be installed directing people to the accessible entrance at the Taunton Superior Courthouse and explaining how to make telephone contact with the ADA coordinator for the Taunton District Court. [Upon execution of the Settlement Agreement]
- 3.) Until the District Court is operating in an accessible facility, any individual who cannot directly or personally access programs or services provided in the Taunton District Court courthouse will be assisted by a court officer in contacting the ADA coordinator who will make the necessary arrangement for the services to be provided at the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]
- 4.) Until the District Court is operating in an accessible facility, civil and criminal proceedings will be scheduled in the first floor Juvenile Court courtroom (or the second floor courtroom once the elevator has been installed) located in the Taunton Superior Court courthouse, whenever necessary to accommodate attorneys, parties or witnesses with mobility impairments. [Upon execution of the Settlement Agreement]
- 5.) Individuals with mobility impairments who are summoned to the Taunton District Court for jury duty will be notified that the courthouse is not accessible to persons with disabilities and these individuals will be reassigned, if they choose, to another District Court in Bristol County for jury duty. [Upon execution of the Settlement Agreement]
- 6.) Until the District Court is operating in an accessible facility, criminal defendants with mobility impairments will be arraigned in the first floor Juvenile Court courtroom in the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]
- 7.) Until the District Court is operating in an accessible facility, probationers with mobility impairments will be provided with probation services at the Probation Department offices located at 18 Broadway in Taunton or an appropriate accessible location such as the probationer's home. [Upon execution of the Settlement Agreement]
- 8.) Until the District Court is operating in an accessible facility, individuals with mobility impairments who need to access the civil or criminal clerk's offices or the small claims offices will be provided with the services that they require in the designated room on the first floor of the Superior Courthouse. [Upon execution of the Settlement Agreement]
- 9.) Until the District Court is operating in an accessible facility, small claims proceedings will be scheduled in the first floor Juvenile Court courtroom of the Taunton Superior Courthouse when necessary to accommodate attorneys, parties, or witnesses with mobility impairments. [Upon execution of the Settlement Agreement]
- 10.) Until the District Court is operating in an accessible facility, a notice, printed on colored paper, will be included in every piece of mail sent from the Taunton District Court (including the Probation Department, the Clerk-Magistrate, and the judges' lobbies), announcing that anyone who needs accommodation at the Taunton District Court should call the ADA Coordinator to make the necessary arrangements. In addition, the notice will be posted on the appropriate Trial Court Web Site, and will be placed on the courthouse's automated telephone system. [Upon execution of the Settlement Agreement]
- 11.) If an individual with a mobility impairment chooses or is required to attend a court proceeding at the Taunton District Court, that proceeding will be scheduled to be held in the first floor Juvenile Court courtroom at the Taunton Superior Courthouse (or the second floor courtroom in the Taunton Superior Courthouse once the elevator is installed) provided that at least 48 hours' advance notice has been given to the ADA coordinator requesting such an accommodation. [Upon execution of the Settlement Agreement]
- 12.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor Juvenile Court courtroom (or the second floor courtroom in the Taunton Superior Courthouse once the elevator is installed) is not available, the proceeding will be rescheduled until a date when it can be conducted in an accessible court room at the Taunton Superior Court courthouse. [Upon execution of the Settlement Agreement]

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#### Appendix F

##### F. Taunton Probate and Family Court

- 1.) As set forth in Appendix G, Bristol County and the Commonwealth will create an accessible entrance to the Taunton Probate and Family Court, with construction of an elevator to all floors of this facility to commence on or before May 31, 2004.
- 2.) Until the new entrance and elevator are constructed by the Defendants, appropriate signage will be installed directing people to the accessible entrance at the Taunton Superior Courthouse and explaining how to make telephone contact with the ADA coordinator for the Taunton Probate and Family Court. [Upon execution of the Settlement Agreement]
- 3.) Until the new entrance and elevator are constructed by the Defendants, any individual who cannot directly or personally access programs or services provided in the Taunton Probate and Family Courthouse will be assisted by a court officer in making contact with the Probate Court's ADA coordinator, who will make the necessary arrangements for services to be provided at the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]

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4.) Until the new entrance and elevator are constructed by the Defendants, court proceedings will be scheduled in the first floor Juvenile Court courtroom (or the second floor courtroom in the Superior Courthouse once the elevator has been installed) whenever necessary to accommodate attorneys, parties, or witnesses with mobility impairments. [Upon execution of the Settlement Agreement]

5.) Until the new entrance and elevator are constructed by the Defendants, individuals with mobility impairments who need to access the family service office (Probation Department) will be provided with those services in the designated room on the first floor of the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]

6.) Until the new entrance and elevator are constructed by the Defendants, individuals with mobility impairments who need to access the Registrar of Probate's offices, the civil or criminal Clerk's offices, or the Small Claims Department offices will be provided with the services that they require in the designated room on the first floor of the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]

7.) Until the new entrance and elevator are constructed by the Defendants, a notice stating that individuals with disabilities needing accommodation should call the ADA coordinator will be printed on every envelope that is used by the Registrar of Probate to send any written material from that office. In addition, the notice will be posted on the appropriate Trial Court web site, and will be placed on the courthouse's automated telephone system. [Upon execution of the Settlement Agreement]

8.) Until the new entrance and elevator are constructed by the Defendants, if an individual with a mobility impairment chooses or is required to attend a court proceeding at the Taunton Probate and Family Court, that proceeding will be scheduled to be held in the first floor Juvenile Court courtroom at the Taunton Superior Courthouse (or the second floor courtroom in that courthouse once the elevator is installed), provided that at least 48 hours' advance notice has been given to the ADA coordinator requesting such an accommodation. [Upon execution of the Settlement Agreement]

9.) Where a participant in the court proceeding (party, attorney, witness) has not provided 48 hours' notice, and if the first floor Juvenile Court courtroom (or the second floor courtroom in the Taunton Superior Courthouse once the elevator is installed) is not available, the proceeding will be rescheduled until a date when it can be conducted in an accessible court room at the Taunton Superior Courthouse. [Upon execution of the Settlement Agreement]

10.) An accessible public telephone and TTY device will be installed on the first floor of this courthouse. [Upon execution of the Settlement Agreement]

11.) Once the new entrance and elevator are constructed by the Defendants, the Commonwealth will make the courtroom, clerk's office, and Registrar of Probate office accessible. [Within 60 days of the date the elevator becomes operational]

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#### Appendix G

1. The County will design and construct a ramp to provide access to the Fall River Registry of Deeds, construction to commence no later than April 30, 2004.

2. The County, in conjunction with DCAM, will design and construct an elevator in the Taunton Registry of Deeds with construction to commence on or before May 31, 2004.

3. The County will install an elevator in the New Bedford Registry of Deeds, with construction to commence on or before August 31, 2004.

4. The elevators and ramps referred to in paragraphs 1, 2, 3 shall comply with the standards set forth in 28 CFR Part 36, App. A.

5. The County will guarantee the continuous existence of a temporary ramp leading to the front entrance of the Taunton Superior Court courthouse until such time as the long-term ramp called for in Appendix D, item no. 1, is installed. Upon execution of the Settlement Agreement, the County will install appropriate temporary signage directing people to this accessible entrance.

6. On or before the date the elevator or ramp in a Registry building is completed, the County will make the following additional structural changes: construct accessible bathrooms in each Registry; install accessible drinking fountains and telephones; make available a TTY telephone; install signage that is accessible to individuals with disabilities; install visual alarms; and install accessible parking. Such work will be done in conformance with the standards set out in 28 CFR Pt. 36, App. A 4.6; 4.15 -26; 4.28; 4.29-31.

7. In consultation with Commonwealth officials, the County will designate and provide accessible parking spaces restricted to persons with disabilities in appropriate locations near the entrances to the Taunton, Fall River, and New Bedford Superior Court courthouses and the Taunton, Fall River, and New Bedford Registries of Deeds. [February 2004]

8. Upon execution of the Settlement Agreement, the County will institute procedures that will make the services of

the Registries accessible to and usable by individuals with disabilities, and continue the use of these procedures until structural changes are completed that will enable individuals with disabilities to enter the buildings.

- A. The Registries will promptly post notices on their web-sites, inside the Registry, and outside the Registry, at or near the foot of the steps, notifying individuals that services are available to individuals with disabilities. The notices will contain, at a minimum, the information set forth in Exhibit 1, attached hereto.
- B. The Registries will provide "curb-side service" for filing documents by meeting an individual with a mobility impairment outside the building, and filing the document while the individual waits. Each Registry will establish procedures for the individual with a disability to contact a clerk. The clerk will initiate service within 10 minutes of arrival and will place the request in the queue for services.
- C. The Registries will permit individuals with mobility impairments who are prevented by the physical barriers from getting into the Registry of Deeds, to have access to the on-line search services at no cost.
- D. The Registries will continue their current practices of providing certain services, such as document retrieval in response to requests received via internet, telephone, fax and mail; readers for visually impaired users; and assistance in carrying or reaching documents.
- E. The Registries will retain at least three professionals, at rates that are mutually acceptable, who will be available to perform title searches, partial title searches and other searches and rundowns for qualified individuals with disabilities. It is understood that the user will select the professional, and that the professional will seek payment from the Registry. This paragraph is not intended to cover individuals with mobility impairments whose main occupation is to perform title searches.
- F. The Registry may charge copying fees for documents at the same cost per page that individuals pay for making their own copies. The Registry will not charge individuals with mobility impairments, who are unable to gain access to the building, for providing documents via facsimile or mail.
- G. The parties may review these procedures six months from the date the Agreement is executed, and from time to time, as necessary.

9. Any individual who self-identifies as a person with a mobility impairment who cannot climb stairs to access a Registry, will be assumed to be an individual with a disability entitled to the services described herein.

10. Each Registry will appoint an ADA coordinator who will, in conjunction with the Registrar of Deeds, have overall responsibility to implement the new procedures, train staff about the procedures and their obligations to provide services to individuals with disabilities, and who, along with the rest of the staff, can answer questions from the public. All staff at each Registry will be fully trained in the services that are provided to individuals with disabilities, so that they can respond to inquiries from the public. [Upon execution of the Settlement Agreement]

11. Registry staff will continue to provide services, such as locating documents; transporting volumes; and copying documents, in order to assist individuals with disabilities.

12. Each Registry will maintain records of any communications it receives regarding the procedures described herein, or implementation of the procedures. Every six months, for a period of three years from the date this Agreement is executed, they will provide these documents to the United States and private plaintiffs in order that they can review the effectiveness of the procedures.

#### NOTICE TO INDIVIDUALS WITH A DISABILITY [Exhibit 1]

The \_\_\_\_\_ Registry of Deeds is not physically accessible to individuals with mobility impairments. In accordance with the requirements of title II of the Americans with Disabilities Act [ADA], the Registry will make alternative arrangements so that you will have access to the documents you wish to review or services you require.

- We can provide documents and services to individuals who contact us by telephone or by e-mail.
- We can assist you in locating and accessing documents.
- We can meet you outside the building to receive documents for filing
- If you have access to a computer, we will show you how some or all of your search for land records can be conducted on-line, and help you to access our on-line services.
- Services will be provided for certain title searches for users who are unable to get into the building.
- The Registry will not impose a surcharge to cover the costs for accommodations provided to individuals with a disability.

Any individual with a disability who requires an accommodation, as described in this Notice, or other assistance, should contact the \_\_\_\_\_ Registry of Deeds at 508-\_\_\_\_\_. If you are dissatisfied with our services, or believe we can do better, please contact \_\_\_\_\_, the Registrar of Deeds for \_\_\_\_\_.

## **MASSACHUSETTS CONSTITUTION**

### **Part 1, Art. XI**

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

## **MASSACHUSETTS STATUTES**

### **G.L. c. 211 § 3. Superintendence of inferior courts; power to issue writs and process**

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary

circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent such action, there would be a severe and adverse impact on the administration of justice in the commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

**G.L. c. 123, § 19. Parties or witnesses; determination of mental condition**

In order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department to assign a qualified physician or psychologist, who, if assigned shall make such examinations as the judge may deem necessary.

**G.L. c. 190B § 5-101**

As used in parts 1 to 4, inclusive, of this article:

[Subsections (1)-(8) omitted.]

(9) "Incapacitated person", an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

**G.L. c. 233, § 23E (b) (1)**

[Subsection (a) omitted]

(b) (1) In any judicial proceeding in which a witness with mental retardation will testify, the court, on its own motion or on motion of the proponent of the witness with mental retardation and after hearing on the witness's competency to testify, may order the use of alternative procedures for taking testimony of the witness with mental retardation; provided, however, that the court finds at the

time of the order, by clear and convincing evidence in the case of a criminal proceeding, and by a preponderance of the evidence in the case of a noncriminal proceeding, that the witness with mental retardation is likely, as a result of submitting to usual procedures for determining competency or as a result of testifying in open court, as the case may be, (i) to suffer severe psychological or emotional trauma; or (ii) to suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities, such that his ability to testify will be significantly impaired. If the court so finds, the court may order the use of alternative procedures for determining competency to testify or for taking testimony of the witness with mental retardation including, but not limited to, the following:

(i) permitting a person familiar to the witness, such as a family member, clinician, counselor, social worker or friend, to sit near or next to such witness;

(ii) permitting the witness with mental retardation to testify in court but off the witness stand; provided, however, that if the proceeding is a bench proceeding, testimony may be taken at another location within the courthouse but outside the courtroom; and, provided further, that if the proceeding is a jury trial, testimony may be taken on videotape out of the presence of the jury or in a location chosen by the court or by agreement of the parties; or

(iii) combining alternative procedures provided in clauses (i) and (ii).

[Section (c) omitted.]

## MASSACHUSETTS COURT RULES

### Mass. R. Civ. P. 43(f)

The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

### Mass. R. Crim. P. 41

The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor.

## MASSACHUSETTS GUIDE TO EVIDENCE

### Mass. G. Evid. § 601 (2008-2009) Competency

(a) Generally. Every person is competent to be a witness, except as otherwise provided by statute or other provisions of the Massachusetts common law of evidence.

(b) Rulings. A person is competent to be a witness if he or she has

(1) the general ability or capacity to observe, remember, and give expression to that which he or she has seen, heard, or experienced, and

(2) an understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter, and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.

(c) Preliminary Questions. While the competency of a witness is a preliminary question of fact for the judge, questions of witness credibility are to be resolved by the trier of fact.

## UNITED STATES CONSTITUTION

### Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## UNITED STATES STATUTES

### 29 U.S.C. § 794 ("Section 504")

Nondiscrimination under Federal grants and programs

#### (a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

#### (b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of-

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;

or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship;

or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

**42 U.S.C. § 12101(2) (Americans with Disabilities Act)**

The term "disability" means, with respect to an individual-

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

**FEDERAL REGULATIONS**

**28 C.F.R. § 35.160**

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

**28 C.F.R. § 35.164**

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens,

a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

**COURT RULES & OTHER MATERIALS - STATES OTHER THAN MASSACHUSETTS**

**OREGON UNIFORM TRIAL COURT RULES 7.060**

**AMERICANS WITH DISABILITIES ACT (ADA) ACCOMMODATION**

(1) If special accommodation under the ADA is needed for an individual in a court proceeding, the party needing accommodation for the individual must notify the court in the manner required by the court as soon as possible, but no later than four judicial days in advance of the proceeding. For good cause shown, the court may waive the four-day advance notice.

(2) Notification to the court must provide:

- (a) the name of the person needing accommodation;
- (b) the case number;
- (c) charges (if applicable);
- (d) the nature of the proceeding;
- (e) the person's status in the proceeding;
- (f) the time, date, and estimated length of the proceeding;
- (g) the type of disability needing accommodation; and
- (h) the type of accommodation, interpreter, or auxiliary aid needed or preferred.

**MARYLAND RULES OF PROCEDURE (GENERAL) 1-332**

A person requesting an accommodation under the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq., for an attorney, a party, or a witness shall notify the court promptly. As far as practicable, a request for an

accommodation shall be (1) presented on a form approved by administrative order of the Court of Appeals and available from the clerk of the court and (2) submitted not less than 30 days before the proceeding for which the accommodation is requested.

**MARYLAND GUARDIANSHIP BENCHBOOK, 2001, COURT ACCESSIBILITY FOR SPECIAL POPULATIONS, MGB MD-CLE 77 AT 10.**

#### 4. Speech Disabilities

Measures that will improve access for persons with *speech* disabilities include the following:

- altering witness boxes so that they can accommodate assistive devices;
- eliminating sources of background noise and making appropriate changes to ensure good acoustics, so that the person's speech can be heard as clearly as possible;
- listening without interrupting for a while, until the person's particular voice pattern becomes familiar, and then asking the person to repeat what the person had said before;
- providing auxiliary aids that are appropriate to the person's specific needs and abilities, such as telecommunication devices for the deaf, or TDDs (formerly known as tele-typewriters, or TTYs), computer terminals, speech synthesizers, communication boards, and exchange of written notes.