

# REASONABLE MODIFICATIONS IN COURT FOR PERSONS WITH PSYCHIATRIC DISABILITIES

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# Mental Health Legal Advisors Committee

- ▶ An independent state agency under the Massachusetts Supreme Judicial Court
- ▶ MHLAC provides advice and direct legal representation on a wide range of civil legal issues.
  - Focus is on cases with systemic impact
- ▶ MHLAC also trains judges, attorneys, and advocates; interprets and analyzes legislation; and produces brochures and longer publications on pertinent legal matters.
- ▶ Staff includes 10 attorneys/advocates, one AmeriCorps fellow, one Boston University fellow, and 3 administrative/management persons.

# Committee for Public Counsel Services

- ▶ Public defender agency in Massachusetts
  - ▶ Criminal defense
  - ▶ Juvenile defense
  - ▶ Represent parents and children in state termination of parental rights cases
  - ▶ Mental health litigation
    - ❑ Involuntary commitments
      - ▶ Where are hearings held?
    - ❑ Compelled medication or other treatment
    - ❑ Guardianships

# Goals for today's session

- ▶ The nature of the problem and how it has been addressed
- ▶ What kind of reasonable accommodations in court might be necessary for people with psychiatric disabilities?
- ▶ What is an effective request for reasonable accommodations and how should a request be handled by court personnel?
- ▶ How can we - attorneys, advocates, people with lived experience, etc. - advocate for systemic improvements in the area of reasonable accommodations in court proceedings?

# Background

What happens when litigants ask for reasonable accommodations?

- ▶ GAL/Next Friend appointments: M.G.L.A. c. 208 § 15: Court may appoint a “Guardian” for a divorce defendant incapacitated by mental illness (MA)
  - ❑ Guardian “appear and answer in like manner as guardian for an infant defendant in any civil action” - stand in the shoes language
  - ❑ No requirement for *any medical evidence for this appointment*
  - ❑ No clear method of termination of appointment
  - ❑ Appointment treated as if litigant is an infant, in constant state of incapacity
  - ❑ Infringement on client’s autonomy for life of divorce, implicates property rights through the judgment

► Requests for reasonable accommodations in Massachusetts?

- ❑ One form - geared more for individuals with physical or sensory disabilities
- ❑ ADA coordinators but no clear administrative process (writing, how to receive a response, right to appeal, etc.)
- ❑ No clear judicial process - unclear when and if such requests should be presented to a judge
- ❑ MHLAC met with court personnel to discuss



MA Trial Court  
Office of Court Management  
2 Center Plaza  
Suite 540  
Boston, MA 02108

## Massachusetts Trial Court Request for Reasonable Accommodation

**INSTRUCTIONS:** To enable a person with a disability to access the court system, information is needed to determine the nature and extent of any requested accommodation. It is the policy of the MA Trial Court to process all reasonable accommodation requests within 72 hours of the date the request is received.

**I wish to make a Request for a Reasonable Accommodation:**

Date of Request

Name:

Phone:

E-mail:

Address:

(Street) (City) (State) (Zip)

Status  Juror  Attorney/Legal Staff  Witness  Party

Other Status (Specify)

**Court Appearance:** Name of Court

Date of Appearance  Case Name and Docket#

### Type of Accommodation Requested

Access: physical access to parking lots/entrances/rest rooms/elevators/court rooms.

Issue-Related: I need the following reasonable accommodations:

Large Print  Digital Audio Reading  Sign Language Interpreter

CART (Communication Access Real-time Translation)  Assistive Listening Devices

Other (please specify)

Date and Time Needed  at   AM

PM

**Limitations Requiring Accommodation:**

Signature of Requestor or Person completing the form

Relationship to Requestor

**Submit form to:** The ADA Coordinator in the courthouse where you are seeking an accommodation.

Refer to website for directory of ADA Coordinators at <http://www.mass.gov/courts/admin/hr.html> for contact information. This document may be available in alternative format.

## ► Requests for reasonable accommodations in Massachusetts?

- ❑ One form - geared more for individuals with physical or sensory disabilities
- ❑ ADA coordinators but no clear administrative process (writing, how to receive a response, right to appeal, etc.)
- ❑ No clear judicial process - unclear when and if such requests should be presented to a judge
- ❑ MHLAC researched how other states address this and met with MA court personnel to discuss





# The Americans with Disabilities Act of 1990

- ▶ Civil rights legislation that prohibits discrimination on the basis of disability and promotes equal opportunity to fully participate in all aspects of life—employment; participation in programs and services; and access to public accommodations
- ▶ **Title II applies to government programs and services, which includes courts**
  - (Title I applies to employment; Title III applies to public accommodations)
- ▶ **ADA Amendments Act of 2008**

# The ADA

- ▶ To be protected by the ADA, one must have a disability, which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.
- ▶ *Exclusions:* The following conditions are specifically excluded from the definition of "disability": transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

# Note on language and “disability”

Clearly not everyone who lives with a psychiatric diagnosis is disabled BUT you must be disabled, or be regarded as having a disability, in order to qualify for modifications or accommodations under the ADA

# Reasonable Modifications (also known as accommodations)

Unlawful for covered entities to refuse to provide reasonable modifications (in employment, programs, services, etc.) to otherwise *qualified individuals*

# Qualified Individual

*“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.”

# Fundamental Alteration or Undue Burden

Government entity is not required to fundamentally alter the program or service for which the person with a disability is requesting an accommodation.

A government entity has the burden of showing that it would be an undue financial or administrative burden to provide certain accommodations.

- ▶ How does this play out in relation to court services?

# Who are court users?

Litigants

Jurors

Witnesses

Attorneys

# Litigants

- ▶ People who file a case in court, or who have a case filed against them
- ▶ Need to file pleadings
- ▶ Need to appear in court to pursue their claim or answer and defend
- ▶ May be deposed in advance of hearing or trial

# Jurors

- ▶ People who serve on a jury
- ▶ Need to attend court and be able to understand the proceedings and render judgment with the rest of the jury members

# Witnesses

- ▶ People who have first-hand information about the facts in a case
- ▶ One or the other side asks them to come to court and testify in open court about what they know
- ▶ May be deposed in advance of hearing or trial

# Attorneys

- ▶ Representing clients in cases in court
- ▶ Need to file pleadings
- ▶ Need to review/prepare court files
- ▶ Need to appear in court and present their client's case
- ▶ May need to conduct or defend depositions

# Case Law

- ▶ Tennessee v. Lane, US Supreme Court (2004):
  - ❑ Title II of ADA can validly be applied to state courts in terms of the fundamental right of access to the courts
- ▶ In re: Marriage of James & Christine C., California (2008):
  - ❑ Undisputed that wife diagnosed with bipolar disorder, as a result entitled to accommodations under ADA
  - ❑ Court has to make specific determination of at least 1 of 3 specifically identified grounds in order to deny request for accommodation
- ▶ Biscaro v. Stern, California (2010):
  - ❑ Court must respond to request for accommodation and must inform the applicant in writing
  - ❑ Cannot treat the failure to rule as a denial - would undermine the policy of the rule, which is to acknowledge and address disabilities of people who come before the Court

# Case Law

- ▶ Blackhouse v. Doe, Maine SJC (2011)
  - ▶ Individual may submit request for accommodation to the clerk of court... Or to the assigned judge, case management officer or mediator.
    - ▶ “If the request is one that may impact the way in which hearing or trial will be conducted, a judicial officer should consider the request.”
  - ▶ “Accommodations are variations in the way things are normally done to enable individuals with disabilities to have an equal opportunity to participate in court activities.”
  - ▶ The court dismissed plaintiff’s case for failure to appear without ever considering and ruling on his request for accommodations.

# Case Law

- ▶ In re: McDonough, Massachusetts (2010):
  - ❑ Witness made the request, normally without standing, but if accommodation request is denied, right to interlocutory review by party seeking to introduce the testimony
  - ❑ Judge should make inquiry on the record if witness has disability and if requires accommodation, and if so, what would that be
  - ❑ If the inquiry itself requires accommodation, the judge shall order it
  - ❑ Mass Equal Rights Act
  - ❑ It is incumbent on all judges and judicial staff to ensure that every person with a disability be provided with reasonable accommodation, if available

# What does some of the case law tell us?

- ▶ Lindsey v. Gharibian, California (2012)
- ▶ Weems v. State, Board of Industrial Insurance Appeals, Washington State (2014)
- ▶ In re: Estate of Coaker, Washington state (2016)
- ▶ Littler v. Massachusetts (2017)
  
- ❖ Even with protections of the ADA, courts can find procedural or other basis to deny appeal - insufficient findings, improperly submitted requests, insufficient lower court record, inapplicable statute ...

# How do you get a reasonable accommodation?

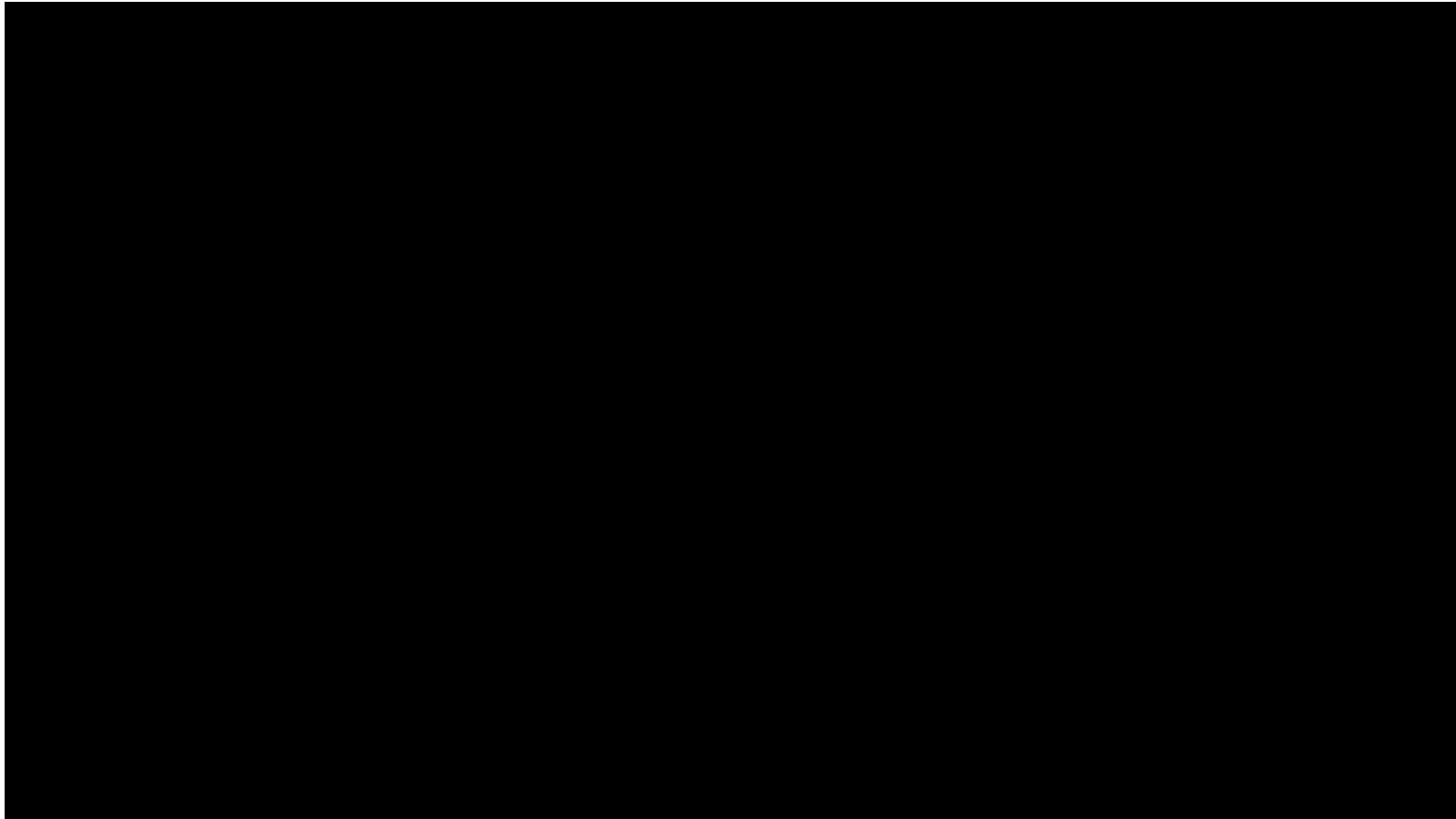
- ▶ What do you generally have to show the courts?
  - ▶ Evidence of disability
  - ▶ Information about how it affects your ability to access court proceedings
  - ▶ What accommodation you are requesting
- ▶ But *process* is different from state to state...

# Case Example

- ▶ Mom with auditory processing disorder
  - ❑ Custody case in court, child welfare involved, not accommodating her disability
  - ❑ Evidence of disability - for purposes of court appearances
  - ❑ How mom's disability affected her ability to access court proceedings - hearing the judge and other witnesses, responding to questions
  - ❑ Accommodations?

# Auditory Processing Disorder simulation

<https://www.youtube.com/watch?v=vzegGXoZY30>



# Case Example

- ▶ Father with ADHD, PTSD, Schizoaffective D/O, Major Depression
  - ❑ Custody case in court and restraining order
  - ❑ Evidence of disability: client presented detailed documentation of disabling affect of his mental health condition
  - ❑ How dad's disability affected his ability to access court proceedings: stress affects ability to recall/speak clearly, recollection of judge's instructions, ability to collect his own thoughts, remember all of his arguments under time pressure
  - ❑ Accommodations?

# Psychiatric and Cognitive Disabilities and Possible Accommodations

## ▶ PTSD

- ▶ Avoid aggressive cross-examination
- ▶ Sit in position that doesn't make you feel like someone will surprise you from behind

## ▶ Anxiety

- ▶ Trusted person to sit at counsel table and help take notes
- ▶ More frequent breaks

## ▶ Auditory Processing Disorder

- ▶ Smaller or quieter courtroom (closed?)
- ▶ Trusted person to help organize paperwork and take notes
- ▶ Opportunities to mediate case

# Psychiatric Disabilities and Accommodations

## ▶ Generally

- ▶ Later start time if medications make it difficult to get to court early
- ▶ More frequent breaks
- ▶ Ability to check in with trusted support person who is present at court
- ▶ Help with organizing papers, taking notes, etc.
- ▶ Ability to access recordings of proceedings
- ▶ Assistance preparing written docs in advance
- ▶ Appointment of counsel!

# Accommodations that may affect the underlying merits of the case

- ▶ When request for accommodations implicates the substance of the case (*i.e.*, custody/parenting time) - inherent risk of prejudice
  - ▶ Versus housing or criminal - disability could be mitigating factor
  - ▶ Stigma
  - ▶ Discrimination based on diagnosis vs. parental capacity
- ▶ Possible solutions?
  - ▶ Requests handled strictly administratively
  - ▶ Requests submitted *ex parte* to different judge

# What is going on in Massachusetts?

- ▶ MHLAC met with Chief Justice of the trial court
  - ❑ Concern re: information available to litigants
  - ❑ ADA coordinators not well equipped to handle requests
  - ❑ Inadequacy of forms
  - ❑ Looked to other states for inspiration
- ▶ Response:
  - ❑ Court doing mandatory re-training of all ADA coordinators, court personnel, judges
  - ❑ Court developing FAQ document
  - ❑ Court distributed “Procedural Guidance for Judges for ADA Accommodations Requests” based on the SJC guidance in *In re McDonough* (2010)

# MHLAC Survey

- ▶ Solicited information from legal service providers
- ▶ Questions included:
  - ▶ Have you ever worked on a case where a RA was requested or provided?
  - ▶ Provide details as to nature of disability, which court, who requested, how requested and if other side given notice of request
  - ▶ Outcome of request including who responded and how (judge order, verbal, in writing)
  - ▶ Was right to appeal denial provided?
  - ▶ Was it for specific stage of case?
  - ▶ Was the party requesting satisfied?

# Survey Results

- ▶ 64 responses
- ▶ Request(s) Approved:
  - ▶ Client with chemical sensitivity requested closed courtroom. Request approved and handled satisfactorily.
  - ▶ Request for frequent breaks approved.
  - ▶ Request for client to sit, order of events to be changed, excused from some of process, opportunity to explain process so client could understand. Sometimes requests honored.
  - ▶ Request for “fairness hearing” to be held at hospital instead of courthouse. Approved.
- ▶ Request(s) Denied:
  - ▶ Client with schizophrenia went in and out of courtroom, could not sit still. Laid down on bench. Court officer told client to move. Attorney explained disability and not affecting anyone. Court officer refused to allow continued movement.

- ▶ Do attorneys and litigants know they can request RAs?
- ▶ Hard to determine how often in our jurisdiction RAs are requested and granted - data collection needed
- ▶ How formal is the process really?
- ▶ Trying to educate court staff/judiciary and potential litigants of their rights to make these requests

# Location of hearings in involuntary commitment cases

*Solomon Carter Fuller v. M.C.* (will be argued October 1, 2018 at the MA SJC - watch here:

<https://www.suffolk.edu/sjc/>)

- ▶ *Amicus solicitation by SJC*: Whether the respondent's due process or equal protection rights were violated when his involuntary commitment hearing took place at the hospital rather than at the courthouse where, he argues, the hospital lacked reliable recording equipment, unauthorized recording devices were substituted, and large portions of the hearing were, as a result, not recorded.

# Sampling of Other States

- ▶ California

- ▶ <http://www.courts.ca.gov/documents/Disability-Accommodations-in-California-Courts.pdf>

- ▶ Colorado

- ▶ <https://www.courts.state.co.us/userfiles/file/ADA%20-%20FAQs%203-9-12.pdf>

- ▶ Connecticut

- ▶ Maine

- ▶ Maryland

- ▶ New York

- ▶ [https://www.nycourts.gov/accessibility/courtusers\\_guidelines.shtml](https://www.nycourts.gov/accessibility/courtusers_guidelines.shtml)

- ▶ Washington State rule

- ▶ [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=gr&rul eid=gagr33](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&rul eid=gagr33)

# Best practices for Accommodations?

- ▶ Strictly administrative process
  - ❑ judges and judicial staff only notified of agreed upon accommodations - denials made in writing, can be appealed
- ▶ Collaborative process between court and litigant
  - ❑ Denials require offer of alternative accommodations; can be grieved
  - ❑ Also strictly administrative process
- ▶ Requests can be submitted *ex parte* to Judge
  - ❑ Option for submitting request under seal
- ▶ Detailed Rules of Court and Disability Etiquette/FAQs
  - ❑ as much for staff as for litigants making a request

- ▶ Standardized forms including offer of alternatives, basis for denial, review first by administrative office, further review by judge
- ▶ For the states that provide detailed process: importance of confidentiality, clear review and denial guidelines and appeal or grievance process
- ▶ Appt of counsel as one accommodation the court could grant (WA Rule)

# Other Recommendations

- ▶ Consideration of accommodations request by a different judge
- ▶ Administrative process but for appointment of counsel and appeals, which would be considered by judge (not trial judge)
- ▶ Specific, individually tailored orders for accommodations with basis for denials, alternatives proposed, consider outside resources?
- ▶ Timing of requests: at the outset, prior to trial, ongoing/as needed basis, specific to discovery for example - ease of process important too
- ▶ Importance of the litigant's right to access the process without necessarily prejudicing their substantive case always has to be taken into account when considering how to handle requests for accommodations

# Questions and Suggestions?

