

## **Providing Legal Services to People with Disabilities**

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April 2008

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1 Lana Kerzner, Barrister and Solicitor, ARCH Disability Law Centre. Research assistance was provided by Ruby Dhand, articling student at ARCH. ARCH Disability Law Centre is a community legal clinic funded primarily by Legal Aid Ontario. This article is a revision and update of a number of previous, similar articles written by ARCH, the first published in 1988. Because the concept of disability and relevant laws evolve over time, this article will always be a “work in progress.” ARCH welcomes comments and questions regarding the provision of legal services for clients with disabilities.

## 1. UNDERSTANDING, DEFINING, AND DESCRIBING DISABILITIES

### 1.1. General

“Disability” is a complex concept. While this paper provides basic information about disabilities and how disabilities are treated in law, the concept of disability, as well as relevant legislation and jurisprudence, are ever-evolving. A lawyer’s best assets in representing clients with disabilities are to keep an open mind and be willing to learn. When in doubt, lawyers should ask clients what living with a disability means for them.

### 1.2 Understanding Disability

Disabilities traditionally were regarded as being divisible into two categories: *physical* disabilities (e.g., paraplegia, blindness and deafness) and *mental* disabilities (e.g. schizophrenia and depression). It has more recently been understood that many disabilities have both a “physical” and a “mental” component, and that these components are not easily separated or differentiated. Some disabilities involve multiple components, such as physiological, psychological, cognitive, sensory, neurochemical, etc. For example, acquired brain injuries may affect both mobility and emotional functioning. Multiple sclerosis may affect memory as well as mobility.

Previously unrecognized disabilities are being identified and distinguished from others. For example, learning disabilities, chronic fatigue syndrome, chronic pain syndrome, fibromyalgia and environmental sensitivities have more recently been considered disabilities.

Some disabilities are highly visible while others may not be apparent from a person’s appearance. The Ontario Human Rights Commission refers to the latter disabilities as “non-evident”.<sup>2</sup> Examples of disabilities which may not be apparent include epilepsy, diabetes and acquired brain injuries.

It should be kept in mind that it is *individuals* who live with disabilities, and that limitations or symptoms commonly associated with a particular disability may not affect a particular person. For example, while it is possible for a person with cerebral palsy to have an intellectual limitation, this is not so for everyone who has cerebral palsy. Many, but not all, people with Down Syndrome have heart conditions. An adult with cystic fibrosis may use a wheelchair and a ventilator and have a limited life expectancy, or may have only mild difficulty in breathing. For this reason, the process of accommodation must be individualized, or tailored, to the particular person and his or her unique needs.

Additionally, when an individual is unable to do something in a certain way, it does not mean that he/she is unable to do the same thing in another way. A person who is blind cannot read in the same way as a sighted person but he/she may read using Braille and/or a computer with a screen reader. A person who is Deaf, deafened or hard of hearing often cannot communicate orally, but can speak using sign language. A person with an intellectual/developmental disability may not understand a written training manual

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<sup>2</sup> Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: OHRC, 2000) at 10 [*Guidelines on Disability*].

but may be able to learn a skill or grasp a concept through careful instruction, demonstration, and support.

### 1.3 Disability Models

A current understanding of the concept of “disability” has been articulated in the Preamble to the *Convention on the Rights of Persons with Disabilities* as follows:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>3</sup>

The Supreme Court of Canada has stated that disability should not be confined within a narrow definition. Rather, the Court stated that it is more appropriate to leave room for flexibility and propose a series of guidelines that will facilitate interpretation.<sup>4</sup> Thus, there are some fundamental principles about disability which are generally embraced by the disability community, and which have been accepted and articulated by recent Supreme Court of Canada jurisprudence. A broad multi-dimensional understanding of disability is the currently favoured approach.<sup>5</sup> This approach is often referred to as the social model of disability or the human rights model of disability. It has been accepted and articulated by Supreme Court of Canada jurisprudence<sup>6</sup> and in the United Nations *Convention on the Rights of Persons with Disabilities* (“*Convention*”).<sup>7</sup> It describes disability as the outcome of the interaction of the person and their environment.<sup>8</sup> This “social model” recognizes that it is society’s failure to accommodate the needs of people with disabilities which give rise to the ‘disabling disadvantage’ that people with disabilities encounter in their daily lives, not some inherent mental or physical condition.

The currently favoured approach, thus, views disability not merely as being the direct result of a health problem or any physical or mental limitation.<sup>9</sup> The older “medical

3 *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 76<sup>th</sup> plen. Mtg., U.N. Doc A/Res/61/106 [adopted by consensus at the UN on Dec. 13, 2006] [*Convention*]. Canada signed the Convention on March 30, 2007. The Convention comes into force on May 3, 2008.

4 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27 at para. 76 [*Mercier*].

5 Mont states that the “[m]edical model has recently been replaced by the social model of disability, which conceptualizes disability as arising from the interaction of a person’s functional status with the physical, cultural, and policy environments.” See Daniel Mont, “Measuring Disability Prevalance,” (March 2007) online: World Bank <<http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf>> at 2-3. See also Human Resources and Social Development Canada, *Advancing the Inclusion of People with Disabilities* (2006) (Ottawa: Social Development Canada, 2006) at 6 [*Advancing Inclusion*]; Arlene S. Kanter, “The Globalization of Disability Rights Law” (2003) 30 Syracuse J. In’l & Com. 241 at 247.

6 *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at paras. 29-30. [*Granovsky*].

7 *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, 76<sup>th</sup> plen. Mtg., U.N. Doc A/Res/61/106 (Dec. 13, 2006) [*Convention*].

8 “Measuring Disability Prevalance,” (March 2007) online: World Bank <<http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf>> at 2-3.

9 *Advancing Inclusion*, *supra* note 5 at 6.

model” understood and defined disability in terms of a physical or mental defect or sickness necessitating medical intervention. However, health problems alone do not prevent people from participating in society. Rather, it is the obstacles in the socio-economic and built environment that do.<sup>10</sup> The difference between the two models has been summarized succinctly as follows: “The medical model tries to adapt the individual to society whereas the social model tries to adapt society to the diversity of individuals that comprise it.”<sup>11</sup> It is important to note that there are other models and theoretical constructs of disability which may not embrace the social and medical models.<sup>12</sup>

As an illustration of the social model, consider as an example people who use wheelchairs. They are able to enter buildings, but when buildings are erected with steps in front of them, they become ‘disabled’ from entering. It is the existence of steps in this example that results in a limitation, or disablement.

People tend to think of barriers as simply physical or environmental; however, barriers manifest in many different forms, such as socially-created economic and legal barriers. These may be based upon policies, procedures, practices, and attitudes. For example, inflexibility with respect to hours of work and job descriptions may create barriers for people with wide ranges of disabilities. There may be a stereotype that an individual is unable to perform a task satisfactorily, or that the individual will take excessive time off work. Removal of this type of barrier creates “attitudinal accessibility.”

#### 1.4 Accommodating Disabilities: The Legal Concept of Accommodation

The widespread inaccessibility of physical, social, economic, and legal systems and the failure of these systems to accommodate people with disabilities to ensure their full participation in society constitute a form of *systemic discrimination*. For people with disabilities “...the right to be free from discrimination is associated with a right to be accommodated short of undue hardship. A failure to accommodate will be considered to constitute discrimination on the basis of disability.”<sup>13</sup>

The duty to accommodate is one of the central concepts in human rights jurisprudence. “‘Accommodation’ refers to what is required in the circumstances to avoid discrimination.”<sup>14</sup> Facilitating the ability of people with disabilities to do things differently than others is called *accommodation*.<sup>15</sup>

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10 *Ibid.*

11 *Ibid.* at 74, citing Delcey, Michel. “Déficiences motrices et situation de handicaps” – ed. AFP-2002.

12 Marcia H. Rioux and Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights and Public Policy,” in Dianne Pothier and Richard Devlin eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2004) at 57.

13 Bill Holder, “Accommodation of Disability in Ontario” (July 2004) at 4, online: Arch Disability Law Centre <[http://www.archdisabilitylaw.ca/ARCH/liveaccess/documents/uploaded\\_file/02\\_accommodation.pdf](http://www.archdisabilitylaw.ca/ARCH/liveaccess/documents/uploaded_file/02_accommodation.pdf)>.

14 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para 22.

15 Holder, *supra* note 13 at 1.

The principles underlying the duty to accommodate include: respect for dignity, individualized accommodation and integration and full participation.<sup>16</sup>

The requirement for individualized accommodation has been articulated by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*<sup>17</sup> and in the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.<sup>18</sup> The Supreme Court has recognized that accommodation is a highly individualized process that must be responsive to individual needs and must be implemented on an individualized basis:

Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability.<sup>19</sup>

Section 3 below provides examples of how people with a wide range of disabilities can and should be accommodated in the legal system. A lawyer's duty to accommodate is discussed further at 2.3 below.

### **1.5 Prevalence of Disability in Canada: Most Lawyers will represent Clients with Disabilities**

According to Statistics Canada approximately 14% of Canadians report having some level of disability.<sup>20</sup> Additionally, the disability rate rapidly increases as age increases.<sup>21</sup> This means that most lawyers, regardless of the area of law they practice, will represent at least some clients who have disabilities or otherwise encounter issues of significance to people with disabilities. For example, you may represent a client who has a disability or an individual who provides financial and other supports to a person with a disability. It is therefore incumbent on each lawyer to be aware of legislation, jurisprudence, services and programs of significance to people with disabilities.

<sup>16</sup> *Guidelines on Disability*, supra note 2 at 12 to 14. Relevant cases include: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 22; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 at para. 54 [*Meiorin*].

<sup>17</sup> [2003] 2 S.C.R. 504, 2003 SCC 54 [*Martin*].

<sup>18</sup> *Guidelines on Disability*, supra note 2 at 13.

<sup>19</sup> *Martin*, supra note 17 at para. 81.

<sup>20</sup> Statistics Canada, "2006 Participation and Activity Limitation Survey: Disability in Canada," online: Statistics Canada <<http://www.statcan.ca/english/freepub/89-628-XIE/2007003/series5-en.htm>>.

<sup>21</sup> Statistics Canada, *A Profile of Disability in Canada, 2001* by Lucie Cossette & Édith Duclos (Ottawa: Minister of Industry, 2002) at 7-8 [PALS]. See also Human Resources Development Canada, *Disability in Canada: A 2001 Profile* (Gatineau: Queen's Printer, 2003).

When representing clients with disabilities it is useful, and may be necessary, to refer to the statistical profile of disability in Canada. The best national database on disability is Statistics Canada's Participation and Activity Limitation Survey ("PALS").<sup>22</sup> PALS is a 2006 survey conducted as a follow-up to the Census.

The following data have been extracted from PALS reports and provide a general picture of disability in Canada:

- 4,417,870 Canadians reported some level of disability
- the incidence of disability increases with age, from 3.7% of children under 15 to 43.4% of those over 65, to 56.3% of those over 75
- the disability rate is approximately 2% higher for women than men, with the exception of the under-15 age-range
- of Canadians with disabilities between the ages of 15 to 64, the three most reported disabilities were chronic pain, mobility related disabilities, and agility-related disabilities.
- more than half a million adult Canadians reported living with a psychological disability
- adults with disabilities are more likely to have multiple rather than single disabilities
- people with disabilities have employment rates approaching half that of other Canadians
- people with disabilities have significantly lower incomes than people without disabilities
- women with disabilities are more adversely affected with respect to employment and income than are men with disabilities, although both groups are significantly disadvantaged
- people with disabilities are about half as likely to have a university education as people without disabilities<sup>23</sup>

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<sup>22</sup> PALS, *supra* note 20.

<sup>23</sup> *Ibid.*

## 1.6 Appropriate Language and Terms Describing Disabilities

It has been stated that “[w]ords are a mirror of society’s attitudes and perceptions. Attitudes can be the most difficult barrier people with disabilities face in achieving full integration, acceptance and participation in society.”<sup>24</sup> It is therefore important that lawyers strive to use appropriate language when speaking with or about people with disabilities.

There are differing views regarding the appropriate use of language to refer to disabilities. Certain types of language are considered appropriate by government and disability organizations, and useful guidance may be obtained from their publications and websites. The federal government produces a guide titled “A Way with Words and Images” and the provincial government publishes a similar guide titled “Word Choices.”<sup>25</sup> Despite the advice contained in the guides of organizations and governments, individual people with disabilities and their families may have their own preferences.

Be aware that archaic or outdated terms may be found in older documents and among segments of the population not familiar with current thinking about disability. There are also cultural variances as to appropriate terminology.

See Appendix “A” for examples that can illustrate what language is, and is not, considered to enhance the dignity of people with disabilities.

## 1.7 Understanding of “Disability” in Jurisprudence and Legislation

There is no one legal definition in Canada either of disability in general or of specific disabilities. Indeed, the Supreme Court of Canada has stated that disability should not be confined within a narrow definition. Rather, the Court stated that it is more appropriate to leave room for flexibility and propose a series of guidelines that will facilitate interpretation.<sup>26</sup>

The Supreme Court of Canada has accepted a “social model” of disability, as distinguished from a “medical model”. See section 1.3 above. In *Mercier*<sup>27</sup>, Justice L’Heureux-Dubé writing for the Court made it clear that disability manifests not only as a physical limitation, but also as a social construct that must be interpreted broadly:

[b]y placing the emphasis on human dignity, respect and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a ‘handicap’[the term used in the Quebec statute at issue]. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes....Thus, a ‘handicap’ may be the result of a physical limitation, an

24 Canada, *A Way with Words and Images: Suggestions for the portrayal of persons with disabilities* (Ottawa: Queen’s Printer, 2003) at 1 [*A Way with Words and Images*].

25 *A Way with Words and Images*, *ibid.*; Accessibility Directorate of Ontario, *Word Choices: A lexicon of Preferred terms for disability issues* (Toronto: Ministry of Citizenship, 2002).

26 *Mercier*, *supra* note 4 at para. 76.

27 *Ibid.* at paras. 77 and 79.

ailment, a social construct, a perceived limitation or a combination of all of these factors.

The Supreme Court expanded upon this model in *Granovsky*,<sup>28</sup> stating that there are three aspects to disability: physical or mental impairments; functional limitations, whether real or perceived, and the “problematic response of society to th[e individual’s] condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed.”

Different statutes and regulations define disability in different ways depending on their purpose and intent. The *Canadian Charter of Rights and Freedoms*<sup>29</sup> (“*Charter*”) refers to “mental disability” and “physical disability” in section 15, but these terms are not defined in the *Charter*. The *Criminal Code*<sup>30</sup> also refers to “mental or physical disability” in several sections, but once again these terms are not defined.

In some pieces of Ontario legislation, disability has been defined using a broad approach. For example, both the *Accessibility for Ontarians with Disabilities Act, 2005*<sup>31</sup> and Ontario’s *Human Rights Code*<sup>32</sup> define disability as:

- a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- b) a condition of mental impairment or a developmental disability,
- c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- d) a mental disorder, or
- e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

In general, statutes and regulations tend to emphasize different aspects of disability. For example,

- human rights legislation typically defines disability very broadly, because the public policy intent is to prohibit, comprehensively, all forms of discrimination on the basis of disability, including perceived disability<sup>33</sup>

<sup>28</sup> *Granovsky*, *supra* note 6 at paras. 29-30.

<sup>29</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>30</sup> R.S.C. 1985, c. C-46.

<sup>31</sup> S.O. 2005, c. 11, s. 2 [AODA]

<sup>32</sup> R.S.O. 1990, c. H.19, s. 10(1) [*Human Rights Code*].

<sup>33</sup> See *Human Rights Code* (Ontario), *ibid.* s. 10(1), and *Canadian Human Rights Act*, R.S.C. 1985, c. H-

- disability income program legislation and guidelines may define disability narrowly, based on medical criteria, and/or may focus specifically on unemployability due to disability, and/or may look more broadly at a person's functional limitations in performing activities of daily living<sup>34</sup>
- disability income and support programs may permit or may prohibit the use of social and economic factors (e.g., age, education, literacy) in determining whether someone is 'disabled enough' to qualify<sup>35</sup>

Clients with disabilities may be surprised to learn that, for some purposes, the government does not consider them to have a disability. In each case, it is important to look closely at the statutes, regulations and guidelines, if such exist, and also at jurisprudence to determine how the legislated definition is actually applied in practice.

## 1.8 The United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities is a new treaty which will enter into force on May 3, 2008. This is a historic event in that the Convention is the first comprehensive international treaty to specifically protect the rights of the world's population of people with disabilities.<sup>36</sup> Its purpose is to "...promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."<sup>37</sup> It prohibits all discrimination on the basis of disability and requires that all appropriate steps be taken

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6, s. 25.

- 34 Under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, the definition of disability in section 42(2) is based on medical criteria, duration, as well as unemployability. According to the Canada Pension Plan Guideline entitled "Severe Criterion for the Prime Indicator (Medical Condition)," a person must first have a medical condition, and second, the medical condition must result in a severe and prolonged disability. The Guideline lists examples of medical conditions, including AIDS, cancer, muscular dystrophy, and Hodgkin's Disease.
- Under the Ontario Disability Support Program (ODSP) disability is defined for the purposes of receiving income support, as well as for the purposes of receiving employment support. The definition of disability for income support looks at a person's limitations in performing activities of daily living, as well as medical criteria: *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 4 [ODSPA]. Alternatively, the definition of disability for employment support (s. 32) looks at medical criteria and unemployability due to disability; however, a person who meets the definition of disability in s. 4 of the *ODSPA* may also be eligible for employment support in s. 32. See also: ODSP Income Support Directive 1.2 "Disability Adjudication Process" (November 2006); and ODSP Employment Support Directive 2.1 "Program Eligibility" (September 2006).
- 35 Generally, the Ontario Disability Support Program permits the use of social and economic factors in determining whether someone is 'disabled enough' to qualify; whereas, the Canada Pension Plan Disability prohibits the use of social and economic factors. See: ODSP Income Support Directive 1.2, *supra*; Canada Pension Plan Guideline, "Personal Characteristics and Socio-Economic Factors"; *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47; and *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140.
- 36 Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities," (2006) 34 *Syracuse J. Int'l L. & Com.* 287 at 288.
- 37 Secretary General, Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 1, delivered to the General Assembly, U.N. Doc. A/61/611 (Dec. 6, 2006) [hereinafter Final Report].

to ensure reasonable accommodation.<sup>38</sup> It also provides several rights for people with disabilities, including rights relating to employment, education, health services, transportation, access to justice, accessibility to the physical environment and abuse.<sup>39</sup> The Convention calls on participating governments to change their country's laws, as necessary, to comply with its terms.<sup>40</sup>

As of April 15, 2008, Canada had signed the Convention but not ratified it. Canada is therefore not legally bound to implement the Convention unless it ratifies it.<sup>41</sup> Nonetheless, laws in Canada, including the *Canadian Charter of Rights and Freedoms* and human rights legislation, such as Ontario's *Human Rights Code*, the *Canadian Human Rights Act*, and the *Accessibility for Ontarians with Disabilities Act*, already address several of the rights articulated in the Convention. Even so, making use of the Convention could strengthen and support legal arguments advanced for clients with disabilities in Ontario. It is a potentially important tool for lawyers to use when representing clients with disabilities. Thus far, it remains to be seen how powerful it will be as it raises the issue of the applicability of international law in Canada. In this regard, reference should be made to the Supreme Court of Canada's decision in *Baker v. Canada*,<sup>42</sup> relating to the role of international instruments in Canada. In *Baker*, L'Heureux-Dubé, J. stated that "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute."<sup>43</sup> She went on to say that "[n]evertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."<sup>44</sup>

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38 *Convention*, *supra* note 5, article 5.

39 These are only some of the rights articulated in the Convention. Reference should be made to the text of the Convention relating to its scope and coverage. See 34 Syracuse J. Int'l L. & Com. 287 (2006-2007). This special issue of the Syracuse Law Journal contains articles discussing the significance of the Convention and its implications.

40 Kanter, *supra* note 36 at 289.

41 However, "...by signing the Convention or Optional Protocol, States ... indicate their intention to be bound by the Treaty at a later date. Signing also creates an obligation, in the period between signing and ratification or consent to be bound, to refrain from acts that would defeat the object and purpose of the treaty" cited in United Nations, "Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality, Realizing the rights of persons with disabilities" Ch. 4: Becoming a Party to the Convention and the Optional Protocol, online: < <http://www.un.org/disabilities/default.asp?navid=37&pid=34>>.

42 [1999] 2 S.C.R. 817, 174 D.L.R. (4<sup>th</sup>) 193 [*Baker*]. Note that *Baker* considered the *Convention on the Rights of the Child* U.N. Doc. A/Res/44/25 (1989), 1992 Can. T.S. No. 3 [CRC], a convention that had been ratified by Canada.

43 *Baker*, *ibid.* at para 69.

44 *Ibid.* at para 70. A number of academics have written on the role of international law in Canada. For instance, reference should be made to Gibran van Ert, *Using International Law in Canadian Courts*, (New York: 2002, Kluwer Law International, 2002); Hugh M. Kindred et al., eds., *International Law Chiefly as Interpreted and Applied in Canada* 6th ed. (Toronto: 2000, Emond Montgomery, 2000); WA Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar. Rev. 174; Anne Warner La Forest, "Domestic Application of International Law in Charter Cases: Are We There Yet?" (2004) 37 U.B.C. L. Rev. 157; Joanna Harrington, "Punting Terrorist, Assassins, and Other Undersirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48 McGill L.J. at 59.

## 1.9 The Accessibility for Ontarians with Disabilities Act, 2005

In 2005, the *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”)<sup>45</sup> became law. It applies to “...every person or organization in the public and private sectors of the Province of Ontario, including the Legislative Assembly of Ontario”.<sup>46</sup> Its stated purpose is to develop, implement and enforce standards for accessibility related to goods, services, facilities, accommodation, employment, buildings, structures and premises in Ontario. According to the statute, the goal of achieving accessibility is to be met by 2025.<sup>47</sup> It is important to remember that the AODA is complementary to Ontario’s *Human Rights Code* and that its existence does not remove any obligations under the *Code*.

The AODA applies to services provided by lawyers.<sup>48</sup> As well, lawyers may have to advise their clients on legal obligations relating to the AODA. As such, it is essential that lawyers are familiar with the Act and any standards pursuant to it.

The AODA requires the development of accessibility standards, which will eventually become regulations under the AODA. These standards are to address the identification and removal of barriers and set out a timeframe for meeting these requirements. There may be penalties for not complying with the standards. The Accessibility Directorate of Ontario is responsible for the administration of the AODA. For information on the status of the development of standards view the following link:

<http://www.mcass.gov.on.ca/mcass/english/pillars/accessibilityOntario/>

On January 1, 2008, the first accessibility standard under the AODA, the Customer Service Standard<sup>49</sup> came into effect. The standard applies to designated public sector organizations and every other person or organization that has more than one employee and provides goods or services to members of the public in Ontario. It sets out requirements for making the provision of goods and services more accessible to people with disabilities. Public sector organizations must comply with the standard by January 1, 2010 and private businesses, non-profit organizations and other service providers (including law firms), must comply by January 1, 2012.

Under the standard, public sector organizations and businesses with more than one employee must:

- Establish policies and practices on providing services to people with disabilities<sup>50</sup>
- Take reasonable efforts to ensure that policies are consistent with the principles of dignity, independence, integration and equality of opportunity<sup>51</sup>

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45 AODA, *supra* note 31.

46 *Ibid.* s. 4.

47 *Ibid.*, s. 1

48 *Ibid.*, s. 4

49 O. Reg. 429/07

50 *Ibid.*, s. 3(1)

51 *Ibid.*, s. 3(2)

- Train staff on interacting and communicating with people with various types of disabilities<sup>52</sup>
- Allow service animals to enter the business or organization’s premises<sup>53</sup>
- Permit support people to accompany people with disabilities into the business or organization’s premises<sup>54</sup>
- Provide documents that are required by the Regulation in accessible formats.<sup>55</sup> For example, the Regulation requires public sector organizations and other providers of goods or services that have at least 20 employees in Ontario to prepare documents describing policies on providing services to people with disabilities.
- Establish a process for people to provide feedback and complaints regarding the manner in which the business or organization provides goods or services to people with disabilities<sup>56</sup>

These are just some of the obligations set out in the standard. There are additional requirements that public sector organizations and organizations with more than one employee must fulfill as well as requirements that apply only to public sector organizations and organizations with at least 20 employees.

The AODA sets out the mechanisms by which the accessibility standards will be complied with. Each person or organization to whom an accessibility standard applies is required to file an annual accessibility report with a director who is appointed under the Act. These reports must be publicly available.<sup>57</sup> With respect to the Customer Service Standard, Regulation 430/07 creates an exemption from reporting for some organizations. Only designated public sector organizations and other providers of goods and services that have more than 20 employees are required to file accessibility reports.<sup>58</sup> The AODA also requires the appointment of inspectors who have powers of entry and investigation. Directors appointed under the Act may order people or organizations to comply with an accessibility standard, file an accessibility report or pay an administrative penalty for contravening a standard.<sup>59</sup>

## **2. THE RULES OF PROFESSIONAL CONDUCT AND CLIENTS WITH DISABILITIES**

### **2.1 General**

The Law Society of Upper Canada’s *Rules of Professional Conduct* (“Rules”) contain two important references to disability. These are the Rule relating to clients under a disability

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52 *Ibid.*, s. 6

53 *Ibid.*, ss. 4(2), 4(3)

54 *Ibid.*, s. 4(4)

55 *Ibid.*, s. 9

56 *Ibid.*, s. 7

57 AODA, *supra* note 31, s. 14.

58 O. Reg. 430/07, s. 1(1).

59 AODA, *supra* note 31, s. 21(3).

(Rule 2.02(6)) and the Rules relating to discrimination (Rule 5.04 and Rule 1.03(1)(b)). It is essential to be aware of and follow these rules when serving clients with disabilities or clients who have a family member with a disability.

## 2.2 “Client Under a Disability” and Mental Capacity

The Rule of Professional Conduct that relates most specifically to clients who have disabilities is Rule 2.02(6), “Client Under a Disability.” It should be read in conjunction with Rule 5.04 relating to discrimination and Rule 3.01 relating to making legal services available.

When representing clients with disabilities, lawyers must follow three main requirements that arise from these rules. Firstly, when a client has a disability, or their ability to make decisions is impaired, the lawyer must maintain a normal lawyer and client relationship.<sup>60</sup> Secondly, a lawyer and client relationship requires that a client have legal capacity to give instructions.<sup>61</sup> This requirement also arises because the relationship of a lawyer to his/her client is one of agent to principal.<sup>62</sup> A valid relationship of agency requires that the principal have the requisite mental capacity to engage in the relationship.<sup>63</sup> Thirdly, when a client does not have legal capacity to manage his/her legal affairs, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.<sup>64</sup>

Most clients, including those who have disabilities, have the mental ability to instruct counsel. However, lawyers agonize over those infrequent situations when a client’s mental ability is such that they are not sure if the client has mental capacity to instruct. As lawyers are precluded from acting on behalf of an incapable client, they are necessarily under an obligation to assess their client’s capacity to instruct. In this context, mental capacity is a legal determination, not a clinical assessment.<sup>65</sup> However, lawyers are not trained to undertake this task, and the rules do not specify how this is to be done.

In sorting out these situations it is important to remember that the lawyer and client relationship is founded on the principle of autonomy. The lawyer’s obligation is to respect the client’s right to make decisions wherever possible. Clients are entitled to make decisions that we believe may be foolish, unwise or risky, as long as they are competently made.<sup>66</sup>

Further, one should never presume that because someone has a disability he/she is necessarily incapable to instruct. There is no reason to believe that a person who is unable to speak, for example, is not mentally capable.

Lawyers are required to look at the capacity of the client to “make decisions about his or her legal affairs”.<sup>67</sup> Thus the requisite level of mental capacity depends on the specific situation. Courts have recognized varying levels of mental capacity. A person may be

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60 Rule 2.02(6).

61 Commentary to Rule 2.02(6).

62 *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532 at 534 (Ont. C.A.).

63 *Godelie v. Pauli (Committee of)*, [1990] O.J. No. 1207 at 5 (Dist. Ct.).

64 Commentary to Rule 2.02(6).

mentally capable of making a basic decision and not capable of making a complex decision.<sup>68</sup> For example, a client with a developmental/intellectual disability may have the mental ability to instruct you to find a remedy relating to poor treatment she receives in a group home but may not understand the information necessary to instruct you to make a will.

If a client's mental capacity is an issue, a lawyer should document how any decision regarding his/her mental capacity was made, and on what basis it was made.

Lawyers should not decline to represent a client only because they are unsure if he/she is mentally capable. While lawyers do have a general right to decline a particular representation, the Commentary to Rule 3.01 states that this right must be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.

For more guidance on the issue of mental capacity to instruct counsel, reference may be made to a paper by Phyllis Gordon, "Notes on Capacity to Instruct Counsel".<sup>69</sup>

### 2.3 Discrimination and Accommodation

Discrimination is addressed in Rule 5.04, which states that "[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the ground of ... disability with respect to professional dealings with other members of the profession or any other person." The Commentary to the Rule states that it is to be interpreted according to the provisions of the Ontario *Human Rights Code* and related case law.

Rule 1.03(1)(b) reinforces this requirement stating that "a lawyer has special responsibilities ... including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario."

Ontario's *Human Rights Code* provides that people with disabilities have a right to be free from discrimination because of their disabilities with respect to services. Like all other services in Ontario, legal services are subject to the provisions of the *Human Rights Code*. Lawyers and law firms have a legal obligation to ensure that services are offered that are accessible to people with disabilities and do not discriminate. The obligation to not discriminate includes an obligation to accommodate people with disabilities, up to the point of undue hardship.

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65 Judith Wahl "Capacity and Capacity Assessment in Ontario" (Paper prepared for the CBA Elderlaw Programme, March 2006) at page 5, online: <[http://practicepro.ca/practice/PDF/Backup\\_Capacity.pdf](http://practicepro.ca/practice/PDF/Backup_Capacity.pdf)>.

66 *Starson v. Swayze*, [2003] S.C.R. 722, 2003 SCC 32, at para 76.

67 Commentary to Rule 2.02(6).

68 *Calvert (Litigation guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Gen. Div.), and *Torok v. Toronto Transit Commission*, [2007] O.J. No. 1773 (Ont. Sup. Ct. J.).

69 Phyllis Gordon, "Notes on Capacity to Instruct Counsel," online: ARCH Disability Law Centre <[http://www.archdisabilitylaw.ca/ARCH/liveaccess/documents/uploaded\\_file/01\\_capacity\(2\).pdf](http://www.archdisabilitylaw.ca/ARCH/liveaccess/documents/uploaded_file/01_capacity(2).pdf)>.

The Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*<sup>70</sup> sets out in detail the views of the Commission regarding accommodation for people with disabilities. While not legislation, the Guidelines are an essential starting point for understanding the duty to make appropriate accommodations, short of undue hardship, for people with disabilities. The Guidelines do not contain a formula for determining which accommodations must be provided. Accommodation is an individualized process, and will require different solutions in different cases depending upon the specific client.

It is important to emphasize that since lawyers are obligated to provide accommodations, the costs of accommodations must be borne by lawyers. Expenditures on accommodations (e.g. sign language interpreters) are not disbursements that may be charged back to clients.

Some accommodation measures entail no costs and are accomplished by changes to law firm policies. For instance, broad policies prohibiting all animals from offices have the effect of preventing access to people with guide dogs or other service animals. An amendment to such a policy, to exempt disability-related service animals from the application of the policy, would cost nothing at all.

### **3. GENERAL INFORMATION REGARDING DISABILITIES AND PRACTICAL CONSIDERATIONS FOR ACCOMMODATING CLIENTS**

#### **3.1 General**

Too often, people with disabilities report that lawyers refuse to consider representing them because of their unfamiliarity with the person's particular disability. For example, someone who has a speech-related disability may find his/her call to a law office inappropriately 'screened out' by the receptionist. It is hoped that this section of the paper will provide information which will increase a lawyer's comfort level with representing clients with disabilities. In this regard, recall that lawyers are obliged to respect the requirements of human rights laws, including Ontario's *Human Rights Code*.<sup>71</sup> The Rules further state that "[A] lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule."<sup>72</sup> Lawyers must therefore not deny services on the ground that an individual has a disability.

It is important to remember that each person who has a disability is a unique individual. While disabilities are often categorized into types, each person with a disability experiences it differently. Additionally, many people have more than one disability. We have included the information in this section to provide lawyers with information and guidance that might assist them in representing their clients with disabilities and ensuring that they receive the accommodations they need. However, the best source of information about your client's disability and accommodation needs is from him/her directly. It is often helpful to ask your clients about how disability affects them. Disability organizations can also provide useful information about specific disabilities.

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<sup>70</sup> *Supra* note 8.

<sup>71</sup> Rule 5.04(1).

<sup>72</sup> Rule 5.04(2).

Some clients with disabilities may require certain accommodations. Ask clients what, if any, accommodations are required or would be helpful. Clients with accommodation needs will appreciate such a question at the start of an interview. They can address, for instance, whether the seating arrangements and environment will permit effective communication with the lawyer, when would be an appropriate time to take a break, and so on. If it is anticipated that there may be a number of accommodation needs, then the lawyer may canvass and address these in advance of the meeting. Lawyers may want to develop a checklist for this purpose.

Time considerations are important for many clients with disabilities. Care must be taken to develop a realistic time-line for case preparation. A very tight timetable can cause problems. Clients with disabilities may use accessible transit services that, because of limited availability, require pre-booking before the date of a meeting. Clients with disabilities may need longer or more frequent breaks than usual to go to the washroom or take medication. A client with a cognitive or emotional disability may require more time to consider options and make a decision. An interview conducted using a sign language interpreter can be very time consuming and must be arranged well in advance.

As with other clients, the lawyer should discuss all aspects of cases fully and frankly with clients who have disabilities. It is essential that clients be questioned about all relevant aspects of their cases, even if the questions may be difficult for the clients.

It is also essential to make sure that clients whose disability affects their mental capacity understand the lawyer's advice. Some techniques which may be useful to assist with communication are as follows:

- use plain and clear language
- ask clients to explain their understanding of what the lawyer has said using their own words or their own alternative means of communication
- encourage clients to ask questions of the lawyer
- encourage clients to tell the lawyer everything that may be relevant, while suggesting what information would be of most use to the lawyer

Ask clients what meeting place is best for them. Some clients with disabilities may require home visits because their disability makes it difficult for them to leave their homes. For example, clients with chronic pain may find that travel exacerbates their pain, and clients with Multiple Chemical Sensitivity may react adversely to a number of substances in a lawyer's office environment. Visiting clients in their homes will afford them with the accommodation they need. However, some clients with disabilities prefer the confidential setting of the lawyer's office for a meeting. Some people with disabilities live in places which do not afford complete privacy, such as group homes, hospitals and supportive housing. Meeting in their place of residence may raise suspicions of other residents and staff and unintentionally divulge confidences.

As has been indicated, there is no one formula for providing accommodation. Lawyers are advised to ensure that their offices are barrier-free and to ask clients what accommodations, if any, are needed. Lawyers are further advised to educate themselves

with respect to specific disabilities and common accommodations associated with such disabilities. Lawyers can do this, for example, by accessing information provided by organizations that provide services for people with particular disabilities. Lawyers can also learn by visiting the websites, some addresses for which are listed in section 4 below, of disability organizations and government agencies.

What follows is a brief description of some accommodation issues and measures that pertain to some generally-classed disabilities. The information is provided to illustrate what accommodation can entail in some, selected, circumstances.

### **3.2 Hearing Disabilities**

For clients with hearing disabilities, it will be necessary for lawyers to consider accommodation measures that pertain to facilitating communication between themselves and their clients.

A teletypewriter (TTY), also known as a text telephone, is an important aid for communication, in written format, over telephone lines. This small machine has a typewriter keyboard, an electronic display, and an attached roll of print-out tape. Users place standard telephone headsets into cradles on the machine and type messages to receiving parties. The message is transmitted to a TTY on the other end, which also has a real-time electronic display, and may also generate a printed copy of the conversation. The other party sees the message on their own screen (and on a print-out) and types back. Using a TTY is similar to using chat technology over the internet.

Communicating via a TTY can, unfortunately, be time-consuming (depending upon the typing skills of interlocutors). However, one benefit for lawyers is that exact records of conversations, including instructions, are created by the resultant print-outs.

Some individuals who are Deaf, deafened or hard of hearing, before the development of an oral language, may have a first language that is gestural (the most commonly-used gestural language in Ontario is American Sign Language). They may therefore have difficulty expressing themselves in written English and/or French since these languages are, for them, second languages. Such clients may find it difficult to communicate problems, concepts, and even basic questions through a TTY. In such circumstances, it is preferable to meet in person in the presence of a qualified interpreter.

Bell Canada offers a service known as the Bell Relay Service, in which an operator will relay messages between people using regular telephones and people using TTY machines. For lawyers who have not yet purchased TTY machines, this is a useful service. Bell Relay operators observe a strict code of privacy for calls.

The Bell Relay Service is accessed by calling the following special national access numbers:

TTY            711 or 1 800 267-6511

Voice         1 800 855-0511

There is no charge for local calls. Regular long distance charges apply to voice-initiated calls, but there is a 50% discount for TTY-initiated calls.

For some people who are hard of hearing, the preferred accommodation is through assistive listening systems. Such technology can render oral spoken communication at meetings, courts, and tribunals accessible through wireless sound transmission. With this technology, people who are hard of hearing wear wireless receivers while speakers use microphones. A transmitter converts the sound into infrared or FM signals which are beamed to those wearing receivers, whereupon the signals are converted back into sound.

Another accommodation measure for people with hearing disabilities is written captioning. Meetings, for instance, can be made accessible to people with hearing disabilities (who have sufficient written language skills) by providing real-time captioning, a word-for-word transcription of oral communications projected onto a screen by a specially-trained stenographer. As with the TTY, an advantageous by-product of this form of accommodation is a written record of the event for which the captioning was provided. To locate companies that offer captioning services, look in the Yellow Pages under Transcription Services, or contact the local branch of the Canadian Hearing Society.

E-mail is often used by clients with hearing disabilities, who have computers and sufficient written language skills, to communicate just as it is used by hearing individuals. Chat on the internet is also used.

For many people who are Deaf, deafened or hard of hearing, the most important accommodation measure for lawyers to provide will be sign language interpretation. Ontario Interpreter Services (OIS) is a provincial organization that books qualified interpreters. It is provincially co-ordinated by the Canadian Hearing Society and the Ontario Association for the Deaf. Both groups are part of the OIS Advisory Council. The Council establishes the fees charged for interpreting services and maintains a registry of qualified interpreters throughout Ontario. An ethical code as well as a code of confidentiality binds qualified interpreters to act solely as a communication channel.

To arrange for an interpreter, the law firm must call their local Canadian Hearing Society office and ask to speak with the OIS staff person. Advance notice of at least two to three weeks is usually required to ensure that a request can be met, although it is possible that an interpreter may be made available on shorter notice. There is a chronic shortage of interpreters in Ontario. Few work full time and those who do are usually booked weeks, if not months, in advance.

For people who are deaf-blind, intervenors may be used to interpret in-person communication. Intervenors are individuals who assist people who are deaf-blind to communicate, for example, using a tactile form of language.

It is important to be aware of potential conflicts of interest if the interpreter or intervenor is a family member or care giver and the possibility that the interpreter or intervenor may try to influence the client. Lawyers must ensure that they are ascertaining the wishes of their client (*i.e.* the person with the disability).

For appearances before courts or tribunals, lawyers should contact the relevant registrar to make requests for the accommodation of their clients. For the purposes of a Deaf, deafened or hard of hearing client being a witness in a proceeding, for example, it may be necessary for both a sign language interpreter and a real-time captioner to be present. A sign language interpreter can communicate most of the dialogue that occurs in a legal proceeding, but a person who is Deaf, deafened or hard of hearing may require real-time captioning in addition to sign language interpretation. Through reference to real-time captioning, a person who is Deaf, deafened or hard of hearing can access oral concepts that were not translated by their interpreter and, furthermore, they can check to ensure that their interpreter is correctly rendering, orally, their evidence given through sign language.

Lawyers must remember Rule 4.06(8) of the Ontario *Rules of Civil Procedure*<sup>73</sup> when commissioning an affidavit for a client with a hearing disability who has limited proficiency in written English or French. The Rule requires the lawyer to certify that the affidavit was interpreted to the client by an interpreter who swore or affirmed to interpret the contents correctly.

### **3.3 Vision Disabilities**

For clients with vision disabilities, lawyers must ensure that written communications are provided in an accessible format.

For clients who have access to and are familiar with computers with specialized software, documents can be transmitted in electronic text format. The advantage of communicating electronically is that it permits individuals with different levels of vision to be able to convert documents into the specific formats that they prefer. For clients who have access to e-mail, this form of communication may be the easiest way to send advice and receive instructions.

Some clients who are blind may prefer documents (and business cards) in Braille. Braille is a system that permits people to read by running their fingers over a series of configurations of six raised dots. With technological change, use of Braille is becoming less common. For offices equipped with Braille printers, documents may be converted into Braille before being sent to clients who require documents in this format.

Some people who are blind prefer written materials to be read onto audio tapes as their main conduit to the “printed word.” Even for those fluent in Braille, tapes can be important because they are often easier and cheaper to prepare and transport than Braille materials.

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<sup>73</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Rules of Civil Procedure*].

Lawyers who receive written correspondence on behalf of clients who are blind can use scanning technology to convert such documents into text formats, ready for electronic transmission to their clients. For lawyers who lack scanning technology, it is important to orally or electronically (*i.e.*, through e-mail) advise clients of the contents of such correspondence, once received.

For appearances before courts or tribunals, lawyers should contact the relevant registrar and other parties to ask that certain accommodations be provided. For instance, a request can be made for evidence to be converted, in advance of a hearing, into an accessible format so that a client will be able to understand the evidence and instruct their lawyer accordingly during a hearing.

Lawyers should consider the applicability of Rule 4.06(7) of the *Rules of Civil Procedure* when commissioning an affidavit for a client who is blind.

### **3.4 Communication Disabilities**

A communication disability describes a restriction in a person's ability to speak in a manner that can be readily understood, which is associated with a physical or mental impairment. For people with communication disabilities, communication through electronic means may be advantageous for relaying day-to-day information.

Communicating with people who have communication disabilities can be time consuming. At in-person meetings, lawyers can accommodate people with communication disabilities by cooperatively using systems designed to augment or serve as alternatives to speech. People who have limited verbal skills may use one or more augmentative communication devices or systems. Augmentative communication systems make use of objects, pictures, graphic symbols (such as those depicted on communication boards), manual signs, finger spelling, or artificial voice outputs. The latter may be controlled by push-buttons, puffs of air, or even eyebrow wrinkles. People who have severe speech or language impairments often rely on gestures and facial expressions and body movements.

There are a number of augmentative communication systems available to people who are non-verbal. Blissymbolics, one example, is a graphic language often printed and presented on the surface of a tray, but sometimes in books and increasingly frequently on personal computers. Symbols accompanied by the equivalent word are written within squares. Symbols may have to be presented one at a time. Each can be pointed to and the client asked if it is the desired one, or a light can scan the symbols and be stopped at the desired one. Some people who use Blissymbolics have mastered a few thousand symbols and can express virtually any idea using them. In addition to Blissymbolics, other codes such as numbers, letters, or shapes can also represent phrases. To use the codes, both communication partners must know the codes or have a chart.

For people who use symbolic languages, a communication assistant who is familiar with the person's particular method of communication may be very important, especially when it comes to interpreting symbols that are newly generated from existing vocabulary. However, because communication assistants often are family members of, or provide

care to, the client, lawyers must be aware of potential conflicts of interest between the client and the assistant, and the possibility that the assistant may try to influence the client. It may be necessary to bring in a neutral communication assistant to ascertain the client's wishes.

### 3.5 Disabilities that Affect Mobility

For people with mobility disabilities, the primary form of accommodation that will be required of lawyers is the removal of physical and architectural barriers in law offices.

While Ontario's *Human Rights Code* provides that facilities must be made accessible to people with disabilities, no standards are set out for developers to follow. There are accessibility standards in the Ontario *Building Code Act, 1992* and its associated regulations,<sup>74</sup> but these apply only to new or renovated buildings. These standards are quite minimal in some respects. There are more comprehensive standards available from the Canadian Standards Association.

While the AODA<sup>75</sup> provides for the establishment of accessibility standards for buildings, no such standards currently exist. The National Building Code of Canada sets out accessibility standards. A new edition of this code appeared in 2005, with accessibility as a core objective.

Accessibility related to structural elements within a building is only part of the broader issue of access. There are potential barriers that are created by badly placed furniture, unsuitable floor coverings, and poor lighting. There are also potential barriers in the environment outside of buildings, including inaccessible sidewalks, inaccessible parking spaces, and uncleared snow and ice.

Transportation can be a major barrier to people who use mobility aids. It is important to check transportation arrangements carefully with clients who use specialized public transportation services such as Wheel-Trans (Toronto) or Para Transpo (Ottawa). For example, some services require three or four days, or sometimes weeks, of notice for ride bookings, and this has to be taken into account when planning client meetings. Unexpected emergency meetings may have to take place in the homes of people with mobility disabilities who rely upon public transit services.

It is important to ensure that appropriate (*i.e.*, accessible) parking spaces are available for clients who bring their own vehicle and that the entrance to the building is accessible. If someone else drives the client, then a safe and accessible drop-off area for the client, and a parking area for the person who drove them, is also required.

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<sup>74</sup> *Building Code Act, 1992*, S.O. 1992, c. 23, and O. Reg. 350/06.

<sup>75</sup> *Supra* note 31.

For appearances before courts or tribunals, lawyers should contact the relevant registrar to ensure that accessible rooms are booked for proceedings involving clients with mobility disabilities. Unfortunately, there are still many court houses with inaccessible rooms<sup>76</sup>

### **3.6 Mental Health/Psychiatric Disabilities<sup>77</sup>**

There are a broad range of mental health/psychiatric disabilities such as schizophrenia, depression, anxiety disorders and phobias. The type, intensity and effect varies from person to person and it can be episodic in that there may be times when they are not affected at all by their mental health problems. It is therefore important to avoid imposing stereotypical perceptions on clients who have mental health/psychiatric disabilities. Everyone experiences mental health problems differently. The focus should be on interacting with them as individuals.

The actions of a person with a mental health/psychiatric disability may seem hostile, antagonistic or bizarre. Do not be overly concerned by a sudden change in mood, speech pattern or volume, a burst of energy or anger, or an indecipherable communication. All of these may be aspects of the disability or side-effects of medication. Lawyers should inquire of clients as to any such side-effects, so that accommodation can be provided, both in a law office and in court. It is important to be respectful, patient, flexible and positive when interacting with people with mental health/psychiatric disabilities. Resist the tendency to focus on the person's behaviour and instead focus on the overall goal of the conversation.

People with mental health/psychiatric disabilities may occasionally have difficulty concentrating. If this is the case, consider breaking down tasks into manageable steps and arranging shorter meeting periods. Written instructions, reminders and clear communication can facilitate interactions and address memory loss and concentration concerns.

### **3.7 Intellectual/Developmental Disabilities**

There is some controversy about appropriate terminology in the context of intellectual/developmental disabilities. However, in current practice the two terms, "intellectual disability" and "developmental disability" are frequently used interchangeably.

In broad strokes, intellectual/developmental disabilities may (or may not) be accompanied by lower intelligence and/or deficiencies in adaptive functioning. Generally, they are

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<sup>76</sup> Report of the Disability Issues Committee, "Making Ontario's Courts Fully Accessible to Persons with Disabilities" online: Court of Appeal of Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/reports/accessiblecourts.htm>>

<sup>77</sup> There are several terms used to describe people with mental health problems and there has been long standing debate and no consensus on appropriate terminology. Other terms in use include: consumer/survivors, psychiatric survivors, psychiatric disability, mental disability and people with mental illness. However, it should be noted that "[m]any psychiatric system survivors are unwilling to see themselves as disabled" cited in Peter Bersford, "What have madness and psychiatric system survivors have to do with disability and disability studies?" (2000) 15.1 *Disability and Society* 167 at 169.

present from childhood, and can affect one's intellectual development and functional capacity in areas such as language, mobility, learning and self care.

The terms "mental retardation," "dumb" and "slow" were used in the past for this disability, but are now avoided because they carry such pejorative connotations. Lawyers can accommodate their clients with intellectual/developmental disabilities by ensuring that appropriate, dignity-enhancing language is used to describe the disabilities.

It is often assumed that individuals with intellectual/developmental disabilities are unable to instruct counsel by virtue of their disability. This assumption is not necessarily true. It is important that each person be assessed individually. See the discussion regarding capacity to instruct in Section 2.2 above .

Some people with intellectual/developmental disabilities are shy and easily intimidated, and they may not be aware of things in the common experience of others. Because of vulnerability and dependence on others they may be afraid to express their own ideas without support. This can result from the environment in which they have spent their lives. Many people with intellectual/developmental disabilities have led sheltered lives, either with their parents, in a group home, or increasingly rarely, in an institution. They may have been denied educational opportunities. They almost certainly have been denied social opportunities.

Clients with intellectual/developmental disabilities should be treated like others unless there is a compelling reason not to do so. Do not underestimate the capacities and potential of clients with intellectual/developmental disabilities. Most individuals with intellectual/developmental disabilities can communicate if they are given the opportunity. When talking with clients, lawyers should use clear and concise concepts and avoid complex sentences. Repetition and careful explanation are important. When something is *really important*, lawyers should say so explicitly to clients. Be alert to the possibility that clients may misinterpret jargon or technical terminology, while seeming to use it appropriately.

A client with an intellectual/developmental disability may benefit from the support of a person whom they know and trust (*e.g.*, a family member, friend, or an advocate) when they meet with lawyers. As with other clients with disabilities, it is important to find out from a client with an intellectual/developmental disability what accommodations are required.

### **3.8 Learning Disabilities**

A learning disability is defined as a neurological dysfunction that interferes with the brain's capacity to accurately store, process, or produce information, either spoken or written or tactile. It is *not caused* by visual, hearing, or motor impairments, or by intellectual or psychiatric disabilities. Learning disabilities are frequently found in association with a variety of general medical conditions (*e.g.*, Fetal Alcohol Syndrome and Fragile X Syndrome).

Generally, individuals with learning disabilities have few obvious problems collecting information, but they may experience difficulties screening, interpreting, recalling, processing, or translating that information. Some specific learning disabilities are: dyslexia (severe problems reading); dysgraphia (severe problems writing); dysphasia (severe problems developing spoken language); and dyscalculia (severe problems doing mathematics). While learning disabilities do not disappear, individuals living with them can learn strategies to compensate for their disabilities.

Because learning disabilities are largely invisible, they are often not taken seriously. It is important to clients with learning disabilities that their lawyer accepts and respects their disability and accommodation needs.

Clients with learning disabilities may take more time than others to reason through a situation or set of facts. Lawyers may need to provide accommodation in the form of longer meetings with clients with learning disabilities. Other forms of accommodation may include the provision, in advance, of a written schedule for a meeting, a written summary of meeting minutes, reminders for meetings, or a written list of tasks to be completed. Lawyers must discuss with their clients what forms of accommodation are desired when the working relationship first begins. Accommodation measures can be assessed, periodically, to determine whether they are working.

#### 4. WEB RESOURCES

For further information, the following websites may be consulted:

- *ARCH Disability Law Centre:* [www.archdisabilitylaw.ca](http://www.archdisabilitylaw.ca)

ARCH is a specialty community legal aid clinic dedicated to defending and advancing the equality rights of people with disabilities. Its website provides a description of the services it offers as well as information on disability law and initiatives in litigation and law reform.

- *Canadian Council on Rehabilitation and Work:* [www.ccrw.org](http://www.ccrw.org)

The CCRW is a network of organizations and individuals that provides leadership in programs and services for job seekers with disabilities and businesses committed to equity and inclusion. The site provides information on programs and services for job seekers and businesses interested in providing accommodation for employees with disabilities.

- *Council of Canadians with Disabilities:* [www.ccdonline.ca](http://www.ccdonline.ca)

The CCD is a consumer-controlled organization that advocates for the equality rights of people with disabilities. This site describes the philosophy and membership of the CCD and includes information on their advocacy work in a number of areas including technology, human rights, international development, social policy and transportation.

- *Directory for Accessibility:* [www.accessibilitydirectory.ca](http://www.accessibilitydirectory.ca)

Sponsored by the Government of Ontario, this site provides links to organizations which provide information and service in, among other things, barrier removal, assistive technology, communication devices, ergonomic consultation and assessment, and employment accommodation.

- *Disability-Related Policy in Canada:* [www.disabilitypolicy.ca](http://www.disabilitypolicy.ca)

This website presents policy discussions on the funding, supply and availability of a range of products and services for disability-related needs, including personal supports and technical aids and equipment.

- *Disability Research Information Page:* [www.ccsd.ca/drip](http://www.ccsd.ca/drip)

This website provides centralized access to information about disability research on a wide range of topics including employment, education, health care, and supports and services available for people with disabilities.

- *EnableLink:* [www.enablelink.org](http://www.enablelink.org)

Enablelink provides links to Canadian and international resources on a wide variety of disability-related topics including links to directories, articles, organizations, advocacy and support groups, services and products.

- *Legal Aid Ontario:* [www.legalaid.on.ca](http://www.legalaid.on.ca)

Legal Aid is available to low income individuals and disadvantaged communities for a variety of legal problems, including criminal matters, family disputes, immigration and refugee hearings and poverty law issues such as landlord/tenant disputes, disability support and family benefits payments.

- *Ontario Human Rights Commission:* <http://www.ohrc.on.ca/en>

The Commission administers the Ontario Human Rights Code, which protects people in Ontario against discrimination in employment, accommodation, goods, services and facilities, and membership in vocational associations and trade unions. The site provides information about the investigation of complaints under the Code and provides other educational materials about human rights in Ontario, such as a guide to the duty to accommodate.

- *People with Disabilities Online:* [www.pwd-online.ca](http://www.pwd-online.ca)

This site is sponsored by the Federal Government and provides links to both national and provincial information sources for a wide range of programs and services available to people with disabilities including housing, employment, assistive technology, tax benefits and transportation.

- *United Nations Convention on the Rights of Persons with Disabilities:* <http://www.un.org/disabilities/>

This site gives information on the history and development of the Convention, the background behind the provisions and the current work taking place on the Convention.

## Appendix A

### **Examples of Language that is, and is not, Considered to Enhance the Dignity of People with Disabilities**

- putting the person first by saying, for example, “people with disabilities” or “women with disabilities” is now generally considered more appropriate than saying “disabled persons” or (especially) “the disabled”
- people with disabilities are often referred to as “consumers” of disability-related services
- people with a strong commitment to Deaf culture capitalize the word “Deaf”
- some people prefer to be known as “autistic” rather than as a “person with autism”
- “disability” is considered a more appropriate term than “handicap”
- “non-disabled” is considered more appropriate than “able-bodied”
- it is preferable to refer to a “wheelchair user” rather than to someone “confined” or “bound” to a wheelchair
- usage (in Canada, especially) strongly favours “intellectual disability” or “developmental disability” as opposed to “mental retardation”
- people with a lengthy history of psychiatric treatment or hospitalization often refer to themselves as “survivors” or “consumer/survivors”. There are several other terms used to describe people with mental health problems and there has been long standing debate and no consensus on appropriate terminology. Other terms in use include: psychiatric survivors, psychiatric disability, mental disability and people with mental illness.
- it is not usually appropriate to speak of someone as “suffering” from a disability or as “afflicted” with it, or as a “victim of it,” except in some particular circumstances. For example, people who were affected by Thalidomide refer to themselves as “Thalidomide victims”
- it is appropriate to use words like “see” as you would normally when speaking to a person who is blind
- it is preferable to use the terms “partial vision”, “low vision” or “no useful vision” rather than “legal blindness”
- the terms “physically challenged” and “mentally challenged” are not in general use (at least in Canada)