

# THE ADVOCATE

Issue 6

Winter 2009

## Understanding the Americans with Disabilities Act

*This article is for informational purposes only and does not constitute legal advice. Podiatrists seeking legal advice should consult with an attorney duly licensed to practice in their jurisdiction.*

### Why must doctors provide services to hearing impaired individuals?

First, Title III of the American with Disabilities Act prohibits discrimination against individuals who are deaf or hard of hearing in places of public accommodation. A public accommodation includes private healthcare offices. Podiatrists, therefore, are considered a public accommodation.

As a public accommodation, podiatrists are required to take “steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals be-

cause of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.” Podiatrists are required to furnish appropriate auxiliary aids and services to ensure effective communication.

Furthermore, under Section 504 of the Rehabilitation Act of 1973 physicians receiving Medicare and Medicaid reimbursements cannot discriminate against individuals on the basis of disability.

### What are the kinds of auxiliary aids and services that a podiatrist must offer?

*(Continued on page 2)*

Subscription Information and Changes	Inside This Issue								
<p>You have received <i>The Advocate</i> because the APMA membership database identifies you as a state executive director, president or state representative to the State Advocacy Forum. If you wish to unsubscribe or change information please contact:</p> <p style="text-align: center;">APMA State Advocacy 9312 Old Georgetown Road Bethesda, MD 20814-1621 advocacy@apma.org</p>	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;">Frequently Asked Questions About the Americans with Disabilities Act</td> <td style="text-align: right; padding: 5px;">1-5</td> </tr> <tr> <td style="padding: 5px;">Association Spotlight: Illinois Podiatric Medical Association</td> <td style="text-align: right; padding: 5px;">6</td> </tr> <tr> <td style="padding: 5px;">Frequently Asked Questions About PACs</td> <td style="text-align: right; padding: 5px;">7-9</td> </tr> <tr> <td style="padding: 5px;">2009 APMA State Advocacy Forum Meeting Agenda</td> <td style="text-align: right; padding: 5px;">10</td> </tr> </table>	Frequently Asked Questions About the Americans with Disabilities Act	1-5	Association Spotlight: Illinois Podiatric Medical Association	6	Frequently Asked Questions About PACs	7-9	2009 APMA State Advocacy Forum Meeting Agenda	10
Frequently Asked Questions About the Americans with Disabilities Act	1-5								
Association Spotlight: Illinois Podiatric Medical Association	6								
Frequently Asked Questions About PACs	7-9								
2009 APMA State Advocacy Forum Meeting Agenda	10								

*(Continued from page 1)*

The kinds of auxiliary aids and services depend on the facts and circumstances of the situation. While there are no one size fits all types of auxiliary services, such auxiliary aids include:

- qualified interpreters;
- note-takers;
- written materials;
- transcription services;
- assistive listening devices and systems for deaf persons;
- telephone handset amplifiers; or
- video interpretive services.

Podiatrists should consult with their patient to determine which auxiliary aids or services would best fit

### **When should a qualified interpreter be used instead of other auxiliary aids?**

There are certain situations when an interpreter must be used to ensure effective communication. These situations include:

- **Discussing a patient's symptoms and medical condition, medications and medical history;**
- **Explaining and describing medical conditions, tests, treatment options, medications, surgery, and other procedures;**
- **Providing a diagnosis, prognosis, and recommendation for treatment; obtaining informed consent;**
- **Communicating with a patient during treatment and testing procedures; providing instructions for medications, post-treatment activities and follow-up treatment; and**
- **Discussing complex billing or insurance matters.**

the patient's needs. During the consultation, podiatrists should consider:

- the degree of hearing loss;
- whether the individual can speak but cannot hear; and
- type of interpreter used by the patient.

Also, podiatrists should consider the type of communication involved, for example, whether the communication concerns medical diagnosis and treatment, costs and billing information, or is for the purposes of obtaining consent to treatment or surgery.

### **What is a Qualified Interpreter?**

Qualified interpreters do not have to be certified sign language interpreters. What is required is a qualified interpreter "who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary."

Family members and friends of deaf patients are not qualified interpreters. The rationale for this rule is that use of a family member or friend will likely inhibit communications of sensitive and confidential information.

In very limited instances, family members or friends may be used. Examples of these limited instances are emergency situations involving a threat to public welfare or when the patient agrees to use a family member or friend. In the situation where the patient agrees to use the family member or friend as an interpreter, the podiatrist still must offer auxiliary services or aids free of charge to the patient.

Also, a child of a patient may never serve as a qualified interpreter.

### **For whom must a podiatrist offer auxiliary aids or services?**

Podiatrists must offer auxiliary aids and services to patients who are hard of hearing or deaf.

In certain situations, podiatrist may need to provide auxiliary aids and services to deaf or hard of hearing

*(Continued on page 3)*

*(Continued from page 2)*

companions of patients, even when the patient is not deaf or hard of hearing. Companions can be the patient's next of kin; anyone who is legally authorized to make healthcare decisions for the patient; a person designated by the patient to assist in providing information regarding the patient's medical history, needs or symptoms; or, a person authorized to help the patient act on information or instructions provided by medical personnel. Such examples include when the companion is a parent of child or a guardian of an elder patient.

**Can a podiatrist bill the patient or their insurance carrier for the use of a qualified interpreter or other auxiliary services?**

No. It is the duty of the podiatrist to accommodate patients with auxiliary aids and services. Podiatrists may not bill the patient for such services. The patient or their insurance carrier cannot be billed for the auxiliary aids or services even if a patient does not show up for their appointment.

Tax relief may be available for compliance with the ADA, such as a credit up to 50% cumulative eligible access expenditures made within the taxable year that exceed \$250 but do not exceed \$10,250. Readers should consult their accountant or tax attorney for more information.

**Does the publication of an educational article on ADA compliance by APMA increase members' liability based on intentional discrimination?**

Federal anti-discrimination laws govern those who are insensitive to the discrimination that the laws abolished, as well as those who are unaware of its scope. The United States Supreme Court has ruled that good intent and good faith are not defenses because the law is directed at the consequences, not the motivation, of discrimination. A claim of discrimination is fundamentally for the redress of a violation of law that caused injury and for which the law imposes liability. So long as a member acted voluntarily and intentionally, there would be liability for discriminatory actions, and there could be no

defense on the ground that the member misunderstood the law. A finding of liability for disability discrimination does not require that the defendant know of all the technicalities contained in the law – ignorance of the rights secured by the ADA is not a defense to an enforcement action.

Indeed, when a defendant accused of discrimination seeks to defend against the charge by establishing actions taken in good faith, courts require the defendant to produce evidence of more than ignorance of the law or uncertainty about its development. They require proof that active steps were taken to ascertain the dictates of the law, and then action was taken to comply with them. Of course, evidence that a member purposely avoided learning about the ADA, or was aware of the mandates of the law and consciously chose to flout those requirements, could expose the member to punitive damages.

**When is it acceptable not to use auxiliary aids and services?**

**A podiatrist is not required to provide an interpreter or other auxiliary aids or services when such service would either present an undue burden or would fundamentally alter the nature of the services normally provided. An undue burden is “a significant expense or difficulty to the operation of the facility.”**

**Factors courts use to determine whether providing an interpreter would present an undue burden include:**

- **The practice or facility's operating income and eligibility for tax credits, and**
- **Whether it has sources of outside funding or a parent company.**

**However, the “undue burden” standard is difficult to meet and the healthcare provider has the responsibility to prove such undue burden.**

(Continued from page 3)

**Is it discrimination if I refer a patient to another podiatrist who has an established relationship with an interpreter or has capabilities to see hearing-impaired patients?**

Under the governing regulations of the ADA, a healthcare provider may not provide disabled patients with services that are different or separate from the services provided to other individuals, unless separate services are necessary to provide the patient with a service that is as effective as that provided to others. In applying this principle, the U.S. Department of Justice has declared that healthcare providers cannot simply refer a patient with HIV/AIDS to another provider merely because the patient has HIV/AIDS. Any referral must be based on the treatment the patient is seeking, not the patient's HIV status alone. Thus, if a podiatrist routinely treats people suffering from the type of condition presented by a hearing impaired patient, sending that patient to another podiatrist who has an interpreter, or ostensibly has special capabilities to see hearing-impaired patients, would violate the ADA.

In a settlement of a charge of discrimination alleging that a hospital failed to accommodate hearing impaired patients, the Department of Justice required the hospital to create and maintain an up-to-date list of sign language interpreting agencies and other qualified sign language interpreters residing within sixty (60) miles of the hospital. APMA members may want to consider contacting their local associations for information about local podiatrists who have explored local resources and may have suggestions of interpreters with whom members may wish to establish relationships.

**Can I schedule all my hearing-impaired patients on one day, so that I only have to pay for an interpreter for one day's work?**

The ADA requires a healthcare provider to provide disabled patients with services that are neither different nor separate from the services provided to

other individuals. A policy of segregating hearing-impaired patients to a limited time frame would expose a podiatrist to a charge of discrimination, just as some healthcare providers have faced enforcement actions by the U.S. Department of Justice for their practice of creating separate waiting areas for disabled patients.

**If I have an established relationship with a patient where we pass notes to communicate, do I need to now offer the patient an interpreter or can we continue to pass notes to communicate?**

Wherever patients with hearing-impairments interact with healthcare personnel, a healthcare provider is obligated under the ADA to provide effective communication. The Justice Department's agreements and consent decrees match the methods of communication and services or aids needed to effectuate communication with the abilities of the person who is hearing impaired and the nature of the communications that are required. For example, exchanging written notes or pointing to items will likely be effective communication for brief and relatively simple face-to-face conversations. Written forms or information sheets may provide effective communication in situations where there is little call for interactive communication, such as pro-



(Continued on page 5)

(Continued from page 4)

viding billing and insurance information or medical history inquiries.

For more complicated and interactive communications, however, the Department of Justice has focused on ensuring that healthcare personnel must provide a qualified sign language interpreter. Examples of such communications include discussion of symptoms between a patient and medical personnel; presentation by a physician of diagnosis and treatment options to patients or family members; or communication with a patient during treatment. In addition, in some circumstances, the Department's agreements and decrees have provided for an interpreter or other aid for a patient's family members who are deaf or hard of hearing. Thus, even where a podiatrist has an established practice of passing notes with a patient, in situations requiring more complicated interactive communication, the podiatrist must offer the services of an interpreter, and if the patient declines the offer, a written waiver of the sign language interpreter's services should be obtained.

**If the patient unilaterally determined that he/she does not need an interpreter and could effectively communicate with me via writing, would I still be liable for subsequent action? What should I do in this case to prevent future liability?**

Even in situations involving complicated and interactive communications, a hearing-impaired patient may knowingly and voluntarily waive his or her right to a sign language interpreter. In such circumstances, an appropriate form should be used to document the patient's election to proceed without an interpreter.

**For more information about ADA:**

**US Department of Justice:**

**[www.ada.gov](http://www.ada.gov)**

**National Association of the Deaf:**

**[www.nad.gov](http://www.nad.gov)**

## LEGAL BRIEF

### ***Court Holds New Jersey Physician Liable for Refusing to Provide Patient with Interpreter***

In October 2008, "a Hudson County [New Jersey] jury...unanimously handed down a \$400,000 award against" a New Jersey rheumatologist "for allegedly refusing to pay for a sign language interpreter for a patient who is deaf." According to the patient, she "repeatedly asked" the physician "to provide a sign language interpreter," but he "argued that, as a solo physician, he could not afford the cost." Instead, the two communicated through "written notes...with the help of family members." Although the patient "made no allegations of medical negligence," she argued that "she never had 'any real understanding' of her diagnosis, treatment or prognosis, and was deprived of an equal opportunity to fully participate in her medical care." The jury ruled that the physician "violated the federal Americans with Disabilities Act and the Rehabilitation Act, as well as New Jersey's anti-discrimination law."

Source: American Health Lawyer's Association, *Health and Life Science Law Daily* (Jan. 5. 2008).