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**I NEED A LAWYER: ESTABLISHING STATEWIDE NEW YORK COMMUNICATION ACCESS FUND
TO SECURE LEGAL ACCESSIBILITY TO DEAF AND HARD OF HEARING CLIENTS THROUGH
VIDEO REMOTE INTERPRETING SERVICES IN COMPLIANCE WITH THE AMERICANS WITH
DISABILITIES ACT**

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I. INTRODUCTION

Discrimination by lawyers against individuals who are deaf and hard of hearing is not a rare occurrence.¹ Many lawyers decline to represent deaf and hard of hearing individuals as clients, despite the protection of federal and state laws to prohibit discrimination on the basis of disability.

Hearing impairments cover a significant range – from those who may not even be aware they have difficulty hearing to those who are deaf and use sign language.² Statistics suggest that approximately more than 37 million people, or 16 percent of the population of age above 18, of the United States, report having some degree of difficulty hearing.³ Despite the large population of the deaf and hard of hearing community, many attorneys fail to recognize their legal obligation to accommodate individuals who are deaf or hard of hearing.

Many private attorneys are unfamiliar with their obligations under the ADA or others are unwilling to incur the costs to provide the necessary communication access services.

Consequently, it has become difficult for many deaf and hard of hearing individuals to retain attorneys for common legal counseling that are widely provided, such as criminal law proceedings, family law issues, probate, and employment law matters.⁴ Even when a deaf or hard of hearing individual successfully meets an attorney, without effective communication, the attorney cannot provide proper representation, unfulfilling their professional responsibilities.

¹ Sam Diehl, *Accommodating Deaf and Hard-of-Hearing Clients*, L.A. LAW, Oct. 2008, at 14.

² *Id.*

³ *Summary Health Statistics for U.S. Adults: National Health Interview Survey*, 2011, Series 10 Vital and Health Statistics No. 256, U.S. DEP'T OF HEALTH AND HUMAN SERV. (Dec. 2012), at 7.

⁴ *Communication Access Funds for Legal Services*, NATIONAL ASSOCIATION OF THE DEAF, <http://www.nad.org/issues/justice/lawyers-and-legal-services/communication-access-funds> (last visited Feb. 27, 2013) [hereinafter *National Association of the Deaf*].

Because of the communication barrier, the client may not understand the nature of their legal issue.

A change is needed to remove the financial disincentives. Following various communication access funds created by other states and local bar associations, the state of New York must advocate for the establishment of a statewide communication access fund. A change is needed to remove the financial disincentives. Such a fund will remove or alleviate the cost of providing communication access, as many do not want to pay money to accommodate their deaf and hard of hearing clients. One of the effective ways to remove such initial economic disincentive is to mandate legal offices to utilize the video remote interpreting services (“VRI”).⁵ VRI service is reasonable accommodation provided under the ADA.⁶ Because of modern technology that allows lawyers to use computers and the Internet connection throughout their legal profession, both the lawyers and prospective clients who are deaf or hard of hearing can easily access VRI services, which require computers and the Internet connection. Unlike traditional on-site interpreting services, VRI does not require interpreters to travel to law offices, which removes any additional fees for the travel time of the interpreter.

The interpreter serves as a communication bridge, which enables the lawyer to render effective assistance of counsel to the deaf and hard of hearing client.⁷ The development of statewide communication access fund makes both financial and practical sense, and it ensures effective communication mandated by the ADA.⁸

⁵ While the video remote interpreting (“VRI”) services are not free, the costs of utilizing the VRI services are relatively low in comparison to in person interpreting services.

⁶ 28 C.F.R. § 36.303(b)(1) (1991).

⁷ Michael A. Schwartz, *A Lawyer’s Obligation Under the Americans with Disabilities Act*, Vol. 55 BAR REPORT No. 3 (March 2010).

⁸ *National Association of the Deaf*, *supra* note 4.

II. RELEVANT LAWS

A. *The Americans with Disabilities Act*

Congress enacted the Americans with Disabilities Act (“ADA”) in 1990, intending that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and broad coverage.⁹ Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.¹⁰

1. **Title III Public Accommodations and Services Operated by Private Entities**

Title III of the ADA and its implementing regulations prohibit discrimination by a public accommodation on the basis of disability.¹¹ Discrimination includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature” of the public accommodation.¹² Furthermore, a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and service, unless the place of public accommodation can demonstrate

⁹ 42 U.S.C. § 12101(a)(1) (2006).

¹⁰ 42 U.S.C. § 12101(a)(2).

¹¹ 42 U.S.C. § 12182; 28 C.F.R. § 36.101.

¹² 42 U.S.C. § 12182(b)(2)(A)(iii).

taking such steps would fundamentally alter or result in an undue burden, is the type of discrimination prohibited by the ADA.¹³

Whether an accommodation is an undue burden focuses on the nature and the overall financial resources of a public accommodation, not the individual with a disability.¹⁴ While the public accommodation is not required to permit an individual with a disability to participate in or benefit from the public accommodation when that individual poses a direct threat to the health or safety of others, the public accommodation must make an “individualized assessment.”¹⁵ The public accommodation must determine whether reasonable modifications and the provision of auxiliary aids or services will mitigate the risk.¹⁶

The office of an attorney is considered a place of public accommodation for purposes of Title III of the ADA.¹⁷ Department of Justice Title III regulations correctly point out that it is not difficult to imagine a wide range of communications involving areas such as health, legal matter, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication.¹⁸ Thus, a public accommodation must furnish appropriate auxiliary

¹³ 42 U.S.C. § 12182(b)(2)(A)(iii).

¹⁴ *Id.* (in determining whether an action is readily achievable, factors to be considered include: (A) the nature and cost of the action needed under this chapter; (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, of location of its facilities; and (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity).

¹⁵ 28 C.F.R. §§ 36.208(a)-(b).

¹⁶ 28 C.F.R. § 36.208(b) (in determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur, and whether the reasonable modifications of policies, practices, or procedures or the provision auxiliary aids or services will mitigate the risk).

¹⁷ 42 U.S.C. § 12181(7)(F).

¹⁸ 28 C.F.R. pt. 36, App. C.

aids and services when necessary to ensure effective communication in accordance with the method of communication used by the individual.¹⁹ A public accommodation should consult with individual with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication.²⁰

a. Auxiliary Aids and Services

A public accommodation should take necessary steps to ensure that no individual with a disability is discriminated on the basis of disability because of the absence of auxiliary aids and services.²¹ The term “auxiliary aids and services” includes: qualified interpreters on-site or through video remote interpreting (“VRI”) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; video-based telecommunications products and system, or equally effective telecommunications devices; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing.²² If a particular auxiliary aid or services by a public accommodation would result in a fundamental alteration or an undue burden, the public accommodation must provide an alternative auxiliary aid or service, if one exists, that would avoid an alteration or such burden but would nevertheless ensure that, to the maximum extent

¹⁹ 28 C.F.R. § 36.303(c)(1)(ii).

²⁰ *Id.* (however, the ultimate decision as to what measures to take rest with the public accommodation).

²¹ 28 C.F.R. § 36.303(a).

²² 28 C.F.R. § 36.303(b)(1) (examples of “auxiliary aids and services” includes – qualified interpreters on site or through video remote interpreting (VRI) services; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening system; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individual who are deaf or hard of hearing).

possible, individuals with disabilities receive equal and full enjoyment of services offered by the public accommodations.²³

B. New York State Laws

All persons within the State of New York are entitled to the full and equal accommodations, advantages, facilities and privileges of any places of public accommodations.²⁴ Under the New York Civil Rights laws, no person, being the owner, lessee, manager, agent or employee of any such place shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantage, facilities, or privileges thereof, to any person on account of race, creed, color or national origin.²⁵ Specifically, the law states that no person shall be denied admittance to and/or the equal use of and enjoyment of any public facility solely on the basis of a disability.²⁶

New York Executive Law also provides that it is an unlawful discriminatory practice for any person of any place of public accommodation, because of the disability of any person, directly or indirectly, to refuse, withhold from or deny such person any of the accommodations, advantages, facilities or privileges thereof.²⁷ Discriminatory practice includes a refusal to make reasonable modifications in policies, practices, or procedures, a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, or a refusal to remove communication barriers, unless such person can demonstrate that making such modifications would fundamentally alter

²³ 28 C.F.R. § 36.303(g).

²⁴ N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992).

²⁵ *Id.*

²⁶ *Id.* at § 47.

²⁷ N.Y. EXEC. LAW § 296.2(a) (McKinney 1992).

the nature of such facilities or such removal is not readily achievable.²⁸ This language comports with the ADA.

One of the prevailing issues with the New York state law is the lack of recognition of the term “places of public accommodations.” As it is under the ADA, commercial spaces are included in the definition of public accommodations under the New York Executive Law.²⁹ However, the definition of the term “commercial space” given neither provides details, nor examples as in the ADA. It is only defined as “any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.”³⁰ This may raise some confusion to privately practicing lawyers whether the legal offices falls within places of public accommodation under the New York State law. However, this does not excuse lawyers from providing reasonable accommodation since the ADA is a federal law and it supersedes the state law.³¹

1. New York State Rules of Professional Conduct

In addition to New York State Executive Law prohibiting discriminatory practice of any place of public accommodation, New York State Rules of Professional Conduct sets out its own rules regarding a client-lawyer relationship communication. It states that a lawyer shall promptly inform the client of any information or material developments in the matter, reasonably consult

²⁸ *Id.* at §§ 262.2(c)(i)-(iv).

²⁹ 42 U.S.C. § 12181(2); EXEC. § 292.13.

³⁰ 42 U.S.C. § 12181(7)(F) (“office of a lawyer” is a private entity considered as a public accommodation); N.Y. EXEC. LAW § 292.13.

³¹ U.S. CONST. art. VI, cl.2.

and inform the client, and promptly comply with a client's reasonable requests for information.³² It is quiet interesting that the Rules of Professional Conduct does not specify how a lawyer should or must ensure effective communication with the client. Rules regarding communication mean very little to nothing if no narrow or detailed regulation is in place to provide guidance and enforce legal professionals how to achieve what it means to provide effective communication.

III. STATEMENT OF THE PROBLEM

A. *Deaf and Hard of Hearing Community Population in New York*

While deaf and hard of hearing persons compose a substantial portion of the New York population, the need of a communication access fund is only voiced within the deaf and hard of hearing community, not the rest of the society. This is partly because the society expects a deaf or hard of hearing person to surmount any and all communication difficulties by "lip-reading" or other methods, such as passing notes.³³ Contrary to the widespread perception about lip-reading for the deaf, it does not provide an effective means of communication except for a few rare individuals.³⁴ Individuals with the ability to rely exclusively upon lip-reading are common and for the majority of persons who are deaf and hard of hearing, lip-reading is never enough as they routinely experience miscommunication.³⁵

³² N.Y. RULES OF PROF. CON. § 1.4 (2009) (Amended 2012).

³³ Jamie McAllister, *Deaf and Hard-of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk to the Judge?* 26 ARIZ. ST. L.J. 163, 172 (1994).

³⁴ Michele LaVigne & McCay Vernon, *The Deaf Client: It Takes More Than a Sign – Part 1*, CHAMPION 26, 27 (June 2005) [hereinafter *The Deaf Client*].

³⁵ McAllister, *supra* note 33; See also *The Deaf Client*, *supra* note 34 (stating no more than 20 to 30 percent of spoken English is visible on the lips).

The Bureau of the Census adjusted its sensory disability question for the American Community Survey American (“ACS”) in 2008 “by separating a generalized sensory disability question into separate vision and hearing questions.”³⁶ It has classified individuals who responded affirmatively to the question, “‘Is this person deaf or does he/she have serious difficulty hearing?’ as persons who are deaf or hard of hearing.”³⁷ Although the data collected does not provide a detailed audiological classification since the determination of the definition of “deaf” or “serious difficulty hearing” is left to the opinion of the respondent, the results do provide data about the population of individuals who perceive themselves as having serious difficulty hearing or perceived as having serious hearing problem.³⁸ According to figures of model-based estimates on American Community Survey 1-Year Estimate data for 2011, estimated 506,025 people, approximately 14.3 percent of New York population had indicated to have a hearing difficulty.³⁹ While the majority with a hearing difficulty is population of the age range between 18 and 64, population below the majority and the elders are all prospective clients with unforeseeable legal matters, as well as those foreseeable, just like the rest of the population.⁴⁰

³⁶ Gerard Walter & Richard Dirmyer, *Number of Persons who are Deaf or Hard of Hearing: Rochester, NY*, NATIONAL TECHNICAL INSTITUTE FOR THE DEAF, ROCHESTER INSTITUTE OF TECHNOLOGY, http://www.ntid.rit.edu/sites/default/files/number_of_persons_who_are_deaf_or_hard_of_hearing.pdf, (last visited Feb. 28, 2013) [hereinafter *Number of Persons who are Deaf or Hard of Hearing*].

³⁷ *Id.*

³⁸ *Number of Persons who are Deaf or Hard of Hearing*, *supra* note 36 (in the case for children, perceived by their guardians as having serious hearing problem).

³⁹ *Disability Characteristics*, U.S. DEP'T OF CENSUS BUREAU http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/11_1YR/S1810/0400000US36 (estimates for: population under 5 years 5,490, population 5 to 17 years 18,328, population 18 to 64 years 179,027, population 65 years and over, 303,180. Percent with a disability estimate: population under 5 years 0.5%, population 5 to 17 years 0.6%, population 18 to 64 years 1.4%, population 65 years and over 11.8%). (last visited March 1, 2013).

⁴⁰ *Id.*

A deaf or hard of hearing prospective client may need a qualified interpreter, notetaker, or other accommodation in order to “fully enjoy the benefit from a lawyer’s service” regarding legal issues.⁴¹ But these auxiliary aids and services can be expensive, “which makes lawyers reluctant to provide them at their own cost.”⁴² Additionally, lawyers have no incentive to comply with requirements of Title III because they are unlikely to suffer any consequences from not complying with the law.⁴³ This problem is exacerbated by lack of enforcement and limited remedies available to deaf and hard of hearing clients who were denied equal legal access. Title III only allows for injunctive relief in private action and deaf and hard of hearing individuals must sue their attorney in order to force the attorney to comply with Title III.⁴⁴ Lastly, when a new attorney is secured, deaf and hard of hearing client no longer have standing to sue the non-compliant attorney.⁴⁵

IV. COMMUNICATION BARRIERS TO LEGAL ACCESSIBILITY

A. *Whether to Represent a Deaf or Hard of Hearing Client in New York*

“When deciding whether to represent a deaf or hard of hearing prospective client, attorneys may consider a number of factors.”⁴⁶ First, legal and ethical requirements should be

⁴¹ 28 C.F.R. § 36.303(a)(1); Elana Nightingale Dawson, *Lawyers’ Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143, 1144 (2011).

⁴² Dawson, *supra* note 41.

⁴³ Diehl, *supra* note 1; Dawson, *supra* note 41.

⁴⁴ 42 U.S.C. §§ 12188(a)(1)-(2); Dawson, *supra* note 41.

⁴⁵ Elizabeth Keadle Markey, *The ADA’s Last Stand?: Standing and The Americans With Disabilities Act*, 71 FORDHAM L. REV. 185, 186 (2002); Dawson, *supra* note 41, at 1144.

⁴⁶ Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas*, 39 ST. MARY’S L.J. 819, 851 (2008).

obeying the law and fulfilling their professional responsibilities.⁴⁷ Attorneys may believe that representing a deaf client will be too difficult because they have never represented a deaf client before and believe that some other attorney would be better suited to represent a deaf client.⁴⁸ However, there are few lawyers who know American Sign Language (“ASL”) and a few deaf lawyers. It has been estimated that there are approximately 200 persons who self-identify as “deaf” and who have obtained the American Bar Association membership.⁴⁹ Deaf lawyers make up a very small percentage of the American Bar Association, which had over 380,000 members in 2010.⁵⁰ Deciding to decline to represent prospective clients because they are deaf violates the ADA, the New York State Human Rights Law and the spirit of the New York State Rule of Professional Conduct. It is discrimination if the attorney accepts the case because the prospective client was hearing, or because the client agreed to provide an interpreter at no expense to the lawyer.

B. Traditional Auxiliary Aids and Services

Pursuant to the ADA, some situations require auxiliary aids and services to ensure effective communication provided under Title III. The use of on-site interpreters has been the traditional and major communicative aids. However, the use of interpreters accompanies numerous ethical rules that the majority of the attorneys are not aware of. “A public accommodation shall not require an individual with a disability to bring another individual to

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ John F. Stanton, *Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, 45 VAL. U. L. REV. 1185, 1186 (2011).

⁵⁰ *Id.* at 1185; *ABA Comm’n on Mental and Physical Disability Law Goal III Report*, AMERICAN BAR ASSOCIATION (2010), <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1839&context=vulr>.

interpret for him or her.”⁵¹ Many ethical problems arise when an attorney requests the client or the prospective client to bring another individual to interpret. Notwithstanding that the family member or friend is able to interpret or is a qualified interpreter, they may not be qualified to render the necessary interpretation because of factors such as “emotional or personal involvement or considerations of confidentiality” that may adversely affect the ability to interpret “effectively, accurately, and impartially.”⁵² A public accommodation cannot require an individual with a disability to bring another individual or rely on a minor child to interpret or facilitate communication unless in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available and to stop gap measure until an interpreter arrives.⁵³

1. Traditional Use of Telecommunication Device for the Deaf and Hard of Hearing

When the ADA was passed, it gave the Federal Communications Commission (“FCC”) jurisdiction over both interstate and intrastate telecommunications relay services (“TRS”), mandating it to carry out the purpose of the title: to ensure and make available to all individuals in the United States a rapid, efficient nationwide communication services, and to increase the utility of the telephone system of the nation, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals.⁵⁴ Places of public accommodations that offers a customer, client, patient, or participants the opportunity to make outgoing telephone calls on more than an incidental convenience basis must make a

⁵¹ 28 C.F.R. § 36.303(c)(2).

⁵² 28 C.F.R. pt. 36, App. C at 684-685.

⁵³ 28 C.F.R. §§ 36.303(c)(2)-(4).

⁵⁴ 47 U.S.C. § 225(b)(2) (2010); Susan J. Bahr, *Ease of Access to Telecommunications Relay Service*, 44 FED. COMM. L.J. 473, 476 (1992).

telecommunication device for a deaf (“TDD”) available for the use of an individual who has a hearing impairment or communication disorder.⁵⁵ On the contrary, individual retail stores or law offices do not need to provide TDDs for the deaf or hard of hearing clients if a telephone is not offered to the general public.⁵⁶ Also, partly due to the availability of TRS, it alleviates the need for such business to have TDDs available.

C. Video Relay Services as Accommodation for Deaf and Hard of Hearing

When a public accommodation uses an automated attendant system, including voicemail and messaging, or an interactive voice response system,⁵⁷ for receiving and directing incoming telephone calls, Title III of the ADA requires that system must provide effective real-time communication with individuals using auxiliary aids and services, including text telephones (“TTYs”)⁵⁸ and all forms of Federal Communications Commission (“FCC”) approved telecommunications relay systems (“TRS”), including video relay systems.⁵⁹ While a public accommodation is not required to use a TTY for receiving or making telephone calls incident to its operations, it must respond to telephone calls from a TRS established under the ADA Title VI, in the same manner that it responds to other telephone calls.⁶⁰

⁵⁵ 28 C.F.R. § 36.303(d)(2).

⁵⁶ *Id.*; see also Susan, *supra* note 53.

⁵⁷ *Interactive Voice Response Systems*, HOWTO.GOV, <http://www.howto.gov/contact-centers/technologies/interactive-voice-response-systems> (last visited March 1, 2013) (an Interactive Voice Response (IVR) is a computer-based system allowing callers to use their telephone keypad or voice commands to retrieve and/or provide information without assistance from trained specialist).

⁵⁸ *TTY/TDD Communications*, HOWTO.GOV, <http://www.howto.gov/contact-centers/technologies/tty-tdd-communications> (last visited March 1, 2013) (telecommunications Device for the Deaf (TDD) are also known as Text Telephones (TTY)).

⁵⁹ 28 C.F.R. § 36.303(d)(1).

⁶⁰ See 42 U.S.C. §§ 12201 et seq.; 28 C.F.R. § 36.303(d)(4).

1. What is Video Relay Service

Video Relay Service (“VRS”) is a form of TRS that enables persons with hearing disabilities who use American Sign Language (“ASL”) to communicate with voice telephone users through video equipment.⁶¹ VRS follows a similar process to traditional TTYs. It allows individuals with speech or hearing impairments to send typed messages over phone lines to other TTY users, but allows persons with hearing impairments to use sign language to communicate their messages, without any typing or texting.⁶² Video equipment, such as a television or a computer with a video camera device and a high speed broadband Internet connection, links the VRS user with a TRS operator called a communications assistant (“CA”), allowing both the VRS user and the CA to see and communicate with each other in signed conversation through a video link.⁶³ The VRS CA then places a telephone call to the party the VRS user wishes to call.⁶⁴ The VRS CA relays the conversation back and forth between the parties, in sign language with the VRS user, and by voice with the called party.⁶⁵ A voice telephone user can also initiate a VRS call by calling a VRS center.⁶⁶

2. Benefits of Video Relay Service

Because computers often are more readily available than TTYs and the conversation between the VRS user and the CA flows much more quickly, VRS is being used with greater

⁶¹ *Video Relay Services Guide*, FEDERAL COMMUNICATIONS COMMISSION (2011) <http://www.fcc.gov/guides/video-relay-services> (last visited Feb. 22, 2013) [hereinafter *FCC*].

⁶² *Video Relay Services Proliferate as Accommodation for Hearing Impaired*, 10 No. 6 MULTICHANNEL VIDEO COMPLIANCE GUIDE NEWSL. 4 (August 2002).

⁶³ *FCC*, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

frequency as a form of TRS and as a public accommodation.⁶⁷ Unlike TTYs, VRS allows sign language users to communicate in ASL, instead of having to type their messages.⁶⁸ Because the communication method is not limited to written form, consumers using VRS are able to more fully express themselves through facial expression and body language, which are vital to ASL and also cannot be expressed in text.⁶⁹ One of the greatest benefits of using VRS is that a VRS call flows back and forth just like a telephone conversation between two hearing persons.⁷⁰ The delay that is usually present in traditional relay conversations like a TTY, where the parties have to take turns communicating with the CA, VRS users can interrupt each other, allowing the conversation flow to be more natural and quicker, resulting the delay almost to diminish to almost real time.⁷¹ Quicker conversation also makes the same conversation much shorter through VRS than it would be through other text-based TRS.⁷²

3. Misuse of Video Relay Service and Its Limitations

The easy access to computer allows video relay service to be used with greater frequency as a public accommodation in legal settings.⁷³ Because VRS is free to qualified individuals and those being connected to and is subsidized by the federal government as a way to ensure deaf

⁶⁷ FCC, *supra* note 62; *Video Relay Services Proliferate as Accommodation for Hearing Impaired*, *supra* note 63.

⁶⁸ FCC, *supra* note 62.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; *Video Relay Services Proliferate as Accommodation for Hearing Impaired*, *supra* note 63.

⁷² FCC, *supra* note 62.

⁷³ *Video Relay Services Proliferate as Accommodation for Hearing Impaired*, *supra* note 63.

access to the hearing phone system, it has been recognized as a good way for lawyers to communicate in ASL with their clients.⁷⁴

However, it should be noted that VRS is not intended as a substitute for live interpreting, and VRS operators and CAs are not allowed to interpret between two people in the same location.⁷⁵ The Federal Communications Commission has found misuse of VRS as substitute for an on-site interpreter. VRS is to be used only when a person with a hearing disability, who absent such disability would make a voice telephone call, desires to make a call through the telephone system.⁷⁶ Attorneys may feel confident in using VRS as a method of communication since VRS CAs must maintain confidentiality of calls⁷⁷ and must not intentionally alter a relayed conversation.⁷⁸ Because using VRS is convenient and easily accessible, attorneys are more attracted to using VRS as a reasonable accommodation than scheduling appointments for on-site interpreters.

VRS providers generally have procedures already in place to terminate calls where VRS is being used as a way to obtain free interpreting services.⁷⁹ However, procedural safeguards in place are not sufficient to effectively screen out persons misusing VRS because they may be

⁷⁴ Diehl, *supra* note 1.

⁷⁵ *Id.*

⁷⁶ *Reminder That Video Relay Service (VRS) Provides Access to the Telephone System Only and Cannot Be Used as a Substitute for "In-Person" Interpreting Services or Video Remote Interpreting (VRI)*, FEDERAL COMMUNICATIONS COMMISSION PUBLIC NOTICE, 20 F.C.C.R. 14528, 20 FCC Rcd. 14528, 2005 WL 2148833, 14528 [hereinafter *FCC Public Notice*].

⁷⁷ 47 U.S.C. § 225(d)(1)(F); 47 C.F.R. § 64.604(a)(2)(i) (2007); Compton, *supra* note 46, at 861.

⁷⁸ 47 U.S.C. § 225(d)(1)(G); 47 C.F.R. § 64.604(a)(2)(ii); Compton, *supra* note 46, at 861.

⁷⁹ *FCC Public Notice*, *supra* note 77, at 14529.

doing so in ways to avoid detection.⁸⁰ There are public consumer bulletin boards and forums that publicize these methods, which results in the large increase in minutes of use of VRS.⁸¹

D. Video Remote Interpreting Services as Accommodation for Deaf and Hard of Hearing

Sign language interpreters facilitate communication between individuals who use sign language to communicate and those who do not.⁸² Video Remote Interpreting (“VRI”) is a service that is used when an interpreter cannot be physically present to interpret for two or more persons who are together at the same location.⁸³ Unlike traditional on-site interpreters, easy access to computers has allowed proliferation of VRI.

1. What is Video Remote Interpreting Service

Under Title III, pursuant to the effective communications provisions, a public accommodation can choose to provide qualified interpreter via a video remote interpreting service.⁸⁴ When using a VRI service, a place of public accommodation must ensure that it provides real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication.⁸⁵ Image should be large enough to display the interpreter’s face and body parts used in signing, and the participating individual’s face and body parts involved in signing, regardless of his or her body

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *FCC Public Notice, supra* note 77, at 14582.

⁸³ *Id.*

⁸⁴ 28 C.F.R. § 36.303(f).

⁸⁵ *Id.*; § 4:97 Effective Communication Must be Ensured-Video Remote Interpreting (VRI) Services, 1 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL § 4:97 (2014).

position, with a clear, audible transmission of voices.⁸⁶ The deaf person and interpreter communicate via sign language through the webcam, the lawyer or staff person speaks to the interpreter via the telephone, and the remote interpreter then interprets as a live interpreter would.⁸⁷

2. Benefits of Video Remote Interpreting

When used appropriately, VRI has several benefits. It provides easier and faster access to communication, access to quality services, and effective use of fiscal resources.⁸⁸ VRI is highly effective in urgent situations when no on-site interpreter is available. “It meets interpreting demands when qualified on-site interpreters are unavailable, especially in rural areas, where qualified interpreters are less accessible.”⁸⁹ It provides easier and faster access to communication because VRI can be used in situations for short, one-time meetings, or for an immediate need since VRI may be arranged requested on-demand.⁹⁰ Because there is no need for an interpreter to travel, VRI reduces “interpreting costs through fee structures and elimination of travel and mileage costs.”⁹¹

⁸⁶ AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL, *supra* note 86.

⁸⁷ Diehl, *supra* note 1, at 16.

⁸⁸ *Standard Practice Paper: Video Remote Interpreting*, REGISTRY OF INTERPRETERS FOR THE DEAF (2010) http://www.rid.org/UserFiles/File/pdfs/Standard_Practice_Papers/VRI_SPP.pdf [hereinafter *Registry of Interpreters for Deaf*].

⁸⁹ *Id.*

⁹⁰ Compton, *supra* note 46, at 866; *Video Remote Interpreting (VRI)*, THE BETTY AND LEONARD PHILLIPS DEAF ACTION CENTER, http://www.deafactioncenter.org/index.php?option=com_content&view=article&id=64:video-remote-interpreting-vri&catid=41:services&Itemid=98 (last visited Feb. 11, 2013).

⁹¹ *Registry of Interpreters for Deaf*, *supra* note 89.

3. Limitations of Video Remote Interpreting Compared to On-Site Interpreter

While VRI is a readily available valuable tool in providing accommodations, it has its limitations. It is not a comprehensive replacement of on-site interpreter.⁹² Because Internet connection is required to provide VRI, a poor high-speed Internet connection may result in a breakdown of communication.⁹³ Situations where there are multiple participants in a room with less structured turn-taking protocols would be inappropriate to utilize VRI.⁹⁴ VRI may be inappropriate depending on the information exchanged. Such situations include conversation involving highly complex dialogic exchange, such as abstract philosophical interchange or dialogue with veiled intentions or multiple meanings.⁹⁵ Lastly, VRI is highly inappropriate for situations involving individuals with a secondary disability, such as visual impairment, that impedes their ability to utilize the service.⁹⁶ In these and other situations, such as where communication is need for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals, rather than utilizing VRI.⁹⁷

V. A LAWYER'S OBLIGATION UNDER THE AMERICANS WITH DISABILITIES ACT

There are no ifs, ands, and buts: a lawyer is clearly financially responsible for providing an interpreter in his or her office when the time comes to discuss a legal matter with a deaf or

⁹² *Id.*

⁹³ Diehl, *supra* note 1, at 16.

⁹⁴ § 2:159 *Video Remote Interpreting (VRI) Services*, 1 AMERICANS WITH DISABILITIES: PRACTICE AND COMPLIANCE MANUAL; *Registry of Interpreters for Deaf*, *supra* note 89.

⁹⁵ *Registry of Interpreters for Deaf*, *supra* note 89.

⁹⁶ *Id.*

⁹⁷ *Id.*; 28 C.F.R. Pt. 25, App. A. § 35.104.

hard of hearing client.⁹⁸ As an officer of the court responsible for complying with the laws of the United States and the State, the lawyer has a special responsibility to ensure compliance with the ADA.

A. *Why Legal Professionals Fail to Comply with the Americans with Disabilities Act*

The ADA requires attorneys engaged in private practice to provide equal access to their services by providing auxiliary aids and services necessary to ensure effective communication between individuals who are deaf and their attorneys.⁹⁹ Inclusion of place of public accommodations reaches broader scope than the Civil Rights Act of 1964, which prohibits racial discrimination in public accommodations.¹⁰⁰ Despite professional offices, including a lawyer's office, are such entity that are explicitly named in the ADA but not in the Civil Rights Act, Title III provides inadequate rights of deaf and hard of hearing people who seek to obtain legal representation.¹⁰¹

1. **Cost Concerns**

Many attorneys have false assumption that it is costly to provide effective communication service to a client who is deaf or hard of hearing is expensive or complicated.¹⁰² Because facilitating effective communication is critical in legal services, the assumption of difficulty in providing reasonable accommodations prevents lawyers from taking on deaf or hard of hearing

⁹⁸ Schwartz, *supra* note 7.

⁹⁹ 42 U.S.C. §§ 12181-89; 28 C.F.R. §§ 36, 36.104; *National Association of the Deaf*, *supra* note 4.

¹⁰⁰ Dawson, *supra* note 41, at 1143.

¹⁰¹ 42 U.S.C. § 12181(7)(F).

¹⁰² Diehl, *supra* note 1.

clients, on both legitimate grounds for denying representation and illegitimate discriminatory grounds.

The ADA allows lawyers to not provide an auxiliary aid or service if it would fundamentally alter the nature of the services or if it would result in an undue burden.¹⁰³ However, this does not allow lawyers to withdraw its obligation to provide reasonable accommodation merely because one method would result in an undue burden.¹⁰⁴ When an alternative accommodation exists, it vitiates the undue burden argument. It is true that if a deaf or hard of hearing client needs an interpreter, note-taker, or other accommodation in order to fully benefit from a lawyer's service, these accommodations could be expensive, which makes lawyers reluctant to provide them at their own cost.¹⁰⁵ However, this argument cannot always stand due to modern technology. Widespread use of computers and high-speed Internet has made making accommodations less costly and provides a wide array of communication options for prospective deaf and hard of hearing clients.¹⁰⁶

a. **Tax Credit Eligibility**

Unlike big firms, many solo practitioners and small-firm lawyers fear that providing accommodations to ensure effective communication can present financial and logistical hardships.¹⁰⁷ However, it is not necessarily true that complying with the ADA imposes severe difficulties, as lawyers might perceive. As discussed previously, modern technology decreased the cost involved in accommodations significantly, while increasing the effectiveness of

¹⁰³ 42 U.S.C. §§ 12182(b)(2)(A)(ii)-(iii).

¹⁰⁴ Diehl, *supra* note 1, at 16.

¹⁰⁵ Dawson, *supra* note 41, at 1144.

¹⁰⁶ Diehl, *supra* note 1.

¹⁰⁷ Margaret Graham Tebo, *An ADA Lesson*, 92 AUG A.B.A. J. 28. (2006).

accommodations for the hearing impaired.¹⁰⁸ Eligible small business can enjoy tax benefits when comply with the ADA.¹⁰⁹ Amount paid or incurred by an eligible small firm for the purpose of enabling such eligible firms to comply with applicable requirements under the ADA are qualified to apply for tax credit for any taxable year.¹¹⁰ Amount up to 50 percent of the eligible access expenditure for the taxable year as exceed \$250 but not exceeding \$10,250, qualify as tax credit.¹¹¹ Eligible access expenditures include providing qualified interpreters or other effective methods for the purpose of removing communication barriers, making aurally delivered materials available to individuals with hearing impairments.¹¹²

2. Confidentiality

Although not explicitly discussed, confidentiality is implied in the effective communication requirement of the ADA. Sign language interpreters are guided and bound by Code of Professional Conduct of the National Association of the Deaf (“NAD”) and the Registry of Interpreters for the Deaf, Inc (“RID”).¹¹³ The guiding principles of the Code of Professional Conduct represent the concepts of confidentiality, linguistic and professional competence, impartiality, and the rights of participants in interpreted situations to informed choice.¹¹⁴ As interpreters hold a position of trust in their roles as linguistic and cultural facilitators of communication, confidentiality is highly valued by consumers and is essential to protecting all

¹⁰⁸ Diehl, *supra* note 1, at 17.

¹⁰⁹ 26 U.S.C.A. § 44(a).

¹¹⁰ 26 U.S.C.A. § 44(c)(1).

¹¹¹ 26 U.S.C.A. § 44(a).

¹¹² 26 U.S.C.A. §§ 44(c)(2)(A)-(B).

¹¹³ *Code of Professional Conduct*, NATIONAL ASSOCIATION OF THE DEAF (NAD) AND THE REGISTRY OF INTERPRETERS FOR THE DEAF (RID) (2005), http://www.rid.org/UserFiles/File/NAD_RID_ETHICS.pdf.

¹¹⁴ *Id.*

involved.¹¹⁵ Unless federal or state laws require mandatory reporting of certain circumstances, such as abuse, threats of suicide, or responding to subpoenas, under the reasonable interpreter standard, professional interpreters are expected to know the general requirements and applicability of various levels of confidentiality.¹¹⁶

VI. ESTABLISHED COMMUNICATION ACCESS FUNDS IN DIFFERENT STATES

Recognizing that many deaf and hard of hearing people are denied access to legal services, a few bar associations around the country have begun to allocate resources to make accessibility more readily achievable to the community and ensure that no one attorney bears a disproportionate burden in providing communication access services.¹¹⁷ In Colorado and Pennsylvania, local bar associations have made funds available to pay for the auxiliary aids and services needed when an attorney communicates with a individual with a hearing impairment.¹¹⁸ Maine has a legal interpreting fund that any attorney licensed in Main can use to pay for sign language interpreters and real-time captioning.¹¹⁹ Texas has a fund that operates similarly to Maine, except that the Bar's funds are used rather than state funds. The Pennsylvania Bar Association has a fund that reimburses bar members for some interpreter and real-time

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *National Association of the Deaf, supra note 4.*

¹¹⁸ *Id.*; see also Eric Maxfield, *Sign Language Interpreters: Who Pays?*, 33 THE COLORADO LAWYER, no. 4, Apr. 2004, available at http://www.cobar.org/tcl/tcl_articles.cfm?articleid=3130; *Sign Language Interpreter/CART Fund Reimbursement Application*, PENNSYLVANIA BAR ASSOCIATION, available at <http://www.pabar.org/public/committees/disabili/Sign%20Lang.pdf>; *Sign Language Interpreter Fund Reimbursement Application*, PHILADELPHIA BAR ASSOCIATION, available at <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/SignLanguageInterpreterFundApp1.pdf>.

¹¹⁹ *National Association of the Deaf, supra note 4.*

captioning expenses, based on availability of the funds.¹²⁰ These initiatives and programs are positive steps that increase access to legal services for deaf and hard of hearing people.

A. Settlement Agreement Between the U.S. and Gregg Tirone, Esq.

Gregg Tirone is an attorney licensed to practice law in Rochester, New York.¹²¹ Ms. Rozanski filed a complaint to the United States Department of Justice (“the Department”), in February of 2002, against attorney Tirone.¹²² Ms. Rozanski has a hearing disability and uses sign language and lip reading as her principal means of communicating.¹²³ While representing Ms. Rozanski in her divorce, Tirone failed to provide accommodation during several meetings with her. Only when he met with Ms. Rozanski in court, he used the services of the court’s interpreter, which was provided by the Court at the Court’s expense.¹²⁴ Outside the Court, Tirone communicated with Ms. Rozanski by pen and paper, fax, lip-reading, a family member as a sign language interpreter, and by use of the National Relay Service when communicating by phone, which Ms. Rozanski alleged resulted in higher costs to her.¹²⁵ She also alleged that due to lack of ineffective communication, she did not understand all that was conveyed.¹²⁶ Although Tirone asserted that he effectively communicated with Ms. Rozanski at all times, the Department’s

¹²⁰ *Id.*; John Sirman, *Sign Up Fund has an Extra \$6K for Sign-Language Costs*, TEXASBARBLOG (Oct. 9, 2009), <http://blog.texasbar.com/2009/10/articles/access-to-justice/sign-up-fund-has-an-extra-6k-for-signlanguage-costs/>.

¹²¹ Settlement Agreement Between the United States of America and Gregg Tirone, Esq., Dep’t of Just. No. 202-53-20 (2004), <http://www.ada.gov/tirone.htm> [hereinafter Tirone Settlement Agreement].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Tirone Settlement Agreement, *supra* note 122.

investigation found that he failed to provide Ms. Rozanski with effective communication.¹²⁷ The settlement agreement resulted in Tirone refunding fees and forgoing further payment from Ms. Rozanski.¹²⁸

The Department cited the ADA requirement of reasonable accommodation to ensure effective communication, and Tirone agreed that it is his obligation to ensure effective communication with his clients who have hearing disabilities, and that he cannot charge them for the cost of the interpreter services or charge any other surcharge to recover this cost.¹²⁹ The settlement agreement appears to indicate that the Department believed the cost of the interpreter was not an undue burden, and Tirone should not have charged for the extra time it took to communicate with Ms. Rozanski.¹³⁰ It is highly likely that the interpreter costs for representing one deaf or hard of hearing client is probably not an undue burden for most firms.¹³¹ Individualized case-by-case determination is required to determine whether a particular modification or accommodation would result in an undue burden.¹³²

¹²⁷ *Id.*; see also Settlement Agreement Between the United States of America and Joseph David Camacho, Esq., Albuquerque, New Mexico Under the Americans with Disabilities Act, Dep't of Just. No. 202-49-37 (2007), <http://www.ada.gov/albuquerque.htm>; Settlement Agreement Between the United States of America and the Law Office of Cohen and Jaffe, LLC, Dep't of Just. No. 202-52-111 (2006), www.ada.gov/cohenjaffe.htm; Settlement Agreement Between the United States of America and Clifford B. Hearn, Dep't of Just. No. 202-15-37 (2008) www.ada.gov/hearn.htm.

¹²⁸ *Id.*

¹²⁹ 28 C.F.R. § 36.301(c) (public accommodations may not impose a surcharge on a person with a disability to cover the costs of measures that are required to ensure that an individual with a disability is treated in a nondiscriminatory manner as required by the ADA); Tirone Settlement Agreement, *supra* note 122.

¹³⁰ Tebo, *supra* note 108.

¹³¹ Tirone Settlement Agreement, *supra* note 122; Compton, *supra* note 46.

¹³² Johnson v. Gambrinus Company/Spoetzl Brewery, 116 F.3d. 1052, 1060 (5th Cir. 1997).

1. Monroe County Bar Association “DEAFund” in Response to *Tirone*

In the State of New York, only the Monroe County Bar Association (“MCBA”) has established communication access fund for its members, called “DEAFund.”¹³³ Rochester of Monroe County has a relatively larger concentration and higher proportion of individuals who are deaf and hard of hearing people when compared to other metropolitan areas in the nation.¹³⁴ It has been suggested that Monroe County has a high proportion of persons who are deaf and hard of hearing stems from the establishment of National Technical Institute for the Deaf and Rochester Institute of Technology in 1968 and its influence on the demographics of the deaf population in the Monroe County area.¹³⁵

The MCBA may have established the DEAFund in response to the lawsuit brought by the Department of Justice against a private attorney Gregg Tirone.¹³⁶ However, it is the position of the MCBA, that because Rochester has a large population of deaf and hard of hearing community, and the Bar Association is required to what they have to do for the members of the community under the ADA, the Bar was not opposed to establishing the fund.¹³⁷ Regardless of the motivation behind the establishment of the DEAFund, the MCBA fully reimburses bar

¹³³ *DEAFund*, MONROE COUNTY BAR ASSOCIATION, <http://www.mcba.org/Members/Memberservices/DEAFund/> (last visited Feb. 9, 2013); Clara Schwabe, *Americans with Disabilities Act Requirement for LRIS Programs and Panel Attorneys: An Update on Serving Deaf and Hard of Hearing Clients*, 14 DIALOGUE No. 1 (2010) http://www.americanbar.org/newsletter/publications/dialogue_home/dialogue_archive/wi10_Iris1.html (last visited Feb. 9, 2014) (in New York City, the New York City Bar Association and the New York County Lawyers Association started to provide a sign language interpreter for the initial consultation starting in 2010).

¹³⁴ Walter, *supra* note 36, at 6.

¹³⁵ Walter, *supra* note 36, at 6.

¹³⁶ Greg Livadas, *Funds to Help Pay Interpreters*, DEAF TODAY (Mar. 24, 2005), http://www.deaftoday.com/v3/archives/2005/03/fund_to_help_pa.html (last visited Apr. 8, 2014) (Michael Wolford, president of the MCBA in 2005 stated, “When we became aware of that situation, we at the bar association decided we didn’t want to see that happen again”).

¹³⁷ Despite the statement of the previous president of the MCBA at the time of the DEAFund was first created, Kathy Fico, stated that the DEAFund did not arise from the *Tirone* case. Telephone conference with Kathy Fico, 2012-2013 MCBA President, Monroe County Bar Association, Oct. 29, 2012.

members for interpreter expenses incurred during the first meeting with the client, not to exceed two hours.¹³⁸ Thereafter, the bar association reimburses member for 50 percent of expenses, with a reimbursement cap of \$150 per client.¹³⁹ Special requests for additional funds are considered on a case-by-case basis and bar members must hire interpreters from an interpreter agency that contracted with the bar association for an hourly interpreter rate of \$45 per hour.¹⁴⁰ Bar member also must submit the actual receipt from the interpreting agency to receive reimbursement.¹⁴¹ The funds are drawn from general funds and grant money.¹⁴²

VII. THE NEED TO ESTABLISH STATEWIDE COMMUNICATION ACCESS FUND IN NEW YORK

A. *Removing Economic Disincentives for Providing Reasonable Accommodation*

The proposed communication access fund would cover the expenses for communication access services between private attorneys and deaf and hard of hearing individuals. It is critical to lower the cost of compliance for attorneys in order to solve noncompliance problems of Title III of the ADA. Creating a communication access fund would “ease the financial responsibility attorneys and law firms bear in order to meet their obligations under the ADA to ensure effective communication” with deaf and hard of hearing persons.¹⁴³ Expenses eligible for coverage would include qualified sign language interpreters, VRI, real-time captioning, or any other auxiliary aid

¹³⁸ *DEAFund Information Sheet: Deaf Equal Access Funds of the Monroe County Bar Association*, MONROE COUNTY BAR ASSOCIATION, <http://www.mcba.org/Data/Documents/DEAFund%20Guidelines%20Rev%20012511.pdf> [hereinafter *DEAFund Information*].

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *National Association of the Deaf*, *supra* note 4.

or services used to ensure effective communication between the attorney and a deaf individual, who is most often a prospective or actual client.¹⁴⁴

B. Revenue for Communication Access Fund

The establishment of a statewide communication access fund in New York to facilitate and ensure the provision of communication access services is desperately needed. Other states have statutorily established a fund to reimburse attorneys for expenses incurred in providing interpreters and other accommodations.¹⁴⁵ By generating a small annual fee to be paid, the revenue created by each practicing attorney licensed in New York would finance the necessary services.¹⁴⁶ It also spreads the cost of providing reasonable accommodation among all attorneys in New York, comporting with the spirit and purpose of the ADA, ensuring effective communication and equal access to all.¹⁴⁷

Such an approach to impose responsibility to all lawyers to financially contribute for anticipated accommodations in a year of providing legal services will meet the needs of the deaf and hard of hearing population in New York. The fund will avoid imposing the cost of accommodation to the few lawyers willing to represent individuals with hearing impairments. It will also allow individuals to pick and choose a lawyer, rather than being limited only to those willing to bear the cost of reasonable accommodation.¹⁴⁸

¹⁴⁴ *Id.*

¹⁴⁵ ME. REV. STAT. tit. 5, ch. 3, § 48-A(4).

¹⁴⁶ *National Association of the Deaf, supra* note 4.

¹⁴⁷ 42 U.S.C. § 12101 et seq.; *National Association of the Deaf, supra* note 4.

¹⁴⁸ Howard A. Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 3, 1061, 1074 (2011).

C. *Creating a Central Administrative Agency*

The state bar association, collaborating with interpreter referral agencies in the state that provide VRI services, should adopt the communication access fund concept and create an administrative agency to maintain a list of qualified interpreters, with the ability and knowledge to match the right interpreter for the deaf or hard of hearing person and the lawyer.¹⁴⁹ The need to set up this network is imperative because there has been a high demand for sign language interpreters and studies show that over period of time that demand will increase by a significant percentage.¹⁵⁰ By connecting VRI services throughout the state into one administrative agency of the state bar association, or allocating referrals to the local bar association, it will allow attorneys in different parts of New York to be able to locate and make appointment of VRI service for their consultation with deaf and hard of hearing clients, since interpreters are a rare commodity and arrangements for the services must be made in advance.¹⁵¹ It would also allow attorneys to represent or choose to represent clients from rural areas, where it may be difficult to locate an interpreter.

This administrative agency will function as a “one-stop shop,” where attorneys place requests for accommodations directly with the agency to provide for the services.¹⁵² It will remove the tension that often accompanies any request for accommodation when the request is no longer made of the lawyer prior to any specific appointment.¹⁵³ Rather, the administrative agency supported by the fund can arrange accommodations for all appointments with lawyers.

¹⁴⁹ Schwartz, *supra* note 7; *National Association of the Deaf*, *supra* note 5.

¹⁵⁰ Stephanie Zito, *American Sign Language Interpreting*, LIFE PRINT, (Apr. 6, 2009), <http://www.lifeprint.com/asl101/topics/interpreting02.htm> (last visited Feb. 15, 2013).

¹⁵¹ David Michael Stokes & Daniel P. McGlenn, *The Accessible Law Office*, 75 MICH. B.J. 390 (1996).

¹⁵² *National Association of the Deaf*, *supra* note 4.

¹⁵³ Rosenblum, *supra* note 149.

Utilizing video remote interpreting service to the maximum extent would decrease the costs incurred from hiring an on-site interpreter. There is no additional charge with the interpreting service for the travel time.¹⁵⁴ Most lawyers, both solo practitioners and firms, if not all, have computers readily accessible. Because there is no need for lawyers to acquire specific equipment to use VRI services, there is no upfront cost disincentive to use VRI services.

VIII. CONCLUSION

Ensuring that deaf or hard of hearing persons have equal opportunity to receive legal services is not only desirable but also the law.¹⁵⁵ It is also reasonably easy for lawyers to comply with their responsibilities.¹⁵⁶ With the available resources and modern technology, the state bar association can establish a communication access fund that would remove a significant barrier for deaf and hard of hearing persons seeking assistance from the legal profession. It would also help to alleviate the financial responsibility attorneys and small firms bear in order to meet their obligations under the ADA to ensure effective communication. Although telecommunication services such as video relay services can decrease the costs of providing interpretation substantially, it is not to be used as a substitute for providing auxiliary aids or services provided under the ADA.

While mere establishment of communication access fund cannot resolve the challenges of the ADA violations, it should mark the beginning of the effort to make Title III goals to be enforced and regulated. Changing the landscape of legal accessibility by requiring systematic

¹⁵⁴ *Registry of Interpreters for Deaf*, *supra* note 89.

¹⁵⁵ Diehl, *supra* note 1.

¹⁵⁶ *Id.*

and deliberate step to ensure that no individual is discriminated on the basis of disability would bring legal profession to meet its obligations and responsibilities under Title III of the ADA.