



Hear Me Well: The Obligation of a Physician's Office to Provide a Sign Language Interpreter Under the Americans with Disabilities Act

By: Fran Quarles, Esq., of Quarles Law Firm, LLC, in Birmingham, Alabama

In 2008, a New Jersey jury awarded \$400,000 in compensatory and punitive damages to a deaf woman who brought a lawsuit against her rheumatologist, not for malpractice, but for discrimination. The physician, a Dr. Fogari, treated the patient for lupus over a year and a half by exchanging written notes, despite her repeated requests for Dr. Fogari to provide a sign language interpreter. Dr. Fogari was a sole practitioner and refused to pay for an interpreter because his Medicare reimbursement was far below the actual costs of the visits. At trial, the patient presented evidence that miscommunication occurred between them - for example, she believed her swollen face was due to her disease, and not due to the use of the steroids Dr. Fogari prescribed. The jury found that Dr. Fogari had discriminated against the patient by failing to provide a sign language interpreter to ensure he was effectively communicating with her. This large verdict captured the attention of many in the medical community because most professional liability carriers do not cover discrimination claims or punitive damages, meaning the money paid to a plaintiff in such instances would come from the physician personally. Dr. Fogari's case eventually settled on appeal for an undisclosed amount.

Even though the above case occurred in New Jersey, the same federal law and its requirements would apply to Alabama physicians. Under Title III of the Americans with Disabilities Act (ADA), a physician's practice, regardless of size, is considered a "public accommodation."¹ In order to ensure equal access to services, a public accommodation has a duty to provide "auxiliary aids or services" when necessary to ensure "effective communication". However, there are a few exceptions to this duty that will be discussed below in more detail.

Auxiliary Aids and Services

Auxiliary aids and services include, but are not limited to, qualified sign language interpreters, note takers, written materials, computer-aided transcription services, telephone handset amplifiers, closed caption decoders or other effective methods of providing verbal information to deaf or hard-of-hearing patients. The choice in an auxiliary aid or service must result in "effective" communication. For this reason, a physician may not require a patient to provide a family member or friend to provide interpreting

services because such persons often do not have the skills to interpret effectively in a medical setting. In addition, family and friends may be too emotionally or personally involved in the situation, have interests that conflict with those of the patient's, or raise patient confidentiality issues, particularly if the patient does not want to share his or her medical condition with anyone else.

When choosing which type of auxiliary aid or service to provide, the physician must take into consideration the type of health care service provided for that particular patient. For example, written notes may suffice for a routine check-up. A surgical procedure, however, would more than likely require a sign language interpreter.

Many deaf or hard-of-hearing patients will contact a physician's office prior to their appointments to discuss their particular needs so the office can make appropriate arrangements. In fact, ADA regulations state that health care providers are expected to consult with the patient and consider his or her self-assessed communication needs before acquiring a particular auxiliary aid or service. The choice of auxiliary aid or service is the physician's. However, if the patient is not satisfied with the physician's decision, as in Dr. Fogari's situation, then the patient may challenge that decision by filing either a lawsuit or a complaint with the Department of Justice.

Undue Burden or Fundamental Alteration

There are two exceptions to a patient's request for a particular auxiliary aid or service. Health care providers do not have to provide a requested auxiliary aid or service if it would result in 1) an undue burden or 2) a fundamental alteration of the nature of the service provided. An undue burden is something that is particularly difficult or expensive. Many physicians, like Dr. Fogari, believe that an "undue burden" occurs when reimbursement falls short of the actual costs of the office visit. However, undue burden is not measured by the amount of income a physician receives from a particular patient or payor. Instead, undue burden is measured by the overall financial impact on the entire practice. In the case above, the patient successfully argued that the annual cost of

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UPCOMING EVENTS

- Oct. 6 Ethics Committee Meeting
- Oct. 14 EHR Incentives & Vendor Contracting Issues
- Oct. 18 Executive Committee Meeting – 5:30 p.m.
- Oct. 19 The Wayne Finley 811 Breakfast Club Meeting –
UAB Archivist Timothy Pennycuff will speak on
“Football Players Who Practiced Medicine in Alabama”
at 8:30 a.m. in the JCMS Board Room
- Nov. 2 JCMS Annual Dinner Meeting with Speaker SEC
Commissioner Michael Slive in the Staterooms at
The Club
- Nov. 4 Looking Into the Crystal Ball – 2011 Issues for
Healthcare Practices
- Nov. 8 Foundation Trust Meeting – 5:00 p.m.
- Nov. 15 Executive Committee Meeting – 5:30 p.m.

Board of Directors Meeting – 6:30 p.m.
- Nov. 16 The Wayne Finley 811 Breakfast Club Meeting –
This meeting will be “A Tribute to James A. Pittman, Jr., M.D.”
at 8:30 a.m. in the JCMS Board Room
- Dec. 1 Ethics Committee Meeting
- Dec. 20 Executive Committee Meeting – 5:30 p.m.
- Dec. 21 The Wayne Finley 811 Breakfast Club Meeting –
Dr. Richard McGlaughlin will speak on his recent healthcare
experiences in Haiti at 8:30 a.m. in the JCMS Board Room

Contact Juanita Pruitt at 933-8601 or jpruitt@jcmsalabama.org for more information regarding any of the above events.

In Memoriam

The JCMS wants to acknowledge the recent passing of the following JCMS members:

Thomas M. Davis, Jr., M.D.
June 17, 2010

Joseph M. Lee, M.D.
August 5, 2010

Special Thanks

The JCMS Executive Committee and Board of Directors would like to thank Healthcare Financial Services, LLC, for their sponsorship of our Annual JCMS Day at the Ballpark to watch the Birmingham Barons play against the Chattanooga Lookouts on August 1, and for their ongoing support of the Jefferson County Medical Society and its members.



New Members

Francis Warren Bemis, M.D.	Anesthesiology	Stephen E. Mason, M.D.	Dermatopathology
Elizabeth Beierle Chen, M.D.	Pediatric Surgery	Philip James McArdle, M.D.	Anesthesiology
Mark R. Benfield, M.D.	Pediatric Nephrology	Dahlia H. McKinney, M.D.	Internal Medicine
Cheri Lee Canon, M.D.	Radiology	Martha S. McLaughlin, M.D.	Obstetrics/Gynecology
Kenneth Alan Carlson, M.D.	Anesthesiology	Robert W. Mitchell, M.D.	Family Medicine
Jack Brennan Carter, Jr., M.D.	Anesthesiology	Rachel Fineberg Oser, M.D.	Radiology
Nileshkumar Chaudhari, M.D.	Orthopedic Surgery	R. Stephen Pannel, D.O.	Psychiatry
Samuel A. Cherry, III, M.D.	Anesthesiology	Sarah K. Pannel, D.O.	Psychiatry
Young Hwan Choi, M.D.	Ophthalmology	Michael Peter Rahman, M.D.	Anesthesiology
Grady Bruce Core, M.D.	Plastic Surgery	David John Schultz, M.D.	Cardiology
Robert Chad Deal, M.D.	Plastic Surgery	Roland T. Short, III, M.D.	Anesthesiology
Sandra K. Gilley, M.D.	Pulmonary Medicine	Gardner Scott Smith, M.D.	Surgery
Cooper Phillip Hagerty, M.D.	Anesthesiology	Stephen W. Starling, Jr., M.D.	Anesthesiology
Scott Edwards Harper, M.D.	Anesthesiology	Shree K. Subedi, M.D.	Nuclear Medicine
Robert Shane Hodson, M.D.	Anesthesiology	Jefferson B. Taylor, M.D.	Anesthesiology
Michael Scott Kendrick, M.D.	Anesthesiology	Alan Q. Thomas, M.D.	Pulmonary Medicine
Christopher A. King, M.D.	Cardiovascular Disease	Tracey Small Wilson, M.D.	Urology
Clifton T. P. Lewis, M.D.	Surgery	Shih-Hsin Eddy Yang, M.D.	Internal Medicine



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CEO UAB Health System

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a sign language interpreter amounted to less than a quarter of a percent of Dr. Fogari's practice. The cost of an interpreter was found not to be an undue burden even though he would have lost money on each visit. Additionally, physicians should be aware that they are prohibited from imposing a surcharge to cover the cost of an auxiliary aid or service, such as charging the patient or his insurer the cost of a sign language interpreter.

A fundamental alteration is a significant change in the basic nature of a service or goods. For example, it would not be discriminatory for a physician specialist who treats only burn patients to refer a deaf individual to another physician for treatment of a broken limb or respiratory ailment. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice.

However, in the event a particular auxiliary aid or service is determined to be an undue burden or fundamental alteration, a physician is still not excused from the duty to furnish an alternative auxiliary aid or service that would not result in an undue burden or fundamental alteration.

Tax Credit Available for Accessibility Expenses

While this article is not intended to provide specific tax advice, physicians should be aware that there is a tax credit for small businesses under Section 44 of the Internal Revenue Code to help cover expenses incurred in providing auxiliary aids and services.

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In general, if a physician's practice has thirty or fewer full-time employees or had a previous tax year revenue of \$1,000,000 or less, it may qualify for a tax credit for certain expenses incurred in providing medical services to individuals covered under the ADA. Eligible expenditures include, but are not limited to, the costs of providing sign language interpreters and captioning devices. For more information that physicians can discuss with their financial advisors, please see "Fact Sheet 4: Tax Incentives for Improving Accessibility", available online from the U.S. Department of Justice at www.ada.gov.

Conclusion

Effective communication is essential to providing quality healthcare services to deaf and hard-of-hearing patients. A physician's office, as a public accommodation, is required by federal law to provide such aids and services to ensure effective communication, even if the physician is not fully compensated for these additional aids and services. If the provision of a particular auxiliary aid or service would seriously impact the practice's overall financial situation or fundamentally alter the nature of the medical services, then the physician would be able to offer an alternative aid or service that provided effective communication. Physicians should keep in mind, however, that if the patient is dissatisfied with the level of communication, he or she has the right to file a lawsuit or complaint with the government to challenge the physician's choice of communication. While the immediate cost of a sign language interpreter or other auxiliary aid or service may seem exorbitant, physicians should keep in mind that the costs of a discrimination lawsuit and possible punitive damages are much more expensive. To help defray the costs of auxiliary aids and services, a physician's office may qualify for a tax credit under the Internal Revenue Code.

No one benefits when a physician tries to cut corners in choosing an auxiliary communication aid or service; the patient does not receive the highest quality of care due to communication barriers, and the physician is exposed to the risk of paying more money in a lawsuit than the cost of one or more sign language interpreters. Therefore, in the best interests of all, a physician should consult with his or her deaf or hard-of-hearing patient before the first visit and "hear each other out" to arrive at a mutually agreeable and effective communication system.

The above is provided for general informational purposes only. You should consult your legal or tax professional for advice specific to your situation.

1 Lawyer's offices, accountant's offices, gas stations, funeral parlors, banks, dry cleaners and shoe repair services are among other private entities defined as "public accommodations." 42 United States Code § 12181(7)(F). These same obligations to provide sign language interpreters apply to all public accommodations.

In The News



James C. Grotting, M.D., of Grotting Plastic Surgery in Birmingham, Alabama, has been elected President of the Southeastern Society of Plastic and Reconstructive Surgeons. He was inaugurated at the annual SESPRS meeting in Palm Beach, Florida, on June 15, 2010.



Mike Kuang-Sing Chen, M.D., has been named Chief of Pediatric Surgery at the Children's Hospital of Alabama. Dr. Chen earned his medical degree from the University of Texas Health Science Center at Houston in 1987, where he received a number of academic and clinical honors and awards. He completed his residency in general surgery and a fellowship in solid organ transplantation at the University of Florida, where he was also the American Cancer Society research fellow. He then completed a pediatric surgery fellowship at the University of Tennessee.

He joined the Children's medical staff in 2009 after serving as an attending surgeon at Alachua General Hospital and Shands Hospital at the University of Florida. Dr. Chen is certified by the American Board of Surgery and holds a Certificate of Special Qualification in Pediatric Surgery.



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Mentors Needed

The School of Medicine - UAB is looking for area physicians who are willing to serve as a mentor to a group of medical students. The new mentoring program is based on "learning communities" which will be composed of students from different grade levels. Each learning community currently has four to five faculty mentors and they would like to add several physicians to each learning community. The focus of the program is to foster academic support, career counseling and research assistance. Rather than a traditional setting where an individual student might interact with a mentor in a clinic, classroom or office setting, this program is designed to have mentors interact with multiple members of a learning community in a more relaxed social setting to foster discussion and more meaningful relationships between students and mentors. The School is coordinating a number of social activities to allow for interaction among the students, faculty and physician mentors. If you are interested in learning more or in serving as a mentor, contact Alicia Battle, M.S., C.H.E.S., Program Manager I - Medical Student Services, at 934-3483 or abattle@uab.edu.

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See ad on page 6

Save the Date

Save the Date of Tuesday, November 2, 2010, for the Jefferson County Medical Society's Annual Dinner Meeting. This year's event will be held in the Staterooms at The Club.

The social hour will begin at 6:00 p.m. and dinner will be served at 7:00 p.m. Our speaker for the evening will be SEC Commissioner Michael Slive. Falling in the midst of football season, the Commissioner is sure to have some interesting stories to tell, so plan to attend!

Watch your e-mail or mail for the invitation coming in October!!

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