A speech-language pathologist and an attorney seek to better accommodate people with aphasia who need to testify in court.

BY CLARA S. LICATA AND MELISSA E. LICATA
A gap in the legal system means many people with aphasia cannot participate in court cases (because of problems with communication, not comprehension). Some states recognize the issue and have moved to accommodate these people in court. But much more needs to be done to meet the Americans With Disability Act’s requirement of court access for all with hearing and speaking disorders.
Liberty and Justice For All With Aphasia?

Ruby McDonough, a resident of a Framingham, Massachusetts, nursing home, was assaulted in January 2009. Because of a prior stroke, McDonough suffered from non-fluent aphasia. The condition impaired her ability to communicate orally—she could respond to yes-or-no questions, but couldn’t provide narrative information. As a result, the trial judge in the criminal case against her assailant found her incompetent to testify, because permitting her to testify would infringe on the defendant’s right to cross-examination.

James Phillips was charged in New York with attempted murder, assault and various other crimes after a domestic dispute. As a result of prior strokes, Phillips suffered from transcortical motor aphasia, which affected his ability to communicate, and possibly his ability to understand. The trial judge found him competent to stand trial and issued numerous guidelines and procedures to assist Phillips at trial: a two-day pre-trial conference to prepare to accommodate Phillips, limited trial days and hours, frequent recesses to enable Phillips to consult with his counsel to go over the proceedings, and instructions to attorneys on how best to structure questions.

Kellen Krueger was charged with various theft offenses involving misappropriation of money of his grandmother, Mary Jeri Bressler. Bressler suffered from expressive aphasia, also from a prior stroke. Bressler could respond to yes-or-no questions, but frequently gave inconsistent answers. Krueger wanted his grandmother to testify in his defense. In a competency hearing, Bressler was found incompetent as a witness, because although she might be able to understand, she couldn’t accurately relay impressions truthfully.

These cases represent different aspects of the same problem: court access for people with aphasia. Several federal statutes guarantee the right of reasonable judicial accommodation to people with hearing and speaking disabilities, and require state and federal judiciaries to enact policies and procedures to assure compliance. Judiciaries also are required to provide auxiliary aids and services to permit effective communication with people who have communication disabilities.

However, although state plans and policies typically address hearing and speaking disorders and foreign language access, they do not address aphasias that do not affect speech per se, but only the ability to communicate effectively.

This situation presents many questions: What is the nature of aphasia? How does aphasia affect court access for victims, defendants
and witnesses with aphasia? What types of accommodations could be made for people with aphasia? What are the legal limits of the rights to these accommodations?

APHASIA AND ACCESS TO THE LEGAL SYSTEM

As every speech-language pathologist knows, aphasia (as defined by the National Aphasia Association) is an “impairment of language, affecting the comprehension or production of spoken language and the ability to read and write.” SLPs also know that no two aphasias present exactly the same and that there is rarely a “cookbook” strategy that works for every patient. It’s a complex task, therefore, to design an accommodation for people with aphasia that could be standardized across the legal system.

We are a mother-daughter team of an attorney (Clara) and SLP (Melissa) seeking to support the ability of people with aphasia to provide testimony in court. Melissa became interested in this issue when—as part of her work on the traumatic brain injury team at Medstar National Rehabilitation Hospital in Washington, D.C.—she collaborated with neuropsychologists to determine if patients were competent to make their own medical decisions. She discovered the case of Ruby McDonough—the nursing home resident who was assaulted and found incompetent to testify because of her aphasia diagnosis—and sent it to Clara. Clara is a New Jersey private-practice lawyer specializing in family law, but with a growing interest in constitutional law and human-rights issues.

We had ongoing discussions about how aphasia is a communication impairment that leads to restricted access to many different systems: health care, leisure, academic, and legal. Melissa knows the challenges that people with aphasia face in health care, such as physicians speaking to partners/caregivers instead of to the patient and patients being unable to ask questions directly. She also saw the reduced opportunities for leisure activities, which inspired new speech-language treatment approaches, such as the life-participation approach to treatment, which helps people with aphasia achieve their immediate and long-term treatment goals by placing the person at the center of treatment that engages them in activities of their choosing (on.asha.org/lpaa).

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The Individuals With Disabilities Education Act (IDEA) standardized many interventions in schools and the legal procedures for putting
these interventions in place and ensuring they are implemented (such as IEPs and 504 plans). However, a review of state judiciary websites shows no consistent legal accommodations or protections for people with aphasia—or, as they are known in the legal literature, people with “expressive language disorders.” Indeed, there is very little recognition of the disorder itself.

**Federal Statutes and State Implementation**

Section 504 of the federal Rehabilitation Act guarantees court access to all people with hearing and speaking disabilities. Department of Justice regulations interpreting the section provide that court systems receiving federal funding must provide qualified interpreters for civil and criminal court proceedings involving people with hearing or speaking impairments, and that court witnesses with hearing or speaking impairments have the right—indepedent of the rights of defendants—to have interpreters available for their testimony.

This regulation also applies to other public entities, such as state-level courts. But the right to an accommodation is not unlimited. It must be “reasonable,” and an accommodation is not reasonable if it results in a “fundamental alteration” of the structure of the trial. In addition, the person is not necessarily entitled to the accommodation of their choice if another accommodation would be equally effective in ensuring the right of access.

For people with aphasia, these limitations mean that the compensatory strategy the clinician or client thinks works best might not be the one that is selected if it raises due process concerns or unreasonably interferes with the efficient functioning of the court, or if the court determines another strategy might be “equally effective.”

In 2010, the Department of Justice (DOJ) revised final regulations for implementing the Americans With Disabilities Act. A January 2014 DOJ bulletin, “Effective Communication” ([www.ada.gov/effective-comm.htm](http://www.ada.gov/effective-comm.htm)), provides guidance to covered entities, including state court systems, on the application of these rules, which took effect on March 15, 2011. The bulletin explains that:

- The effective communication rules ensure that a person with a vision, hearing, or speech disability can communicate with, receive information from, and convey information to the covered entity.
- Courts must provide auxiliary aids and services when needed to communicate effectively with people who have communication disabilities. Effective communication should consider the nature, length, complexity, and context of the communication and the person’s normal method of communication.
- For “speech disabilities,” ADA compliance may require providing a qualified speech-to-speech transliterator (a person trained to recognize unclear speech and repeat it clearly), especially if the person will be speaking at length (such as giving testimony in court), or just taking more time to communicate with someone who uses a communication board. Keeping paper and pencil on hand so the person can write out words that staff cannot understand. or simply allowing more time to communicate with someone who

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uses a communication board or device may provide effective communication.

State court systems have developed their own policies and procedures to ensure ADA and Rehabilitation Act compliance. Most state judicial websites either reference that compliance with the ADA is required, provide a summary of the right of access and requirement of accommodation, or link to a pamphlet or brochure with such a summary. They tend not to list specific disabilities to be accommodated, but rather list the types of accommodations that could be made, such as American Sign Language interpreters, computer-assisted real-time transcription (CART), readers and notetakers.

However, none of these accommodations would be suitable for a person with an expressive language disorder.

Very few state judicial ADA policies specifically address fluency, motor speech disorders, and expressive language disorders/aphasia as disabilities that require accommodation. In Georgia, for example, the court accessibility handbook recognizes language disorders as communication disorders and suggests the use of pens, pencils, and note paper to write notes; a computer available to type back and forth; flashcards; alphabet boards; communication boards; or other communication aids (bit.ly/ga-handbook). It also allows people to use their own assistive technology products, but notes that the court would not be required to purchase such a device for someone who does not already have it.

In Colorado, the Judicial Department describes aphasia and other language disorders as “cognitive disabilities,” but notes this may not include limited intellectual functioning. Suggested accommodations include having the court and witness speak slowly and write things down, repeating information using different wording or a different communication approach, allowing time for information to be fully understood, taking periodic breaks, or even providing a coach or support person at the proceeding (bit.ly/ncsc-adaguide).

ACCOMMODATIONS
What types of accommodations would provide effective communication so that people with aphasia may participate in the judicial system? A trial court may possibly permit nonverbal gestures, such as pantomime.
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In Eisenberg v. Gagnon (bit.ly/eisenberg-gagnon), testimony of a witness with aphasia was presented “in summarized form” to the jury. Standard types of auxiliary aids mentioned in DOJ interpretive rules and materials, and adopted by state judiciaries, include communication-assisted real-time transcription (CART), telecommunications relay service (TRS), video relay service (VRS), video remote interpreting (VRI), assistive listening devices and systems, and a qualified speech-to-speech transliterator. Except for the transliterator, all of these devices are intended to help people with hearing loss. The devices provide visual presentation of language, but do not assist someone who can understand what is being asked but cannot respond verbally. There may be other devices not listed by the DOJ that would enable effective communication.

For example, in Commonwealth v. Tavares (bit.ly/commonwealth-tavares), a nursing home resident with cerebral palsy who had difficulty speaking was permitted to testify using a “speak and spell” device, and his assailant’s conviction was upheld on appeal.

In an appeal of the McDonough case, the victim claimed that she had requested to testify with “interpretive assistance” from family members who could “provide communication assistance,” but those family members were not permitted to participate. The use of such non-expert interpreters, however, raises other questions concerning the reliability of the interpretation. The Massachusetts Supreme Court sent the case back to the trial court, and McDonough was allowed to testify, but media accounts do not indicate how she testified or whether she used accommodations.

Although some people with expressive language disorders or non-fluent aphasia have generally intact comprehension, they may struggle to understand more grammatically complex questions. An SLP could help an attorney simplify a question, or help a judge understand why a question may be too complex for a witness to understand. No such federal or state case, however, appears in the literature.

A person with aphasia who has a speech-generating device (SGD) should be allowed to use this device to testify in court. However, not all people who use SGDs can do so independently. In most situations, an SLP helps a patient navigate their device to find vocabulary in the early stages of use. In more advanced stages, an SLP might help them prepare a longer presentation.
These situations raise questions:

- Should an SLP serve as an expert witness or as an accommodation to a person with a disability?
- Who should that accommodating SLP be? The witness's regular clinician may be more familiar with the nuances of that person's communication profile, but may be more biased emotionally. A court-assigned SLP could observe the witness and have the opportunity to speak to the SLP working with the witness prior to the trial. Clearly, the courts can offer more accommodations while still upholding neutrality, although finding the most appropriate and fair options requires more discussion.
- Is an aid or interpreter—even a qualified expert—necessary if other procedures are available to help the witness communicate effectively? An expert may be unnecessary if attorneys can rephrase their questions to be easier for the witness to understand. This method, rather than having questions re-stated by someone else, would prevent any “fundamental alteration” in the nature of the trial.

**WHAT CAN WE DO?**

We see a gap in the legal system that does not account for the ability of some with aphasia to participate as a defendant, a plaintiff or a witness. We want to raise awareness of the issue to generate more ideas for accommodating people with aphasia in the judicial system.

There is no simple strategy or device that allows all people with aphasia to communicate effectively in a trial. The cases tend to be idiosyncratic and state judiciaries do not have a uniform approach or recognition of this unique population. At a minimum, however, states must recognize the issue, as in Georgia and Colorado. Such recognition, along with the ADA’s broad requirement of court access to all persons with hearing and speaking disorders, should provide the courts with the flexibility they need to ensure access, while also observing legal requirements to assure protection to all parties in litigation.

We encourage you to reach out to your local state lawmakers or state judiciary to ask how to ensure that your state complies with federal law regarding court access for people with aphasia. Other opportunities, such as Brain Injury Awareness Day, an event that takes place every March in Washington, D.C., offer a chance to speak to federal lawmakers. You can also speak to your state chapter of Brain Injury Association of America (BIAA, biausa.org) about opportunities for advocacy.  

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