



Beyond the Criminal Justice System

REPRESENTING SURVIVORS OF SEXUAL ASSAULT WITH DISABILITIES

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I. INTRODUCTION

Attorneys representing survivors of sexual assault with disabilities need to respond to their accommodation needs and advocate for their legal rights. The frequent overlap between sexual assault and the disability experience dictates that a trauma informed practice addresses the emotional and legal needs of survivors with visible and invisible disabilities. This chapter gives an overview of the disability experience and how to provide trauma-informed and accessible representation, how to address the needs of clients with substitute decision makers, and disability-related legal protections that may be available to a client. Disability aware representation can improve your relationship with your client and disability protections may give them essential protections after a sexual assault.

II. THE INTERSECTION OF DISABILITY AND SURVIVORSHIP

A. Experiencing Disability

A disability is “any condition of the body or mind that makes it more difficult for the person with the condition to do certain activities and interact with the world around them.”¹ Disabilities can affect vision, movement, thinking, remembering, learning, communicating, hearing, mental health, and social relationships.² In the U.S., approximately 1 in 4 people live with one or more disabilities. This rate increases to 1 in 3 people in rural areas, making

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¹ *Disability and Health Overview*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html> (last updated Apr 3, 2024).

² *Disability and Health Overview*, *supra* note 2. *Disability and Health Overview*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html> (last updated Apr 3, 2024).

it one of the largest protected classes in the U.S.³ Many marginalized communities experience disability at significantly higher rates, including American Indians/Alaska Natives, women, people older than 65, people living below the poverty level, and people who identify as Hispanic or “other non-Hispanic race or multi-racial.”⁴ People with disabilities have a significantly higher risk of sexual violence.⁵ Survivors with disabilities, like many survivors of sexual violence, experience mental health and other medical consequences due to the violence. The medical consequences of a sexual assault may exacerbate an existing disability or cause a new or additional mental health disability (e.g., post-traumatic stress or anxiety disorder).

The kinds of physical and cognitive disabilities, and the extent they impact clients’ lives and your representation, will vary widely. How a survivor developed a disability also may influence their needs. For example, if a client has a disability due to a sexual assault, you may need to help them access agencies, providers, and legal remedies that can meet both their sexual assault- and disability-related needs.

Because anyone’s experience of their disability is unique, this section offers guidelines for representation, not prescriptions. A client’s disability may not be apparent to you. You may need to help service providers and triers of fact to understand the nature of a client’s disability and their related needs, especially when their disability is not apparent, symptoms appear and disappear, or symptoms’ severity varies intermittently. For example,

³ *Disability Inclusion*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html> (last updated Sept 16, 2020, last visited Sept 3, 2024).

⁴ *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults – United States, 2016*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/features/kf-adult-prevalence-disabilities.html> (last updated Sept. 16, 2020; last visited July 16, 2024).

⁵ *Sexual Violence and Intimate Partner Violence Among People with Disabilities*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/sexual-violence/about/sexual-violence-and-intimate-partner-violence-among-people-with-disabilities.html?CDC_AAref_Val=https://www.cdc.gov/violenceprevention/sexualviolence/svandipv.html (Apr 23, 2024); Kathleen Basile et al., *Disability and Risk of Recent Sexual Violence in the United States*, 106 AM. J. PUB. HEALTH 928-33 (2016). (These statistics do not include prisons, group homes, nursing homes, and other congregant living situations.).

someone with multiple sclerosis, Parkinson's, or a bipolar disorder may have no signs of an impairment some of the time (especially if the disease is in its early stages and/or medications are effective). But, if a client with a disability stops taking the medication they need, they may decompensate, and the disability may become obvious. Since not all disabilities are apparent, ask all clients if they have a disability and what accommodations they need.⁶ (*See Conducting a Holistic Intake*).

You may need to engage with a broad range of legal resources, safety tools, and community service providers when representing a client with a disability. While you may be familiar with the law of your practice area, applying it to representing survivors with disabilities may be unfamiliar. For example, attorneys are accustomed to following mandatory reporting laws for children but have limited experience with the reporting requirements for adults with disabilities. Safety planning for survivors with disabilities may require different legal remedies, limited housing or counseling options, and non-existent community collaborations. Depending on the disability, statutes of limitation for relevant legal remedies may vary, too. Attorneys and triers of fact⁷ may have limited experience working with substitute decision-makers such as guardians, conservators, and powers of attorney. For a client with a substitute decision maker, an attorney must navigate two relationships to ensure that the client makes decisions about their case to the extent practicable.

B. Historical Models of Understanding Disability

Historical models of understanding disability and how they might impact a client's experience can inform your representation. People with disabilities' experiences are shaped by how society views them and their disabilities. This perspective shifts, in large part due to the advocacy of individuals with

⁶ Sometimes, persons with disabilities will choose not to tell you (or other providers) that they have a disability. This issue is discussed in greater detail in Section II, below.

⁷ For an overview of sexual assault prosecutions involving a victim or witness with an intellectual disability, see generally William Paul Deal and Viktoria Kristiansson, "Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault", THE VOICE, Vol. 1, No. 12 (2007) (The National Center for the Prosecution of Violence Against Women, American Prosecutors Research Institute).

disabilities and their allies. Historically, people with disabilities were isolated, stigmatized, and discriminated against. While this situation is slowly improving, most people with disabilities still experience substantial barriers and stigma.

Moral Model of Disability: The moral model of disability gives the experience of disability purpose or meaning related to the person's character, purpose, deeds, etc. This model sees disability as shameful and a punishment or, conversely, as a gift to be shared. This model of disability is both outdated and too pervasive.

Medical Model of Disability: The medical model of disability views disabilities as physical or mental impairments or defects. This model recognizes a "normal" human and anything deviating from that standard is abnormal. In this model, a defect (or disability) should be minimized, cured, or fixed. This model is often used in medical and education settings, and it provides the framework for U.S. disability civil rights laws.⁸ However, many in the disability community reject the view that their experiences are not "normal" or need to be "fixed" even if they are legally protected.

Social Model of Disability: The social model of disability places disability in the context of all peoples' abilities and challenges. This model rejects the idea of one "normal" experience and asserts that people with disabilities face difficulty navigating society because there is a mismatch between the person with a disability and their environment, not because there is something "wrong" with them. The environment needs to be altered, not the person with the disability.⁹ This model advocates for universal inclusion through modified environments that reduce barriers and create accessible spaces for everyone.

⁸ University of California San Francisco, Department of Family and Community Medicine, *Medical and Social Models of Disability*, OFFICE OF DEVELOPMENTAL PRIMARY CARE, <https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability> (last visited June 27, 2024).

⁹ University of California San Francisco, Department of Family and Community Medicine, *Medical and Social Models of Disability*, OFFICE OF DEVELOPMENTAL PRIMARY CARE, <https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability> (last visited June 27, 2024).

C. Disability Concepts

Some concepts may help you better represent clients.

Ableism: Ableism is societal discrimination against individuals with disabilities. Ableism includes negative stereotypes, exclusion, the idea that someone with a disability is less capable, and belief that people with disabilities have less value.

Person First Language: Person first language puts a person before a disability (e.g., “person with a disability” or “child with cerebral palsy”).¹⁰ Person first language resists the use of dehumanizing disability first language. Some people with disabilities prefer person first language to center their identity as a whole person and convey that they are more than their disability.

Disability First Language: Disability or identity first language places a disability before a person (e.g., “Autistic person”). Some disability communities and people with disabilities think disability first language better reflects the centrality of their disability identity to their lived experience and pushes back on the stigma of living with disability.

People with disabilities debate if person first or disability first language better dismantles ableism. Listen to the language clients use to describe themselves or their disability and mirror that language.

Deaf and deaf: For this manual, “Deaf” with an upper case “D” refers to individuals who identify as part of Deaf culture.¹¹ Deaf culture is diverse and may include deaf, deafblind, hard of hearing, and late-deafened individuals. Child of a Deaf adult/Sibling of a Deaf adult (CODA/SODA) may be included in this culture. Deaf culture is a unique cultural identity and often identified with signing as a first language. An individual’s choice to

¹⁰ The Arc of the District of Columbia, *People First Language*, OFFICE OF DISABILITY RIGHTS, <https://odr.dc.gov/page/people-first-language#:~:text=PFL%20uses%20phrases%20such%20as> (last visited June 26, 2024).

¹¹ *Community and Culture - Frequently Asked Questions*, NAT’L. ASS’N. OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> (last updated 2024).

identify with one or more of these identities may be influenced by their relationship with Deaf culture, their level of hearing, the age at the onset of deafness, etc.¹² Many Deaf individuals do not consider themselves disabled nor their deafness something that needs to be fixed. They often use disability/identity first language. For this legal manual, “deaf” with a lowercase “d” refers to individuals with any level of deafness that could be protected by civil legal rights and other legal remedies.

Intellectual, Cognitive, and Developmental Disabilities: Although these terms are often used interchangeably, slight differences in their definitions are helpful to understand. “Intellectual disorder” is defined in the DSM as neurodevelopmental deficits characterized by limitations in intellectual functioning and adaptive behaviors that present before a person reaches adulthood. These can be caused by various things, including illness, injury, and genetics.¹³ A cognitive disability or impairment generally refers to a condition that impairs cognitive function, regardless of cause or age of onset. This can include intellectual disabilities, and includes later onset disabilities like dementia. “Developmental disability” is a broader term that can include intellectual and physical disabilities.¹⁴ “Intellectual and Developmental Disabilities” (IDD) refers to individuals who have both intellectual and developmental disabilities.

Learning Disability: A learning disability is condition that affects learning and the use of academic skills, such as, reading, writing, and mathematics.

Disability Justice: Disability justice is a movement, led by persons with disabilities, to expand civil legal rights for people with disabilities, to create a society without ableism, to value all bodies equally, and to provide every

¹² *Community and Culture - Frequently Asked Questions*, NAT’L. ASS’N. OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/> (last updated 2024).

¹³ *Intellectual Disability*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/25015-intellectual-disability-id> (last updated May 25, 2023).

¹⁴ *Intellectual and Developmental Disabilities (IDDs)*, U.S. DEP’T. OF HEALTH AND HUMAN SERV., NAT’L INST. OF HEALTH, <https://www.nichd.nih.gov/health/topics/factsheets/idds> (last visited July 17, 2024).

body with what it needs to thrive.¹⁵ Disability justice centers disability at its intersection with other social isolation, exclusion, and oppression.

Universal Design: Universal design is an approach to creating physical and digital environments that are “usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”¹⁶

D. Accessible Representation

Barriers to accessible representation for clients with disabilities are as varied as their disability experience. Barriers to access can start when clients start to look for attorneys and continue to the end of a court case. They can range from lack of language access to the ability to meet with you in your office or at the courthouse. Greater accessibility builds trust and understanding with a client, helps you gather information, and mitigates the trauma survivors can experience with legal processes. This section introduces basic accessibility considerations and is not comprehensive. Attorneys who want to create an accessible environment should conduct a full accessibility review.¹⁷

1. Assessing Accessibility

Assessing your firm’s accessibility is key to meaningfully and equitably representing survivors with disabilities. Not only will accessible representation enhance a client’s experience with you and the legal system, but many attorneys, non-profit entities, and law firms must provide access and disability accommodations under federal law,¹⁸ state and local

¹⁵ Patty Berne, *Disability Justice - a Working Draft* by Patty Berne, SINS INVALID, <https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne> (last updated June 10, 2015).

¹⁶ *What Is Universal Design?*, THE UD PROJECT, <https://universaldesign.org/definition> (last visited June 26, 2024).

¹⁷ Attorneys can access the National Disability Rights Network’s Accessibility Guides and Accessibility Checklists at their website: <https://www.ndrn.org/accessibility-guidelines/> (last visited July 14, 2024).

¹⁸ Americans with Disabilities Act, 42 U.S.C. § 12181(7) (1990). The ADA explicitly includes the offices of lawyers and social service centers in the definition of public accommodations. For a discussion of attorney obligations under the ADA, see David Bulkowski & Donald Lawless, *An Attorney’s Obligations Under Title of the Americans with Disabilities Act*, 2010 MICH. BAR J. 40.

laws, and ethics rules.¹⁹ While universal design is the goal, a comprehensive accessibility review and subsequent modifications may take years to achieve. An initial accessibility assessment should identify accommodations you need to ensure accessibility for clients. Your accessibility review should include looking at accessibility barriers (physical and digital) and representation-related materials. An accessibility review should consider the needs of survivors with physical disabilities; Deaf survivors and survivors with hearing disabilities; vision disabilities; speech disabilities; learning disabilities; cognitive and intellectual disabilities; and psychiatric disabilities. The review should look at client access from when they visit your website or initiate contact (e.g., through a phone system or email) through the end of representation. You should check for barriers at each step of representation, a process for clients to request accommodations under the Americans with Disabilities Act (ADA)²⁰, and include a plan to address the barriers.²¹

2. Providing Accommodations

You probably have a legal obligation to provide reasonable accommodations to individuals with disabilities who require them to access your services.²² Places of public accommodation are required to make reasonable modifications to make their goods and services available to

¹⁹ MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/. Many jurisdictions have adopted similar ethics rules and/or guidance that may impose ethical requirements in certain situations for attorneys working with clients with disabilities.

²⁰ The ADA is covered in depth in Sections V-IX below.

²¹ Many organizations provide free resources for agencies seeking to improve their disability accessibility. The Violence Against Women with Disabilities Project at the Wisconsin Coalition for Advocacy offers a free accessibility checklist for SA/DV programs: <https://safehousingpartnerships.org/sites/default/files/2017-01/selfassessmenttool.pdf> (Last accessed Aug 5, 2024). The American Bar Association offers free resources on disability on their website: https://www.americanbar.org/groups/diversity/disabilityrights/resources/access_info/ (Last accessed Sept 3, 2024). Activating Change provides courses on disability accessibility for OVW grantees, provides disability related technical assistance, and offers accessibility reviews.

²² 42 U.S.C. § 12181(7). The ADA definition of public accommodation includes the lawyers' offices and social service centers.

people with disabilities, unless the modifications would fundamentally alter their goods, services, or operations.²³ Reasonableness is an individual, fact-dependent assessment that may require consideration of facility size, ability to afford accommodations, and alternative effective accommodations. Public accommodations also must provide access to goods and services to people with disabilities through auxiliary aids and services to promote effective communication (e.g., closed captioning, telecommunications devices, interpreters, and alternate formats for written materials).²⁴ The cost of accommodations may not be shifted to the person needing modifications or services.²⁵ (For a fuller discussion of the requirements of public accommodations under the ADA, see Section V, below.) Even if the law does not require accommodations, a trauma-informed, intersectional approach to lawyering will consider the impact of a client's disability and provide accessible legal representation.

a. Communication Access

You need a language access plan to address disability accommodations such as Communication Access Realtime Translation (CART), American Sign Language (ASL) and other signing interpretation, teletypewriters (TTY), screen readers, braille, and other technologies that provide communication access to survivors with hearing and vision disabilities. If your plan does not provide for these accommodations, it may not be ADA compliant. Include qualified sign language interpreters, CART services, and other communication services with your access plan and ensure staff know how to use them before clients reach your door. Allow enough time to arrange for ASL interpretation or CART services and build relationships with trusted providers. Make your intake materials, phone system, and web portal accessible, including for people with low vision and who use screen readers. Use size 14 sans serif fonts. Use plain language with written materials and when you explain legal concepts to clients. Until you can

²³ 28 C.F.R. §§ 36.202-203. Certain buildings, such as facilities preserved as historical sites, may be exempt from this requirement.

²⁴ 28 C.F.R. § 36.203.

²⁵ 42 U.S.C. § 12182.

conduct a comprehensive review of all materials, prioritize materials you use with clients.

b. Physical Spaces

Think about physical barriers and accessibility for people who use mobility assistance devices (from home to a meeting place) and public transportation. Consider accessible parking spaces, flat walking surfaces, chairs with arms to help with getting up and down, doors that can be easily opened from wheelchairs and operable with a closed fist, ADA compliant restrooms, and 36" paths from the firm or building entrance to a meeting space. While some of these needs may be easily met (such as replacing door handles or rearranging furniture to create adequate clearance), others may require negotiation with landlords or work with a contractor. Know your and your landlord's ADA obligations for accessibility, the age of your building (which can affect ADA design requirements), obligations to cure ADA deficiencies, and acceptable accommodations if a barrier cannot be removed. If your program's meeting space does not meet a client's needs, identify other meeting spaces.

E. Safety Planning for Clients with Disabilities

As with all sexual assault clients, safety considerations are key for clients with a disability. An initial safety assessment for a client with disabilities should include a discussion about strategies that are tailored to their disability experience. Safety planning considerations that you may want to discuss:

- What disability barriers keep them from feeling safe?
- How has their disability been used against them in the past (e.g., to attack their credibility, isolate them, obtain their medical information)? The answer(s) will help you understand what may come up during their case.
- What of their daily needs (e.g., communication, transportation, medications, food, personal hygiene care, health care) do they depend on the person who harmed them to provide? What other services, programs or support persons might help them meet those needs?

- What supportive services do they want to use to help navigate the legal process (e.g., a disability advocate personal assistant)?
- Do they need accommodations to access survivor supports (e.g., transportation services, ASL interpreters, CART services)?
- What housing accommodations might they need?
- Do they need accommodations to ensure access to emergency services (e.g., a phone with programmed speed-dial, specialized transportation services, back-up medical equipment at an off-site location)?

Organizations that regularly serve people with disabilities may be able to help you and a client develop a safety plan.²⁶ If consistent with what a client needs, consider working with Adult Protective Services to improve their well-being, particularly if a person harming a client is a caregiver.²⁷

F. The Decision to Disclose Disability Information

A client may not want to disclose their disability or may refuse to pursue legal remedies for reasons like ableism and fear of being stigmatized. For example, even though federal workplace protections for mental health disabilities are in place, employees are often treated differently after disclosure. But this different treatment may not meet the legal standard for discrimination. A client may prefer finding a new job to staying in their current position and asserting a federal disability claim. Also, information about PTSD, DID, depression, etc., may be weaponized in legal proceedings. Attorneys who think if a client discloses a disability or pursues

²⁶ Additional materials and publications are available. See, e.g., <https://arcminnesota.org/accessingsafety/> (Last accessed Sept 3, 2024)

²⁷ For a fuller discussion of the confidentiality and ethical implications of disclosing your disabled client's abuse, see Section III, below. Discuss the potential cost and benefit of disclosure with your client. Disabled clients may be dependent on an abusive caregiver for their daily activities. In this instance, a part of the safety planning process should be developing a plan for their care after protective services are involved. For additional guidance, local resources, or support, you may be able to reach out to your local independent living center or the Protection and Advocacy Agency in your state or territory. A directory of Independent Living Centers can be found online: <https://www.ilru.org/projects/cil-net/cil-center-and-association-directory>. A directory of Protection and Advocacy Organizations can be found here: <https://www.ndrn.org/about/ndrn-member-agencies/>.

a specific remedy they could succeed, might be frustrated when clients choose not to make such a disclosure. But, as with all clients, clients' choices direct representation. Also, ethics rules address your obligations when disclosing adverse information about a client – which may at times include disability related information about mental health conditions or diminished capacity, for example.²⁸

III. CLIENT CONFIDENTIALITY

Clients with disabilities need to have their confidentiality protected as much as other clients. However, survivors with disabilities often have to disclose private medical information to access education, employment, housing, public benefits, and other legal remedies. In addition to the stigma of the assault, they have probably faced discrimination and stigma when they've disclosed their disability information. And some circumstances are unique to the disability experience, such as substitute decision makers and medical disclosures for disability services, which can complicate protecting survivors' information. (See *Protecting Sexual Assault Survivors' Privacy* for a discussion of survivors' privacy rights generally.)

State, Tribal, territorial, and federal laws, govern client privacy rights, as do certain funder requirements (e.g., the Violence Against Women Act of 2022 (VAWA) has confidentiality requirements for victim service programs²⁹ receiving funding from the Office on Violence Against Women (OVW).³⁰).³¹ Ethical obligations also may determine a survivor's rights and an attorney's duties.

²⁸ See MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 8 (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/.

²⁹ "Victim services" include legal assistance.

³⁰ 34 U.S.C. § 12291(b)(2).

³¹ Confidentiality and privilege are intersecting but distinct protections. Confidential communications are made with the expectation that they will not be shared with third parties. Generally, if confidential information is subpoenaed it must be released (unless it is also privileged). Privileged information must remain private even if subpoenaed or otherwise requested in court proceedings, unless certain exceptions are satisfied, or the privilege is waived by the privilege holder.

Clients with disabilities may have ongoing relationships with various service providers. For example, a client with a mental illness may receive therapy from a counselor, medications from a psychiatrist, and have a case manager. A survivor with a developmental disability may receive vocational services, live in an adult family home, receive assistance from a home health care aid, and have a case manager. In addition to disability-related services, a survivor may also receive sexual assault-related services, such as counseling from a sexual assault crisis program. To provide effective legal services, attorneys may need to communicate with these other service providers. Such communications must occur only with the informed consent of a client (or their designated decision maker, if applicable). This consent may require executing a VAWA-compliant release of information.³² (See *Protecting Sexual Assault Survivors' Privacy* for information about informed consent, releases, and confidentiality generally.)

A. Confidentiality Protections

1. Health Care Provider Records and Privacy: The Health Insurance Portability and Accountability Act of 1996³³

A client's health care providers may be subject to the confidentiality requirements established by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA protects the privacy of patients' health care records. Other jurisdictions' laws may afford additional health care privacy protections. HIPAA applies to "health care" providers and "health care information." HIPAA defines "health care" as "care, services, or supplies related to the health of an individual" including "[p]reventative, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body"³⁴ and the sale or dispensing of a "drug,

³² See 34 U.S.C. § 12291(b)(2)(B). VAWA requires the informed consent of the person with a legally appointed guardian if that person "is permitted by law to receive services" without the involvement of the guardian. A non-abusive, court-appointed guardian is otherwise required to give the consent "in the case of legal incapacity."

³³ 45 C.F.R. pts. 160, 164.

³⁴ 45 C.F.R. § 160.103.

device, equipment, or other item in accordance with a prescription.”³⁵
HIPAA defines “health information” as

any information, including genetic information, whether oral or recorded in any form or medium, that ... [i]s created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and ... [r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.”³⁶

You may need to request accommodations that require you to provide a client’s HIPAA-protected information. Explain to a client the privacy protections for their disability-related information under HIPAA and the risks of disclosure of that information. Because a survivor with a disability may have concerns about disclosing personal and medical information, understanding HIPAA privacy protections may help them decide what disability-related information to disclose. Remember that HIPAA establishes only the minimum privacy protections afforded to patient health records. Check your jurisdiction’s privacy laws, too. Ensure that any releases of information or consent forms executed by a client comply with both HIPAA and other federal and local laws, including VAWA. If a client thinks a covered entity violated HIPAA by disclosing their protected health information, they might file a complaint with the Office of Civil Rights.

2. VAWA Protections

Attorneys funded by OVW have more stringent confidentiality provisions than those established by non-federal ethics rules or other law. Under the VAWA confidentiality provisions, OVW-funded legal assistance programs must protect personally identifying information “collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’

³⁵ 45 C.F.R. § 160.103.

³⁶ 45 C.F.R. § 160.103.

programs”³⁷ The statute defines “personally identifying information” as any information about an individual that may directly or indirectly identify the individual including “information likely to disclose the location of a victim of ... sexual assault ... regardless of whether the information is encoded, encrypted, hashed or otherwise protected....”³⁸ This information includes “date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.”³⁹ Information about a client’s disability could be personally identifying. VAWA’s confidentiality provisions exempt situations in which a grantee or subgrantee is mandated by statute to report abuse or neglect.⁴⁰

B. Working with Substitute and Supported Decision Makers

Attorneys need to navigate when their clients have substitute and supported decision makers. While many people with disabilities do not have such decision makers, some have a designated person who legally “stands in their shoes” for purposes of certain decisions through a guardianship, conservatorship, or both. Never assume that clients with certain disabilities need or have a substitute or supported decision maker. Many people who historically would have a guardian live with independent legal capacity or with a limited guardianship.

The decision-making capacity of clients with intellectual disabilities and other diminished capacity may range from completely independent legal decision-making capacity to complete incapacity. You must establish at the outset whether a client has an authorized substitute decision-maker and, if so, who that person is, the scope of the decision-making authority, and whether the individual is assaulting the survivor. You need this information for informed consent, to be sure you are authorized to pursue legal

³⁷ 34 U.S.C. § 12291(b)(2)(B)(i).

³⁸ 34 U.S.C. § 12291(a)(25).

³⁹ 34 U.S.C. § 12291(a)(25)(E).

⁴⁰ 34 U.S.C. § 12291(b)(2)(E). For further discussion about the VAWA confidentiality provisions, access OVW’s VAWA Confidentiality Provision FAQs: <https://www.justice.gov/ovw/resources-and-faqs-grantees> (last updated October 2017).

remedies on behalf of a client, and to provide effective and ethical representation.

[PRACTICE TIP: View the most recent copy of a guardianship/conservatorship and other relevant orders as early as possible when any guardianship or conservatorship is implicated. Know the applicable laws in your jurisdiction for guardianships, powers of attorney, or other substitute decision-makers. You cannot meet your confidentiality obligations, at least, without this information. Secure the informed consent of the legal decision maker, whether the client or the guardian/conservator, before pursuing legal remedies. While only the substitute decision maker's consent may be legally required, a survivor-centered attorney will also consult with the client about their case to the extent possible.]

1. Full Guardianships/Conservatorships

Some clients may have a full guardianship, conservatorship, or both. Guardianships and conservatorships are generally governed by state law and vary significantly in their standards and process. The legal responsibilities of the guardian/conservator and court oversight also vary.⁴¹ Some jurisdictions use the term “conservatorship” interchangeably with “guardianship” and other jurisdictions distinguish conservatorship as fiscal in nature. While the specific legal standards may vary from jurisdiction to jurisdiction, when we refer to full guardianships in this Legal Practice Manual, we mean a situation where a court has granted a guardian power to make all legal decisions affecting the person with the disability, including where to live, education decisions, medical treatment, consent to legally binding arrangements, etc. A court establishes a full conservatorship when the conservator has legal authority to make all the financial decisions affecting a person with a disability. Remember that even when you work

⁴¹ Annamarie M. Kelly, et al., *A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning*, 75 J. FIN. SERV. PROF'LS. 59-79 (2021), https://www.emich.edu/cob/documents/kelly_2021_234.pdf.

with a guardian or conservator, you represent the person with the disability.⁴²

[PRACTICE TIP: If a client needs a third party (e.g., a family member, support person, or guardian) present in order to communicate with you, label communications as confidential, explain privilege and confidentiality to everyone involved, and document how you determined the third party was necessary to accomplish the communication.]

Once you confirm that a client is the subject of a full guardianship, you may look to the guardian to make decisions about the legal representation and execute legal documents, including a retainer agreement and permission to release personally identifying information.⁴³ When representing a client with a guardian, think about how privilege and confidentiality may be affected. Attorney-client privilege, as recognized by most jurisdictions, does not adhere when a third party is present. However, most jurisdictions recognize an exception to this rule when communication conducted with a third party present is reasonably necessary to the communication.⁴⁴ This exception likely covers communication with a guardian when they are acting as a legal agent for the client. Similarly, confidentiality probably covers information from the guardian related to the client's case because the ethical obligation of confidentiality extends beyond information directly from client.⁴⁵

⁴² MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 4 (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/. ("If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.")

⁴³ 34 U.S.C. § 12291(b)(2)(B)(ii).

⁴⁴ The exact scope of this exception varies by jurisdiction.

⁴⁵ MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6/. ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.")

A person-centered and trauma-informed model requires that you engage a client in every way possible in their representation even when they have a full guardian/conservator. All concepts, consequences, and processes should be explained to a client to the extent possible. Their legal objectives and other interests must direct your representation as fully as possible, regardless of the interests of a guardian or conservator. In addition to being client-centered and trauma-informed, you may have an ethical obligation to engage clients with diminished capacity as much as possible given your ethical duty to maintain communication.⁴⁶

When you learn that a guardian is harming a client, your ethical rules may allow you to disclose limited information about the client to the extent “reasonably necessary to protect the client’s interests.”⁴⁷ For attorneys subject to VAWA’s confidentiality provisions, you will need to get a release of information from you client (or another appropriate guardian if one exists) to make a disclosure unless you are mandated by statute, court order, or

A more complicated and unsettled question arises if your client asks you to withhold case-related information from a guardian who has legal decision-making capacity for their case. Your jurisdiction’s case law may have guidance on this question, or your ethics commission may be able to guide you. Due to the pervasiveness of abuse of people with disabilities by their caregivers, you may want to screen the reason why the client would like specific information withheld from the guardian.

⁴⁶ Commentary to the Model Rules discusses the ethical obligation of the attorney to communicate with clients with diminished capacity. Your jurisdiction may have adopted ethics rules that have a different ethical responsibility than the Model Rules. See MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 2 (AM. BAR ASS’N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/ (“...[T]he lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.”).

⁴⁷ MODEL RULES OF PROF’L CONDUCT r. 1.14(b) (AM. BAR ASS’N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/ (“When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”); *id.* at 1.14(c) (“When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”).

case law to make it. If a client lacks the capacity to consent to the release of information, you may need to petition a court for another guardian. You may need to consult with your program manager or a technical assistance provider to navigate the VAWA implications. Also, VAWA does not allow an abusive guardian to consent to release of a client's personally identifying information.⁴⁸ Consult your local ethics rules and decisions, case law, VAWA grant manager, or VRLC's TA team for guidance on your ethical obligations in this delicate situation.

2. Limited Guardianships/Conservatorships

Most jurisdictions provide limited arrangements for both guardianships and conservatorships. In these situations, the court grants a substitute decision maker the authority to make decisions for a person with a disability in at least one area, but not all areas, of the person's life. For example, a court could restrict an individual's ability to choose their living arrangement or refuse medical treatment but leave the rest of their legal decision-making intact. Alternatively, a court could grant the power to make substitute financial decisions for the person with the disability but not restrict the client's medical or legal decisions.

When a client is subject to a limited guardianship, the guardianship or conservatorship order should identify the decisions that are conveyed to the substitute decision maker. If your representation relates to those decisions, then the guardian/conservator should be consulted, execute documents, and make decisions related to that matter. If the substitute decision maker has not been granted rights related to the representation, then you should not involve them without first obtaining informed consent and a release (VAWA compliant, if necessary) from a client.⁴⁹ For example, if a client has a conservator for fiscal management only, but has no other rights delegated, they could likely consent to services, make legal decisions on how to pursue their case, etc. If a client is awarded money or needs to pay a retainer, you may have to work with the fiscal conservator on that limited matter within their scope of authority. In a limited

⁴⁸ 34 U.S.C. § 12291(b)(2)(B)(ii); 28 C.F.R. § 90.4(b)(3)(ii)(C).

⁴⁹ For additional information on VAWA-compliant releases, see 34 U.S.C. § 12291(b)(2)(B).

guardianship/conservatorship, confidentiality and privilege will probably cover information shared with the substitute decision maker authorized to act on behalf of the client. In this case, note the need for the substitute decision maker's involvement. In a limited guardianship, the individual required to provide informed consent or sign a release of protected information will depend on the scope of the guardianship. Consult the terms of the court order and relevant case law to determine the proper legal decision maker.

3. Other Arrangements Affecting Clients' Legal Capacity

Keep in mind several other legal arrangements that may affect a client. One arrangement is a "representative payee" or "protective payee." This payee is appointed to manage funds from certain federal benefits programs including benefits from Social Security, the Veteran's Administration, Railroad Retirement, and other public benefits. A client may also have a power of attorney or durable power of attorney to designate others to act in their stead for certain financial, medical, business, or other legal matters. Some of these arrangements only take effect upon a triggering event. Durable powers of attorney generally continue even if someone is disabled or incapacitated. For example, a client-created power of attorney that gives financial responsibilities to someone else may stay in place even if the client loses legal capacity after it is created. Unlike with guardianships and conservatorships, a court does not typically oversee these arrangements and they can be revoked by a client without court involvement.

These legal arrangements typically do not affect a client's capacity to make legal decisions. You will need a client's consent. Representative payee and powers of attorney arrangements generally do not grant those individuals access to information about a client's case. If a client wants to share information with these individuals, proceed as you would for a client without a disability. If a client with a disability does not have capacity to understand

legal proceedings or act in their own interests, a guardian may need to be appointed.⁵⁰

4. Supported Decision Making

Supported decision making is an alternative to substitute decision making. Supportive decision making allows individuals with disabilities to make decisions with support from a team of individuals they have chosen. With supported decision making, a client with a disability retains full legal capacity to make their own legal and medical decisions without court involvement. They may independently retain your services, execute their own legal documents, direct their own case, and make other legal decisions. A client with supportive decision making remains entitled to confidentiality.⁵¹ Document your client's informed consent to share information with a supportive individual per VAWA and your firm's policies. In this situation, the client holds the attorney-client privilege and confidentiality. Most jurisdictions assert that a client and attorney may have confidential communication when a third party is present because they are necessary for communication, so you may want to document why the supportive individual was necessary for the communication.⁵² Because the

⁵⁰ In this situation, seek the advice of your ethics board about the best way to proceed given your jurisdiction's rules and laws. See MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/ ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.").

⁵¹ MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent....").

⁵² MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 3 (AM. BAR ASS'N 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/ ("The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.").

extent that confidentiality and privilege applies to a client’s conversation with you is fact specific, you might seek the advice of technical assistance providers, mentors with experience in representing individuals with disabilities, and the ethics advisory board in your jurisdiction to make sure you meet your legal obligations to a client.

C. Mandatory Reporting Requirements

Know your jurisdiction’s laws about mandatory reporting of abuse or neglect of adults with disabilities. These laws address who is mandated to report, for people with which disabilities, and how “abuse” and “neglect” are defined. Establish whether a client meets the statutory definition of “disabled,” “vulnerable adult” or “at-risk adult.” Attorneys’ reporting obligations may be limited by attorney-client privilege and legal ethics requirements. Some mandatory reporting laws differ when someone lives in a facility versus independently.

IV. FEDERAL INCOME SUPPORT

Some survivors have limited capacity to work or lose employment due to their disability. Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) are federal public benefits programs administered by the Social Security Administration (SSA).⁵³ Both programs provide cash income payments to people with disabilities.⁵⁴ Medicare and Medicaid eligibility is linked SSDI and SSI eligibility.

A. SSDI

SSDI pays benefits to people with disabilities who have worked and paid Social Security taxes on their earnings, and to certain dependents of a worker who retired, became disabled, or died.⁵⁵ There are no income or resource limits for SSDI eligibility.

⁵³ Rules for SSDI and SSI are found at 20 C.F.R. §§ 404, 416.

⁵⁴ 20 C.F.R. §§ 404.1505, 416.905.

⁵⁵ 42 U.S.C. § 401, *et seq.*

B. Medicare

After a two-year waiting period, anyone eligible for SSDI due to a disability is also eligible for Medicare.⁵⁶ Medicare is a health insurance program for Social Security beneficiaries who are over the age of 65 or permanently disabled. Medicare eligibility is not based on financial need.

C. SSI

SSI is a needs-based program that pays benefits to people with disabilities whose income and resources are below established limits.

D. Medicaid

People eligible for SSI are also eligible for Medicaid.⁵⁷ There are two main categories of individuals who qualify for Medicaid: (1) Low-income people who are over age 65 or permanently blind or disabled; and (2) Parents, pregnant people, and children who meet income and asset limits.⁵⁸

E. State and Local Laws

In addition to federal guarantees of the rights of persons with disabilities, many other jurisdictions have laws, including court and/or evidentiary rules, that offer comparable or additional protection to individuals with disabilities.

[KNOW YOUR LAW: Research your jurisdiction's laws to determine if they provide more protections, protect a broader group of persons with disabilities, offer additional legal remedies, or are otherwise better for a client (e.g., longer statutes of limitation, lower standards of proof, less rigorous standards for determining disability, etc.).]

⁵⁶ 42 U.S.C. § 1383.

⁵⁷ The Medicaid program is funded jointly by the state and federal governments. 42 U.S.C. § 1396, *et seq.* and 42 C.F.R. Part 430, *et seq.*

⁵⁸ An application for SSDI and/or SSI should be made to the local SSA District or Branch Office. Office location and application information is available at SSA offices and on the SSA web site (www.ssa.gov). The SSA office number is (800) 772-1213.

[PRACTICE TIP: If a client’s rights were violated under both federal and state law, consider these factors: (1) How long the governing agency has to act on a complaint or grievance; (2) Complainants’ experience with the agency and how often individuals with disabilities succeed with their claims; (3) The difficulty of preparing and pursuing a complaint or grievance;⁵⁹ and (4) The scope of remedies available.]

V. PUBLIC ACCOMMODATION PROGRAMS AND FACILITIES

A. Americans with Disabilities Act, Title III

Title III⁶⁰ of the Americans with Disability Act (ADA)⁶¹ governs public accommodations and services provided by private entities. Title III guarantees that individuals with disabilities⁶² are offered full and equal enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations”⁶³ offered by a place of public accommodation.⁶⁴ The public accommodations provision applies to any nonprofit group or private place of business that is open to the public for the sale or lease of goods or services.⁶⁵ For example, sexual assault programs, hospitals, day care centers and hotels are considered public accommodations. Private clubs

⁵⁹ RIGHTS AND REALITY II: AN ACTION GUIDE TO THE RIGHTS OF PEOPLE WITH DISABILITIES IN WISCONSIN 237 (2001).

⁶⁰ 42 U.S.C. § 12132, 28 CFR Part 36.

⁶¹ 42 U.S.C. § 12101, *et seq.*

⁶² A “disabled” person is defined the same throughout the ADA. Three categories of individuals are protected by Title II of the ADA⁶²: (1) Individuals who have a physical or mental impairment that substantially limits one or more major life activities [“Major life activity” means functions such as caring for oneself, performing manual tasks, walking, hearing, seeing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i).]; (2) Individuals who have a record of a physical or mental impairment that substantially limits one or more of the individual’s major life activities; and (3) Individuals who are regarded as having such an impairment, whether they have the impairment or not. 42 U.S.C. § 12102.

⁶³ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

⁶⁴ Places of public accommodation are defined at 28 C.F.R. § 36.104; *see also* 42 U.S.C. § 12181.

⁶⁵ *Supra*, note 927.

and religious organizations are the only private entities explicitly exempted from Title III's requirements.⁶⁶

Places of public accommodation must make reasonable modifications to their policies, practices, and procedures to make their goods and services available to people with disabilities.⁶⁷ Places of public accommodation also must provide access to goods and services to people with disabilities through the use of auxiliary aids and services to promote effective communication (e.g., closed captioning, telecommunications devices, interpreters, and alternate written formats).⁶⁸ The place of public accommodation must assume any costs of compliance with the ADA; the burden may not be shifted to the person requesting modifications or services.⁶⁹

Finally, Title III requires the removal of physical and structural communication barriers in facilities.⁷⁰ If a public accommodation is unable to provide access by removing barriers, it must provide alternatives. The ADA Accessibility Guidelines (ADAAG) provides guidance about removing these barriers.⁷¹

B. Making an Accommodation Request

The ADA does not prescribe how a request to a place of public accommodation for an accommodation is made. Many institutions have a standard mechanism for requesting accommodations. A client should follow any reasonable procedure for requesting accommodations. Document their request and the response to it in case they are unlawfully denied the accommodation. Whether a client or you, as legal counsel, should request an accommodation is a strategic decision. An institution may be more

⁶⁶ 42 U.S.C. § 12187.

⁶⁷ 28 C.F.R. §§ 36.202 and 36.203. Certain buildings, such as facilities preserved as historical sites, may be exempt from certain modifications to physical spaces. They may still require alternate accommodations to allow individuals with disabilities access.

⁶⁸ 28 C.F.R. § 36.303.

⁶⁹ 42 U.S.C. § 12182.

⁷⁰ 28 C.F.R. § 36.304.

⁷¹ 28 C.F.R. pt. 36, app. A; *see also* 49 C.F.R. pt. 37.

cooperative if a client advocates for themselves. However, in some situations, such as language inaccessibility, a client may not be able to advocate for themselves effectively.

C. Filing a Complaint/Enforcement

If a client is denied an accommodation for services like health care, sexual assault advocacy, etc. (e.g., an ASL or other interpreter), they may be able to access certain federal, state, or local legal remedies including the ADA, Section 504,⁷² or state anti-discrimination or health care laws. Such laws may not be designed to address the needs of sexual assault survivors or survivors with a disability but may provide additional protections. For example, in Oregon, insurers must provide mental health insurance coverage equal to coverage provided for other health care, including parity for medications, psychiatric hospitalizations, mental health counseling, etc.⁷³ Similarly, federal patients' rights laws may provide protections, such as laws that protect individuals in a federally funded hospital or community-based residential youth facility.⁷⁴ Medicare- and Medicaid-funded hospital patients are also afforded certain federal guarantees, including entitlements and due process rights.⁷⁵

Under Title II, an individual complainant and the U.S. Department of Justice (DOJ) may file discrimination complaints on the basis of disability. Individuals may file a private civil action for injunctive relief. Private remedies may include a permanent or temporary injunction, a restraining order, or other order (e.g., to remove barriers or provide an auxiliary aid or

⁷² Section 504 of the Rehabilitation Act of 1973 provides that “[n]o 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.”

⁷³ OR. REV. STAT. § 743A.168(2).

⁷⁴ See, e.g., 38 U.S.C. 7334, *et seq.*

⁷⁵ See, e.g., 42 U.S.C. § 290; 42 C.F.R. § 482.13.

service).⁷⁶ Compensatory or punitive monetary damages may not be granted in a private suit.⁷⁷

Lawsuits filed by the DOJ typically focus on a pattern or practice of discrimination or discrimination that raises an issue of public importance. The remedies available in civil actions brought by the DOJ include those available through private suits and those with monetary damages.⁷⁸ Monetary damages do not include punitive damages, but do include compensatory damages, such as out-of-pocket expenses and pain and suffering. A court also may assess a civil penalty against a defendant up to \$50,000 for a first violation and up to \$100,000 for any subsequent violation.⁷⁹ In addition to litigation, the ADA encourages alternative means of dispute resolution (e.g., settlement negotiations, conciliation, facilitation, mediation, mini-trials, and arbitration).⁸⁰

VI. GOVERNMENT SERVICES AND SPACES

A. Americans with Disabilities Act, Title II

Title II⁸¹ of the ADA guarantees that people with disabilities have equal access to services, programs, and activities offered by state and local governments.⁸² For purposes of Title II, “State” is defined as the “several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific

⁷⁶ 28 U.S.C. § 12188.

⁷⁷ See *Powell v. Nat’l Bd. Of Med. Examiners*, 364 F.3d 79, 86 (2d Cir. 2004).

⁷⁸ 42 U.S.C. § 12188.

⁷⁹ 42 U.S.C. § 12188.

⁸⁰ 45 C.F.R. pt. 84.

⁸¹ 42 U.S.C. § 12131, et seq.; 28 CFR Part 35.

⁸² This includes any state or local government departments, agencies, or other instrumentalities. The ADA does not cover the federal government and federal agencies. The Rehabilitation Act of 1978 prohibits discrimination by any program or activity that is conducted by any executive agency or the United States Postal Service. Each federal agency has their own policies. See JACQUIE BRENNAN, THE ADA NATIONAL NETWORK DISABILITY LAW HANDBOOK 52-53 (2013), available at https://adata.org/sites/adata.org/files/files/DisabilityLawHandbook_2013-rev-2015.pdf.

Islands, and the Commonwealth of the Northern Mariana Islands.”⁸³ All activities, services, and programs of public entities are covered, including activities of legislatures and courts,⁸⁴ town meetings, police and fire departments, motor vehicle licensing, and employment.⁸⁵ Title II also imposes architectural accessibility requirements on facilities used by public entities.

Title II of the ADA prohibits discrimination in government services through state and local programs.⁸⁶ These services include public education, public transportation, recreation, health care, social services, courts, voting, emergency services, and administrative offices.⁸⁷ Public agencies, such as courts, county health care clinics, Health and Human Services agencies, public housing agencies, public transport providers, etc., may not deny or exclude a qualified individual with a disability from the benefits of their services, programs, or activities.⁸⁸ A “qualified individual with a disability” means “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”⁸⁹ Persons with disabilities may not be compelled to participate in different programs than those available to others. Like the employers described above, state and local governments must make reasonable modifications when necessary to accommodate persons with disabilities.⁹⁰

⁸³ 28 C.F.R. § 35.104 “State”.

⁸⁴ Federal courts are not subject to the ADA; however, the U.S. Judicial Conference has implemented some accessibility policies. See https://www.uscourts.gov/sites/default/files/guide_vol05.pdf for their language access policies governing the national operations of the federal judiciary (last modified May 6, 2024).

⁸⁵ 42 U.S.C. § 12131(1).

⁸⁶ *State and Local Governments*, ADA.GOV, <https://www.ada.gov/topics/title-ii/> (last modified June 27, 2024).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 28 C.F.R § 35.104; see also 42 U.S.C. § 12131(2).

⁹⁰ *Id.*

For example, if a client is deaf or hard of hearing and needs an interpreter to communicate with a prosecutor, police investigator, court clerk or judge, a free interpreter must be provided. Similarly, government agencies must include ramps and/or elevators in new construction, purchase or lease wheelchair accessible buses or trains, if possible, provide braille panels in public buildings, and ensure that new crosswalk signs have audio and visual indicators.

A state or local government is not required to change a policy if it would fundamentally alter the essential nature of the program, service, or activity.⁹¹ Similarly, if a request or modification would cause an undue burden, the state or local government must explore alternatives that ensure individuals with disabilities receive the same services and benefits as people without disabilities.⁹²

B. Making an Accommodation Request

People with disabilities often encounter barriers to accessing courts and other public spaces. These barriers may include: Inaccessible courthouses or spaces without capacity to accommodate assistive technology; judges and other court personnel who do not attend to the needs of survivors with disabilities; few or no auxiliary aids and services (e.g., ASL interpreters, materials in alternate formats such as large print or braille, readers for people who are blind or visually impaired).⁹³ Public entities must provide “program accessibility,” meaning that their services, programs, and activities must be “readily accessible to and usable by” people with disabilities. Program accessibility can be accomplished in various ways, including modifying policies, practices or procedures; acquiring adaptive

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See, e.g., Americans with Disabilities Act*, MICH. COURTS, <https://www.courts.michigan.gov/administration/trial-court/trial-court-operations/americans-with-disabilities/> (last visited Apr 4, 2023) (providing list of resources and accessibility considerations pursuant to ADA requirements); *Accessibility*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/courthouseplanning/needs-of-persons-with-disabilities/accessibility> (last visited Apr 4, 2023).

equipment or a communication device; or providing services at alternate, accessible sites.⁹⁴

The process for requesting accommodations will vary across public institutions. The ADA requires most state institutions to designate an ADA compliance officer or coordinator. Contact information for these officers can often be found through an online search or by asking any employee how to reach them.

[PRACTICE TIP: Your state court administrator’s office may have an ADA compliance officer who can help you and a client access court services. If a client needs accommodations to participate in courtroom proceedings, reach out to court administration as early as possible to allow enough time to arrange accommodations and notify the judge or court administrator that you may need additional time for proceedings.]

C. Filing a Complaint / Enforcement

Because Title II of the ADA prohibits discrimination against people with disabilities by public entities, and states are not immune from private suit,⁹⁵ an ADA remedy may be available if access to the courthouse or public entity is limited or denied.⁹⁶ Clients have two options if their rights are violated under Title II: (1) An administrative complaint with the appropriate federal agency; or (2) A lawsuit in federal district court.

⁹⁴ 28 C.F.R. §§ 35.149–35.150.

⁹⁵ *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that Title II constitutes a valid exercise of Congress’ Fourteenth Amendment, § 5 authority to enforce the guarantees of the Fourteenth Amendment in lawsuit filed by court reporter who alleged she lost work because she could not access courtrooms and a criminal defendant who crawled up two flights of stairs to his first hearing but was arrested for failure to appear after refusing to be carried or to crawl to his second, in a courthouse with no elevator).

⁹⁶ See, e.g., *Americans with Disabilities Act*, MICH. COURTS, <https://www.courts.michigan.gov/administration/trial-court/trial-court-operations/americans-with-disabilities/> (last visited Apr 4, 2023) (providing ADA Title II checklist under “Related Links” section applicable to state and local governmental entities).

An individual may file a complaint at one of three federal agencies: (1) An agency that provides funding to the public entity that is the subject of the complaint; (2) The DOJ; or (3) A federal agency designated in a Title II regulation to investigate Title II complaints. Eight federal agencies are designated to receive Title II complaints.⁹⁷

Complaints must be filed within 180 days of the alleged acts of discrimination, unless the time for filing is extended by a federal agency for good cause. Private lawsuits alleging Title II discrimination also may be filed in federal court, and reasonable attorney's fees may be awarded to the prevailing party.

[PRACTICE TIP: Your jurisdiction may have legal protections that align with the ADA and offer more efficient timelines for a client and/or a more complainant friendly administrative process than a federal complaint.]

VII. HOUSING RIGHTS AND REMEDIES⁹⁸

A. The Fair Housing Act

The Fair Housing Act⁹⁹ (FHA) requires owners and landlords of housing facilities to make reasonable exceptions and accommodations to their policies to ensure persons with disabilities have equal housing opportunities (e.g., allowing a service animal despite a no-pets policy). The FHA prohibits discrimination against a buyer or renter because of their disability, or the disability of an individual associated with the buyer or renter or an individual who intends to live in the buyer or renter's residence. Under the FHA, tenants with disabilities may make reasonable access-related modifications to their private living and common use spaces,

⁹⁷ An individual may contact the U.S. Department of Justice to determine with which federal agency to file a complaint. The agencies: Department of Agriculture, Department of Education, Department of Health and Human Services, Department of Housing and Urban Development, Department of Interior, Department of Justice, Department of Labor, Department of Transportation.

⁹⁸ For a detailed discussion of survivors' housing rights generally, see *Housing Considerations for Survivors of Sexual Assault*.

⁹⁹ 42 U.S.C. § 3601, *et seq.*

although landlords are not required to pay for these modifications. The FHA's reasonable accommodation provisions allow an individual with a disability to occupy a dwelling unit with a service animal as a reasonable accommodation to a "no pets" policy, and a landlord may not charge an additional security deposit for the service animal.¹⁰⁰

[PRACTICE TIP: If an accommodation request involves a service animal, the client is not required to provide documentation of what tasks the service animal performs or whether the animal is "certified."¹⁰¹]

The FHA states that people with disabilities may not be denied access to housing and requires that reasonable exceptions to policies, practices, and procedures be made for them. The FHA defines "handicap" to mean individuals with mental or physical impairments that substantially limit one or more major life activities.¹⁰² The FHA does not provide protection to users of illegal controlled substances, persons convicted for illegal manufacture or distribution of a controlled substance, sex offenders, juvenile offenders, and those individuals who present a direct threat to persons or property of others.¹⁰³ Under the FHA and Section 504 of the Rehabilitation Act (discussed below), "discrimination" includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."¹⁰⁴ The FHA generally applies to multi-family housing. It applies to single-family homes only in certain

¹⁰⁰ 42 U.S.C. § 3604(f)(2).

¹⁰¹ *Frequently Asked Questions about Service Animals and the ADA*, ADA.GOV, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., <https://www.ada.gov/resources/service-animals-faqs/> (last updated Feb 28, 2020).

¹⁰² 42 U.S.C. § 3602(h)(1).

¹⁰³ 42 U.S.C. §§ 3604(f)(8), 3606(b)(4).

¹⁰⁴ 42 U.S.C. § 3604(f)(3)(B). HUD regulations pertaining to reasonable accommodations may be found at 24 C.F.R. § 100.204.

circumstances.¹⁰⁵ The FHA also requires that people with disabilities be allowed to make reasonable modifications to the occupied premises.¹⁰⁶

B. Americans with Disabilities Act, Titles II and III

The ADA, Titles II and III, provide housing protections for individuals with disabilities. Title II covers housing facilities and programs run by state and local governments.¹⁰⁷ Title III covers other housing facilities that would qualify as a place of public accommodation, regardless of whether they receive federal financing.¹⁰⁸ Similar to other protections under the ADA, covered landlords must not exclude individuals with disabilities, charge them a higher deposit or rent, and must allow reasonable modifications to policy and facilities needed for an individual to access their housing. Under Title III, places of public accommodation are not allowed to invoke a “no pets” policy to exclude a service animal.¹⁰⁹ Additionally, the ADA places affirmative accessibility requirements on new buildings to ensure that a certain percentage of the apartments are physically accessible.¹¹⁰

C. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act of 1973, commonly called the “Rehab Act” or “Section 504” for the provision covering federally funded entities, prohibits discrimination on the basis of disability in employment and programs receiving federal financial assistance.¹¹¹ Section 504 of the Rehabilitation Act states that “no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to

¹⁰⁵ 42 U.S.C. § 3603(b)(1)-(2).

¹⁰⁶ 42 U.S.C. § 3601, *et seq.*

¹⁰⁷ 28 C.F.R. § 35.102, *et seq.*

¹⁰⁸ 28 C.F.R. § 36.102, *et seq.*

¹⁰⁹ Service and emotional support animals may be treated differently in housing cases than in other places of public accommodations. For an in-depth discussion of the ADA protections for service animals, see GREAT LAKES ADA CENTER, *Service Animals and the ADA*, Taylor, B., & Weisberg, R. (2018), available at https://www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo39_Service_Animals_and_the_ADA.pdf.

¹¹⁰ 28 C.F.R. § 36.401, *et seq.*

¹¹¹ 29 U.S.C. § 793, *et seq.*

discrimination under” any program or activity that receives federal funding, is conducted by any executive agency, or is run by the U.S. Postal Service.¹¹² Section 504 regulations apply to federal agency programs. Agencies that provide federal financial assistance to programs or individuals are also subject to Section 504 regulations. These regulations typically include reasonable accommodation for employees with disabilities; program accessibility; effective communication with people with hearing or vision disabilities; and physically accessible new construction and alterations. Each agency enforces its own regulations.

Section 504 also prohibits discrimination against people with disabilities in housing. However, it only applies to housing programs, services, and activities administered and/or funded by the federal government.¹¹³ Federal housing assistance is provided by the Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture’s Rural Development agency through public housing authorities and other organizations.

Section 504 regulations apply to applicants for, and recipients of, HUD assistance.¹¹⁴ In addition to the general prohibition of discrimination and physical accessibility requirements, these regulations require public aid recipients (i.e., agencies that receive federal funds) to provide effective program accessibility, meaning they can be approached, entered, and used by individuals with physical disabilities.¹¹⁵ Section 504 sets the “reasonable accommodation” standard. Both the FHA and Section 504 define “discrimination” to include refusing to make reasonable accommodations in rules, policies, practices, or services when these accommodations are necessary for equal opportunity to use and enjoy the housing.¹¹⁶ The

¹¹² 29 U.S.C. § 793, *et seq.*

¹¹³ 29 U.S.C. § 794.

¹¹⁴ *Assistance Animals*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals (last visited June 27, 2024).

¹¹⁵ 24 C.F.R. § 9.103.

¹¹⁶ 42 U.S.C. § 3604.

regulations require assurances of compliance by recipients and provide enforcement mechanisms.¹¹⁷

[PRACTICE TIP: A person with disabilities must show that the individual from whom they requested a reasonable accommodation knew, or should have known, about the need for an accommodation. Therefore, submit any accommodation request in writing and to keep a copy for the record. Records should also provide evidence that the person received the accommodation request (e.g., a return receipt, certificate of personal service.)]

D. Making an Accommodation Request

Safe and secure housing may be especially difficult to secure for survivors with disabilities because appropriate and affordable housing is limited. People with disabilities may be impeded from residing in housing that is not designed to accommodate their needs. For example, a client who needs a wheelchair may need housing with a ramp or an elevator. A deaf or hard of hearing client may need a residence where telephones, smoke alarms, security alarms, and other safety devices are visual instead of auditory. A client may need specialized services and devices if they were assaulted in their home or when the person who harmed them knows where they live. Clients with mental health, developmental, or cognitive disabilities are sometimes evicted from or denied tenancy of certain housing because their disability can cause anti-social or self-destructive behavior. (For example, some residential facilities will not accept or retain a resident who engages in self-harm.)

E. Filing a Complaint/Enforcement

FHA violations may be reported to HUD.¹¹⁸ DOJ can file cases against owners and landlords involving a pattern or practice of discrimination.

¹¹⁷ 24 C.F.R. pts. 8, 9.

¹¹⁸ See *Disability*, U.S. DEP'T. OF HOUS. & URBAN DEV. https://www.hud.gov/program_offices/fair_housing_equal_opp/disability_main (Last visited Sept 3, 2024)

Enforcement of federal housing anti-discrimination law is initiated by an individual or agency complaint. If a client thinks that they were denied an equal housing opportunity, they may file a complaint with the appropriate administrative agency or file a civil court action. A complaint alleging an FHA or Section 504 violation may be submitted to HUD's Fair Housing and Equal Opportunity Office in Washington, D.C., or to any local HUD office. Complaints under Section 504 about other federal agencies (e.g., the Office of Rural Development, Office of Public and Indian Housing, or Government National Mortgage Association), or their recipients, must be filed directly with the agency accused.

Complaints must be in writing, signed, and affirmed under penalty of perjury by the person with a claim. FHA complaints must be filed within one year from the alleged violation.¹¹⁹ Section 504 complaints must be filed within 180 days of the violation.¹²⁰ If a complaint has been filed and the agency is not able to successfully resolve the matter, the investigating agency will make an initial determination of whether discrimination occurred.¹²¹ If the agency finds cause to believe that a prohibited housing practice has occurred, it will make a charge and serve all parties. The complainant or respondent may elect, within 20 days of issuance of the charge, to have the claims decided in a civil action.¹²²

Instead of using the administrative complaint process, a complainant may pursue a civil lawsuit. In contrast to other discrimination complaints, the complainant is not obliged to pursue the administrative process first.¹²³ A civil action must be filed within two years of the alleged discriminatory act under the FHA. The two-year limitation period is tolled for the time a

¹¹⁹ 42 U.S.C. 3610.

¹²⁰ See *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html#rtn2> (last modified Mar 19, 2024). The OCR enforces section 504 of the Rehabilitation Act of 1973, among other federal laws.

¹²¹ 24 C.F.R. § 103.30; 42 U.S.C. § 3610(a); 24 C.F.R. § 8.56(c)(3).

¹²² 24 C.F.R. § 103.30; 42 U.S.C. § 3610(a); 24 C.F.R. § 8.56(c)(3).

¹²³ 42 U.S.C. § 3604.

complainant is pending with the agency pursuant to the administrative process.¹²⁴

Additional information about HUD and the complaint process may be requested directly from a HUD Office¹²⁵ Other national resources include the Disability Rights and Resources page¹²⁶ and the National Fair Housing Advocate Online¹²⁷.

VIII. EMPLOYMENT RIGHTS AND REMEDIES

Survivors of sexual assault with disabilities often face employment-related challenges, including hiring, retention, terms of employment, and accommodations. Several federal provisions may be useful. (See *Sexual Assault Survivors' Employment Rights*)

A. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) can help a person with a disability who needs leave time from work. A client might qualify for leave under FMLA due to a “serious health condition,” if the client is receiving ongoing treatment from a health care provider. They should submit a request for leave under FMLA as soon as possible and gather any documentation that supports their “serious health condition.”

You will need a client’s informed consent to request the documentation. A signed, time limited, record-specific release of information should be used to secure the consent. You may need to contact the ongoing treatment provider to clarify what documentation should be provided in support of the claim that a client has a “serious medical condition” that requires ongoing treatment.

¹²⁴ 42 U.S.C. §§ 3613, 106.04(6m).

¹²⁵ Additional information about FHA, HUD, and Section 504 Regulations is available from the HUD Fair Housing Hotline at (800) 669-9777 and (800) 927-9275 (TTY).

¹²⁶ https://www.hud.gov/program_offices/fair_housing_equal_opp/disability_main.

¹²⁷ <https://nationalfairhousingadvocate.org/>.

[PRACTICE TIP: While the FMLA strategy might be more efficient way to secure time off work for a client, another option is to request time off from work due to their disability as a “reasonable accommodation” under Title I of the ADA.]

B. ADA Title I

Under the ADA, disability is determined on a case-by-case basis. As a matter of law, some conditions are excluded from the ADA’s protections (e.g., current substance abuse, compulsive gambling, and pedophilia) and will not be deemed a disability.¹²⁸ Title I¹²⁹ of the ADA prohibits employment discrimination against a qualified applicant or employee in hiring, promotion, compensation, termination, and other terms of employment.¹³⁰ The employment provisions of the ADA apply to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year.¹³¹ The ADA prohibits an employer from discriminating against a qualified individual with a disability on the basis of a disability during the employment relationship - from application to termination.¹³² Determinations of whether an individual

¹²⁸ 42 U.S.C. § 12211(b).

¹²⁹ There is a jurisdictional split on whether Title II affords government employees any employment protections in addition to those offered by Title I. The majority opinion, followed by the 1st through 10th Circuits, holds that Title II does not afford any employment protections. The 11th Circuit has held that Title II affords employment protection to government employees. See *Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (“[E]mployment coverage is clear from the language and structure of Title II.”)

¹³⁰ The ADA does not apply to federally recognized Tribes when they are acting as an employer. They may have jurisdiction over some employers operating on Tribal lands or businesses owned by Tribes but not controlled by the Tribe. See *Frequently Asked Questions About Indian Tribes and Tribal Employment Rights Offices*, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N., <https://www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-tribal-employment-rights-offices> (last visited June 27, 2024).

¹³¹ 29 C.F.R. §§ 1630.2(b), (e). The ADA does not cover the United States as an employer or corporations wholly owned by the United States government, nor does it apply to Indian Tribes as employers. Employees of the federal government and its subcontractors are protected from discrimination based on disability under the Rehabilitation Act of 1973.

¹³² 29 C.F.R. §§ 1630.2, 1630.4.

has a disability are made on a case-by-case basis, not simply by a diagnosis or label.

An employer must be willing to provide an employee with a disability a reasonable accommodation unless doing so would cause undue hardship.

[PRACTICE TIP: The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title I of the ADA. The EEOC website has a section dedicated to disability discrimination. See <https://www.eeoc.gov/eeoc-disability-related-resources>.]

According to the EEOC, an accommodation is “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”¹³³ A modification is “reasonable” if it appears to be “feasible” or “plausible.”¹³⁴ In other words, a reasonable accommodation enables an individual to perform the essential functions of a position. There are three categories of “reasonable accommodations”:

- i. modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position they desire; or
- ii. modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- iii. modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges or employment as are enjoyed by its other similarly situated employees without disabilities.¹³⁵

¹³³ See “Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA,” U.S. Equal Employment Opportunity Commission (Oct 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

¹³⁴ *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516, 1523 (2002).

¹³⁵ 29 C.F.R. § 1630.2(o)(1)(i-iii).

An employer is not required to provide an accommodation if doing so would cause them undue hardship.¹³⁶ “Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing the specific accommodation. Accommodations that are unduly extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business, may cause undue hardship.¹³⁷

To be protected under the ADA, an individual must be able to perform the fundamental job duties of the position the individual with a disability holds or desires. Reasonable accommodation means modifications or adjustments to a job application process, work environment, or manner or circumstances under which the position is performed, that allow the individual with a disability to perform the essential functions.¹³⁸ Determining the appropriate reasonable accommodation should be an interactive process between the employer and the individual with the disability.

[PRACTICE TIP: Although a request for an accommodation does not have to be made in writing, best practice is to submit the request in writing so that it is dated and a copy can be kept in the client’s records.]

Employers are not required to provide the specific accommodation, modification, or device the individual with a disability requests; they are obliged to provide an accommodation that effectively meets their needs. An employer may request reasonable documentation that supports the need for the accommodation. “Reasonable documentation” includes information needed to establish that someone has an ADA disability, and that the disability necessitates reasonable accommodation. An employer is not allowed to request documentation that is unrelated to the disability and the need for the accommodation.

¹³⁶ *Id.*

¹³⁷ See 42 U.S.C. § 12111(10)(B).

¹³⁸ 29 C.F.R. § 1630.2(o).

[PRACTICE TIP: When an employee requests an accommodation and the employer responds with a request for documentation, a client's privacy is especially vulnerable. Sometimes, employers seek information beyond the scope of what relates to the job. Clients with disabilities should protect their privacy by only signing releases of medical information that are narrow, specific, and for a definite period of time.]

ADA Title I is an important tool, especially for clients with disabilities who need time off work because of their disability. Employers are prohibited from penalizing employees for work missed during a leave that was granted as a reasonable accommodation.¹³⁹ If an employee acquires a disability from a sexual assault, for example, the employee may have to demonstrate their continued ability to perform the essential functions of the job or may develop a need for reasonable accommodations.¹⁴⁰

[PRACTICE TIP: When representing a client in a Title I employment case:

- Encourage a client not to delay requesting an accommodation. Make sure the employer is aware of the request (once employment is terminated, you may not be able to make a viable claim of denial of an accommodation).
- If a client's job has already been terminated, determine if they could perform the essential job functions.
- Gather documentation, such as job descriptions, performance reviews, and witness statements.
- Assess whether and when to file an ADA Title I complaint or lawsuit, or a complaint to the EEOC.

¹³⁹ When a leave becomes unreasonable varies from job to job and with the employers' needs.

¹⁴⁰ See *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N. (Jan 1992), <https://www.eeoc.gov/laws/guidance/technical-assistance-manual-employment-provisions-title-i-americans-disabilities-act> (last visited Aug 5, 2024).

- Possible remedies include back pay, out-of-pocket expenses, reimbursement for attorney's fees, expert witness fees, court and other costs, uninsured medical costs, emotional distress damages, etc. The employee might also seek punitive damages.]

[PRACTICE TIP: Check your jurisdiction's laws about employment discrimination. Typically, ADA Title II employment complaints may be filed either with the EEOC or the state equivalent. Remember that claims must be filed within 300 days of the alleged incident of discrimination.]

C. The Rehabilitation Act of 1973

The ADA does not apply to federal employees. However, Section 501 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability for federal employees.¹⁴¹ Section 501 has been amended to align the standards for disability discrimination under Section 501 with Title I of the ADA.¹⁴² Section 501 covers the postal services and other agencies under the Executive Branch.

In addition to Section 504 housing remedies outlined in Section VI above, Section 504 of the Rehabilitation Act of 1973 requires affirmative action on the part of an employer and prohibits employment discrimination by federal government contractors and agencies or subcontractors with contracts of more than \$10,000. If an employer is covered by Section 504, a discrimination complaint may be filed with the appropriate federal agency.

D. Requestions Accommodations and Navigating the Interactive Process

Generally, an employee seeking an accommodation must inform an employer that it is needed.¹⁴³ Accommodations must be provided regardless of if an employee works part-time or full-time, or is

¹⁴¹ 29 U.S.C. § 791(a).

¹⁴² 29 U.S.C. § 791(f).

¹⁴³ See 29 C.F.R. § 1630.9.

“probationary.” Some accommodations, however, are considered unreasonable, and an employer is *not* required to, but may, provide them. For example, an employer does not need to eliminate an essential function of a job to accommodate an employee who, with or without accommodations, is not a “qualified individual.” Also, an employer does not need to lower uniform production standards.

An “interactive process” governs requesting and providing accommodations in the employment sector. An employee is not required to use specific words or a specific process to trigger an accommodation request and the interactive process.¹⁴⁴ The request can be verbal or written. To better create a record, requests in writing should be used.

An accommodation or modification request is the first step in the interactive process. After receiving a request, an employer should engage in an informal process to determine reasonable accommodations. As part of this process, an employer may request relevant information to decide about the request. However, employees are not required to provide medical records unrelated to their disability. Failure to provide reasonable documentation of disability eligibility may result in a lawful denial of accommodations.¹⁴⁵ This process should be fact-specific and consider the needs of the individual with disability and the specific job responsibilities, including the “essential functions” of the job. An employer is not required to provide the accommodation requested by an employee if another reasonable accommodation would be effective. In cases of obvious disability needs and readily achievable accommodation, the employee and employer do not need to engage in a formal or lengthy interactive process to comply with the ADA. Once an accommodation is approved and implemented, the

¹⁴⁴ *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N., <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (last visited June 27, 2024).

¹⁴⁵ *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N., <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (last visited June 27, 2024).

employer and employee may monitor the accommodations to ensure they continue to be effective.¹⁴⁶

E. Filing a Complaint / Enforcement

If an employer refuses to grant a reasonable accommodation, a client may file a complaint charging discrimination with the EEOC.¹⁴⁷ The EEOC will prepare a charge form and send it out for the client's signature. Ensure that: (1) The information on the charge form is accurate and reflects what the client believes the employer did wrong; and (2) The signed charge form is returned to the EEOC before 300 days from when the discrimination occurred.¹⁴⁸

The charge form will then be sent to the employer for a response – starting the EEOC investigation. Once the EEOC receives the employer's response, it will review the information and render its initial determination about probable cause that the employer discriminated against the employee. In most cases, the EEOC does not find probable cause. Someone who believes they were discriminated against may still sue the employer even if the EEOC does not find probable cause. The EEOC issues a Right-to-Sue letter. This letter establishes that the administrative

¹⁴⁶ The Job Accommodation Network is an employer-focused resource with a searchable disability database with related accommodations and articles on ADA Title I compliance matters: <https://askjan.org/a-to-z.cfm>.

¹⁴⁷ The EEOC enforces other federal labor protections, including Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, or national origin. For an in-depth discussion of how the Title VII sex discrimination prohibition may overlap with the ADA, see *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence Sexual Assault, or Stalking* [Review of *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence Sexual Assault, or Stalking*], U.S. EQUAL EMP'T. OPPORTUNITY COMM'N. (Oct 12, 2012) <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

¹⁴⁸ See *EEOC: Time Limits for Filing a Charge*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N., <https://www.eeoc.gov/time-limits-filing-charge> (last visited July 11, 2024).

requirements have been exhausted and a client may proceed to court within 90 days of the letter being issued.¹⁴⁹

The EEOC will typically try to negotiate a remedy on a person's behalf if it finds probable cause. If the EEOC cannot reach agreement with the employer, it may file a lawsuit in federal court on the person's behalf.¹⁵⁰

IX. HIGHER EDUCATION SETTINGS

Clients with disabilities in higher education settings will likely have disability-related federal protections. The definitions of disability in the ADA and Section 504 differ from those in the Individuals with Disabilities in Education Act (IDEA), so students transitioning from high school to higher education may find that the eligibility or documentation they need to establish a disability differs from earlier education. The ADA and Section 504 will apply differently depending on if the institution is public, private, or religiously affiliated. These laws can protect clients from exclusion from academic and extracurricular activities, housing, and other services offered by an institution based on a disability. These laws can also be a basis for requesting accommodations that supplement other supports students get through Title IX supportive measures. Accommodations for mental health diagnoses may include attendance modifications, course requirement substitutions, late drop and test time extensions, housing changes, etc.

[PRACTICE TIP: Following sexual or relationship violence, Title IX academic adjustments available through supportive measures may be immediately available to your client without proof of a disability or prior medical diagnosis. However, the Title IX process may require a student to show an ongoing need to access those adjustments in the future and/or to submit additional requests to the Title IX Coordinator.

In contrast, similar academic adjustments available as disability accommodations will likely require your client to obtain proof of

¹⁴⁹ See *EEOC: Filing a Lawsuit*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N., <https://www.eeoc.gov/filing-lawsuit> (last visited July 11, 2024).

¹⁵⁰ An EEOC attorney will be assigned to represent the client, but the client also has a right to intervene with a private attorney.

a disability diagnosis and navigate the initial accommodation request process. Once a student establishes eligibility for an accommodation; however, they will likely not need to prove their eligibility for their accommodations on an ongoing basis.

Strategically, Title IX may offer your client the quickest route to the academic assistance they need following an episode of sexual assault and could provide them with the academic support they need while they pursue the disability accommodations they will need to be successful long-term.

A. Section 504 and Private Institutions

Section 504 of the Rehabilitation Act covers higher education institutions that receive federal funding, including private religious institutions that may be exempt from ADA, Title II requirements. Section 504 requires that “[n]o otherwise qualified individual with a disability in the United States...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....”¹⁵¹ A person with a disability is defined as a person who “has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment....”¹⁵² Federally funded higher education institutions are required to make adjustments to admissions, academics, housing and nonacademic services as necessary to prevent the denial of participation by disabled students.¹⁵³ The regulations give a non-exhaustive list of examples of accommodations. They also address modifications to policies to prevent discrimination, such as a forbidding the use of recorders in class or excluding trained assistance animals.

[PRACTICE TIP: Determining auxiliary aids or other accommodations that a client needs to access campus activities and programming is fact specific. What one person

¹⁵¹ 29 U.S.C. § 794(a).

¹⁵² 29 U.S.C. § 705(20).

¹⁵³ Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, Postsecondary Education, 34 C.F.R., Subpart E §§ 104.41-47.

needs in one situation may not be needed in another situation. For example, accommodations someone with a disability needs in a lecture hall may be different than those they need in a lab. Case law can help you determine if the modifications a client needs have been provided.]

B. ADA, Titles II and III, and Higher Education

Title II and III of the ADA may also provide protections for survivors with disabilities. Title II of the ADA applies to publicly operated higher education institutions. Title II provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁵⁴ Unlike Title III and Section 504, Title II institutions are required to have an ADA coordinator.

Title III of the ADA covers higher education settings that are places of public accommodations. The ADA includes higher education institutions, including private institutions, in its definition of public accommodation.¹⁵⁵ It excludes higher education institutions controlled by religious organization from the definition.¹⁵⁶ Title III states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁵⁷

While the ADA follows Section 504 in many ways, the protections are identical. Generally, the ADA has some protections that Section 504 does not. For example, for communication auxiliary aids, the ADA requires an

¹⁵⁴ 42 U.S.C. § 12132.

¹⁵⁵ 42 U.S.C. § 12181(7)(J) (“The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commers – a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education....”).

¹⁵⁶ 42 U.S.C. § 12187.

¹⁵⁷ 42 U.S.C. § 12182(a).

entity to provide effective communication and to give primary consideration to the aid or service requested by the person with the disability.¹⁵⁸ Additionally, there are differences between where complaints are filed and the distinct remedies available.¹⁵⁹

C. Requesting Reasonable Accommodations and Academic Adjustments

In higher education, a student, not the institution, is responsible for identifying their need for disability accommodations/adjustments¹⁶⁰ and to request the accommodations/modifications they need to access the education. This is a shift in responsibility from K-12 settings and students may struggle with advocating for themselves when they enter the higher education system. This burden lies with the higher education student regardless of whether they attend a 504 or ADA covered institution. While all ADA, Title II institutions must have a disability coordinator, practically speaking, most have a designated staff person or office to handle student requests for accommodation or modifications. The law does not require a student to make a formal request to the disability coordinator. However, best practice is that the student follows the institution's standardized process and conveys in writing important information for the disability coordinator and other faculty and staff responsible for carrying out their accommodations. This documentation will be critical if a dispute arises about if an accommodation was requested or provided.

[PRACTICE TIP: When a client is going to request academic adjustments, encourage them to research accommodations based on their disability and list adjustments they want the

¹⁵⁸ See *ADA Requirements - Effective Communication*, ADA.GOV, <https://www.ada.gov/resources/effective-communication/> (last updated Feb. 28, 2020).

¹⁵⁹ For an in-depth discussion comparing the ADA and 504 in higher education, see GREAT LAKES ADA CENTER, *The ADA & Higher Education*, Taylor, B., & Weisberg, R. (2021), available at https://www.adagreatlakes.org/Publications/Legal_Briefs/Brief_45_ADA_and_Higher_Educ.pdf.

¹⁶⁰ In the higher education context, academic settings changes are often referred to as academic adjustments. 34 C.F.R. § 104.44.

institution to provide *before* they approach the accommodation coordinator.]

Institutions may request reasonable documentation to verify a student's disability needs before it provides academic adjustments.¹⁶¹ Documentation may include records from qualified medical professionals about a client's disability diagnosis and need for specific accommodation. Schools may also require students to use a reasonable procedure for processing accommodation requests.

[PRACTICE TIP: Decide with a client if and when to disclose that you are representing them with accommodations. Students without an attorney may get a more collaborative and cooperative response from schools. Your involvement will typically move the accommodation process to counsel and away from the disability coordinator. A disability coordinator might be more accommodating and an ally for a student during their education. A client might initiate an accommodation process and only disclose your involvement if an institution does not approve accommodations.]

D. Filing a Complaint / Enforcement

The Office of Civil Rights (OCR) reviews complaints of disability discrimination under the ADA and Section 504 in higher education.¹⁶² A complainant has 180 days from the act of discrimination to file a complaint, unless they are engaged in an internal complaint process or with a state or local investigative agency.¹⁶³ If a student misses the 180-day filing

¹⁶¹ *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, U.S. DEP'T. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/transition.html> (last modified Jan 10, 2020).

¹⁶² For additional information about filing a complaint, visit www.ADA.gov, <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>, or <https://www.ojp.gov/program/civil-rights-office/filing-civil-rights-complaint>.

¹⁶³ Your client may be able to file a complaint with an equivalent local investigative body. Research your local options and filing deadlines, which may differ from federal filing deadlines.

deadline, they must request a waiver.¹⁶⁴ OCR will first determine if it can investigate the complaint – that it is timely and within its jurisdiction. OCR may then offer Facilitated Resolution Between the Parties. This can be an opportunity to quickly mediate an acceptable solution to the complaint. However, both parties must agree to participate in this process. If the parties are unable to agree or decline to participate in the facilitated resolution, OCR may proceed with an investigation. OCR will issue their determination in a Letter of Findings. A client may also pursue remedies through court action.

E. State and Local Laws

In addition to federal guarantees of the rights of persons with disabilities, many other jurisdictions have laws, including court and/or evidentiary rules, that offer comparable or additional protection to individuals with disabilities.

[KNOW YOUR LAW: Determine if your jurisdiction’s laws provide more protections, protect more persons with disabilities, offer additional legal remedies, or are otherwise better for a client (e.g., longer statutes of limitation, lower standards of proof, less rigorous standards for determining disability).]

[PRACTICE TIP: If a client’s rights are violated under federal and state law, consider: (1) How long an agency has to act on a complaint or grievance; (2) Complainants’ experience with the agency and how often individuals with disabilities succeed with claims; (3) The difficulty of pursuing a complaint or grievance;¹⁶⁵ and (4) The scope of remedies available.]

X. CONCLUSION

Survivors of sexual assault with disabilities face barriers that many of our other clients don’t face. The bias, stigma, prejudice, access barriers, and

¹⁶⁴ For additional information about how OCR handles complaints and waiver guidelines, access the OCR’s Case Processing Manual at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> (last updated Jul 18, 2022).

¹⁶⁵ RIGHTS AND REALITY II: AN ACTION GUIDE TO THE RIGHTS OF PEOPLE WITH DISABILITIES IN WISCONSIN 237 (2001).

other ways in which we, as a society and as legal practitioners, do not yet provide universal access to and acceptance of everyone impacts our legal representation. We need to understand the legal remedies that may help our clients with disabilities. Federal legal protections under laws like the ADA, Section 504 of the Rehabilitation Act, the Fair Housing Act, FMLA, in conjunction with state and local protections may provide clients with the accommodations they need to access programs in various settings including courts, education and employment settings, and places of public accommodations. We need to understand the role that substitute and supported decision makers may have with representation. All while protecting survivor confidentiality and consent.