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Representational Accommodation in Washington's Administrative Hearing Process

By Judge Johnette Sullivan and Judge Pamela Meotti

A Hearing Scenario

Judge: Do you understand your rights?

Party: (long pause) Can you tell me again?

Judge: What did you not understand?

Voice from gallery: Jim, show him the letter.

Party: (silently extends arm holding a piece of paper)

Voice from gallery: Your Honor, he has a letter from his doctor about his head injury. He was in a bad car accident. He used to run his own business. Now, he struggles to find the right words and he forgets everything.

The judge in this scenario needs a process to determine Jim's need for accommodations in a way that respects Jim's privacy and avoids ex parte communication. If the judge reads the letter from Jim's doctor, is the opposing party entitled to read the letter? Few judges have clear guidance about how to proceed on the record when a self-represented party in a civil case appears to be unable to participate in a meaningful way due to a disability. For more than 25 years, court systems have searched for innovative ways to meet the mandate of the Americans with Disabilities Act (ADA) to ensure that services, programs and activities are "readily accessible to and usable by" individuals who have disabilities.¹ The state of Washington has taken a significant step forward to provide administrative law judges with a process to meet these challenges.

For more than one year, the Washington State Office of Administrative Hearings (OAH) has been appointing "suitable representatives"² for self-represented parties who are unable to participate meaningfully in the adjudicative process due to a disability. OAH makes the appointment at no cost to the party when a suitable representative is the minimum necessary accommodation under Title II of the ADA, and alternative accommodations are inadequate. The suitable representative could be an attorney or a non-attorney who has the knowledge, skills and abilities to serve as a representative. OAH's process can provide a blueprint for court systems of all types, be they administrative, judicial or quasi-judicial, looking to ensure access in civil proceedings by self-represented parties with disabilities.

Background

About OAH

Established in 1981, OAH is an adjudicatory agency that hears appeals from more than 20 state and local agencies. As a separate state agency, OAH's mission is to independently resolve administrative disputes through accessible, fair, prompt processes and issue sound decisions. OAH received more than 50,000 appeals in fiscal year 2017.

The Washington State Legislature intended OAH administrative hearings to be informal and easily accessible for the public.³ The vast majority of parties in OAH appeals represent themselves. Evidentiary standards are relaxed and the administrative law judge (ALJ) takes an active role to develop the record, asking questions of witnesses to ensure a complete record.⁴ Moreover, in keeping with this informal approach, a number of the administrative agencies that refer matters to OAH have promulgated rules that permit non-attorneys to represent litigants in administrative proceedings. Parties who have the ability to represent themselves, but do not wish to do so or do not feel confident doing so, often enlist a family member or friend to represent them during the hearing process. Most parties are capable of representing themselves in OAH's informal setting, including parties with a disability.

ALJs have authority to approve and implement accommodations to ensure that a party with a disability can readily access OAH's hearing process. For example, an ALJ may approve a scheduling accommodation to avoid a conflict with the days a party has dialysis treatments. An ALJ may modify the hearing process to allow a party with an intellectual disability extra time to review an audio recording of the direct testimony of the department representative before the party asks cross-examination questions. For self-represented parties like Jim in the opening scenario, an ALJ rarely has the time or information to determine the extent of an intellectual, cognitive or mental disability. Moreover, in a case such as Jim's, modifications to the hearing process and other accommodations may not provide the assistance Jim needs if he does not understand the hearing issue. It is hard to imagine how someone like Jim alone and without the assistance of someone else could exercise any sort of meaningful role in a legal proceeding, even with other accommodations.

A Call for Representational Accommodation

In June 2016, OAH received a petition for rulemaking to provide representational accommodation for appellants in administrative hearings. The purpose of the petition was to address cases, such as Jim's, in which other approved accommodations are not sufficient to ensure that the participant can meaningfully participate in the hearing process. The chief ALJ initiated rulemaking and convened a workgroup to develop the language for the proposed rule.

The workgroup addressed objectives and elements of (1) assessment, (2) accommodation response, (3) training, and (4) data collection. Stakeholder representatives on the workgroup included the petitioners, state agencies that referred over 90 percent of OAH's appeals, legal services providers, the Washington Supreme Court's Access to Justice Board, and the Governor's Office. Some stakeholders supported the rulemaking effort, while others opposed the initiative. The Chief ALJ carefully considered the comprehensive analysis and discussion, and ultimately decided to adopt a rule in August 2017.⁵ The Chief ALJ convened a second workgroup in the fall of 2017, to make recommendations about how OAH would implement the rule. Most members of the development workgroup continued on the implementation workgroup.

During the rulemaking process, OAH considered the approach of the Washington state courts. Since 2007, general court rules provide that an accommodation may include "as to otherwise unrepresented parties to the proceedings, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability."⁶ In addition, OAH considered the legal or funding restraints on persons serving as a public ombuds. The ombuds' terms of employment allow them to accompany a party to a hearing and provide moral support, but they cannot serve as the party's lay representative.

To ensure that the workgroup and rulemaking processes were transparent, OAH posted workgroup minutes, public comments, rulemaking filings, and an audio recording of the public hearing on the OAH public website. We refer readers interested in detail about the rulemaking process to OAH's public website.⁷

OAH's Accommodation Rule

In August 2017, OAH completed the rulemaking process and adopted an accommodation rule effective January 1, 2018.⁸ The rule "is intended to ensure that all requests for accommodation are addressed in accordance with the requirements of the ADA and that any accommodation response is the minimum necessary to effectively address the needs of the party." The rule, which applies the federal definition of "disability," provides an on-the-record process for an ALJ to delay a proceeding in order to refer the issue of accommodations to the ADA coordinator. Most significantly, the rule gives the ADA coordinator the option of recommending appointment of a suitable representative and sets out a process for the ADA coordinator to determine when such an appointment is appropriate. Finally, the rule authorizes OAH to form a network of individuals who qualify by training or experience to be suitable representatives. OAH has committed to annual training for all staff about the ADA and the rule, to collect data during the initial two years of implementation, and to seek feedback to evaluate and improve the process.

On-The-Record Action by the ALJ

OAH's accommodation rule provides ALJs with a process for handling cases that involve a party like Jim in the opening scenario. Under the rule, an ALJ may form a reasonable belief that other accommodations are inadequate and that a self-represented party might be unable to participate meaningfully due to a disability. With the party's consent, the ALJ may delay the proceeding and refer the matter to the ADA coordinator for further determination. Through this process, the ALJ avoids ex parte communication. The ALJ can assure the parties the ADA coordinator will keep confidential and separate from the record of the adjudicative proceeding all records considered in deciding whether to appoint a suitable representative.

Confidential Determinations by the ADA Coordinator

For each referral, the ADA coordinator first determines whether the self-represented party has a disability, and whether the party is unable to participate meaningfully in the adjudicative proceeding because of the disability. The fact that a party has a legal guardian, relative, or friend who might be available to assist them does not factor into the ADA coordinator's determination of whether the party is able to participate meaningfully in the proceeding. To make this determination, the ADA coordinator contacts the party and asks a series of questions to assess whether the individual has the required knowledge and skills. This is generally a thorough and extensive inquiry.

The ADA coordinator considers numerous factors, including whether the party understands the nature of the dispute in the adjudicative proceeding, the right of representation, the right to present, examine, and object to evidence, the right to cross-examine witnesses, and the right to appeal. The ADA coordinator also considers whether the party has the ability to exercise these rights and can make informed decisions concerning waiver of these rights. The ADA coordinator must also determine whether the party can meet the physical demands of participating in the proceeding, respond to arguments and evidence presented by other parties, evaluate and discuss arguments and defenses, present relevant evidence and testimony, and

follow instructions. Based on a consideration of these factors, the ADA coordinator makes a determination as to whether the party can participate meaningfully in the proceeding.

If the ADA coordinator determines that the party is unable to participate meaningfully in the adjudicative proceeding due to a disability, the ADA coordinator must determine what type of accommodations will provide access. This is an interactive process, in which the ADA coordinator and the party discuss whether an alternative accommodation is sufficient to address the party's disability-related limitations, or whether a suitable representative is the most appropriate accommodation.

The Appointment Process and Training

The rule defines a “[s]uitable representative” as “an individual who is qualified . . . to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the adjudicative proceeding.”⁹ In order to qualify as a suitable representative, one must complete an online, self-paced training program developed by OAH and accessible on the OAH public website.¹⁰ The training program covers the fundamental components of the hearing process, the rights involved in the hearing process, applicable rules and procedures, substantive law, and information about advocating for individuals who have disabilities. An individual may satisfy the training with equivalent training or experience. In addition, OAH's online resources¹¹ may be useful to the public and anyone interested in working with or advocating for people with disabilities.

To be clear, OAH's suitable representative initiative is not a version of civil *Gideon*.¹² OAH appoints a suitable representative only when an individual has a disability that requires a reasonable accommodation under the ADA and only when no other accommodation is sufficient to provide for meaningful participation. Factors such as an individual's lack of education or proficiency with the English language would not constitute reasons for appointing a suitable representative. The purpose of OAH's suitable representative initiative is not to provide representation for all parties. OAH appoints a representative only when necessary under the ADA, when other accommodations are not adequate to meet a party's disability-related needs.

If the ADA coordinator concludes that it is necessary to appoint a suitable representative, the ADA coordinator then identifies an individual to assist at no cost to the party. Ultimately, the Chief ALJ makes the suitable representative appointment, which only becomes effective when the party accepts it.

Putting the Process into Action

Since January of 2018, OAH has considered whether to appoint a suitable representative in 67 cases.¹³ In approximately one-half of the cases, the parties contacted OAH directly to request a representative. In the remaining cases, with the party's consent, an ALJ made a referral to the ADA coordinator.

After considering the facts and circumstances in each of these cases, the ADA coordinator recommended appointing a suitable representative in six cases. The parties in these cases experienced substantial impairments due to multiple physical and/or mental disabilities. Some had significant intellectual disabilities or memory impairments. Some had mental disorders that substantially interfered with their ability to follow the ALJ's instructions, maintain focus, understand the issues, or articulate their positions. Each had been receiving Social Security Disability Insurance or Supplemental Security Income for some time. In sum, appointing a

suitable representative was imperative because alternative accommodations were not adequate to ensure that these parties could participate in the hearing process.

In the majority of the cases, however, OAH determined that it was not necessary to appoint a suitable representative. In some cases, the party requesting representation was not disabled. In most of the cases, alternative accommodations made it possible for the party to participate fully. For example, some parties had the knowledge, skills and ability to articulate their position, respond to other parties' arguments, and ask cross-examination questions, but they required frequent breaks, additional time to think before responding to a question, or permission to interrupt during the hearing to ask the ALJ or a party to repeat a statement. Some parties simply required assistance in marking exhibits, or in sending out documents.¹⁴ Some of these individuals filed a grievance to challenge the denial of a suitable representative. The chief ALJ affirmed the determination of the ADA coordinator that other approved accommodations were sufficient to give these parties the opportunity to participate meaningfully in their hearing, and therefore satisfied OAH's obligation under the ADA.

A Work in Progress

OAH has encountered some surprises, both positive and negative, in implementing the suitable representative initiative. During the rule-making process, opponents of the program raised concerns that OAH was opening the floodgates to requests for representation. To date, these concerns have been unfounded. Both the overall number of requests for suitable representation and the number of appointments have proven to be manageable. Given that OAH receives over 50,000 appeals annually, 67 requests for appointment of suitable representation is a tiny percentage.

Finding individuals to serve as suitable representatives has been more difficult than OAH anticipated. Of the six parties identified by the ADA coordinator, a private attorney and two legal services groups agreed to assist parties pro bono. OAH contracted with legal services to be the suitable representative for two parties, and appointed another party's preferred choice of lay representative. In two cases, OAH was unable to find an attorney to volunteer or to accept a contract. A private attorney may not be comfortable with the timeline if unfamiliar with the substantive law at issue in the appeal. Legal services organizations declined some OAH offers of paid contracts due to their limited resources.

Because the suitable representative program does not have an independent source of funding, OAH anticipated that it would need to rely on volunteers, at least initially, to serve as suitable representatives. This involves building a volunteer network, which is a work in progress. OAH has identified attorneys who are interested in volunteering as suitable representatives, including retired ALJs, attorneys who work in the federal system, and members of the state bar association.

Most of the attorneys who have expressed interest in volunteering are not members of a firm or group that provides professional liability insurance coverage. As a result, an ongoing challenge is figuring out how to provide coverage so that these individuals can serve as suitable representatives. OAH needs to resolve the liability issue for non-attorney suitable representatives, too. While law students would seem an obvious source of volunteers, enlisting their help is complicated. Law students need supervising mentors, and existing law school clinics already have an established purpose. In addition, the hearing schedule is not always consistent with the law school schedule.

OAH continues to develop a network of suitable representative by presenting at or sponsoring continuing legal education seminars, and by reaching out to community organizations that share a commitment to meeting the needs of people with disabilities. In addition, the Chief ALJ receives input from an advisory group formed in spring 2018.

Fortunately, costs associated with implementing the suitable representative program have been in keeping with OAH's expectations. As anticipated, OAH has devoted a significant amount of time and resources to building a volunteer network and to developing training materials for ALJs, staff members and individuals who are interested in becoming suitable representatives.

Next Steps

OAH will continue to gather data about the timeliness of the process, the outcome in cases in which the chief ALJ appointed a suitable representative, the number of requests granted or denied, sources of referrals, and the number and outcome of grievance appeals to the chief ALJ. In addition, OAH will continue to seek feedback from all involved, including parties, suitable representatives and ALJs. In 2020, OAH will review and assess the program for its effectiveness. In addition to providing the assessment results to Washington's Office of Financial Management, OAH will post the assessment results on its public web site. Through these actions, OAH plans to refine and improve the suitable representative process on an ongoing basis.

Conclusion

Given OAH's informal hearing process, most parties are equipped to represent themselves in their hearings. Alternative accommodations under the ADA are usually sufficient to ensure that most parties who have a disability have access to meaningful participation in the hearing process. Even with other accommodations, however, a small number of individuals are unable to participate meaningfully in legal proceedings where the outcomes can significantly affect their lives. Allowing these individuals to proceed, unrepresented, does not serve the interests of the parties or the tribunal, and does not satisfy the mandates of the ADA.

In these most difficult cases, OAH appoints a suitable representative as a reasonable accommodation under the ADA. Not only does this ensure compliance with the requirements and the underlying intent of the ADA, it is in keeping with OAH's mission to independently resolve administrative disputes through accessible, fair, prompt processes and issue sound decisions. Since it launched the suitable representative program, OAH has found the number of requests for representation to be manageable. OAH's suitable representative initiative is still in its infancy, and the long-term benefits and costs of the program are unknown. However, OAH is committed to an assessment and review process to improve the program's effectiveness. OAH's program can serve as a blueprint for court systems of all types looking for ways to ensure that parties with disabilities can participate meaningfully in civil proceedings.

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¹ 42 U.S.C. § 12101 et seq.; 28 C.F.R. § 35.150(a).

² Washington Administrative Code (WAC) 10-24-010(2)(b).

³ "Hearings shall be conducted with the greatest degree of informality consistent with the fairness and the nature of the proceeding." RCW 34.12.010.

⁴ RCW 34.05.449; RCW 34.05.455; WAC 10-08-140; and, WAC 10-08-200.

⁵ Washington Administrative Code (WAC) 10-24-010.

⁶ Washington State Court General Rule (GR) 33.

⁷ <http://oah.wa.gov/Home/Index/3396>.

⁸ WAC 10-24-010.

⁹ WAC 10-24-010(2)(b).

¹⁰ <http://oah.wa.gov/Home/Index/3449>.

¹¹ <http://oah.wa.gov/OAHPublicWebDocuments/General%20Resources.pdf>

¹² See *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963).

¹³ In more than one quarter of the cases, the matter settled or the party withdrew the request for suitable representation. Some individuals were involved in more than one case.

¹⁴ Alternative accommodations included increasing the font size in notices and orders, sending case documents electronically, providing a qualified interpreter in American Sign Language, and providing real-time transcription by a court reporter. In some cases, the accommodation was to divide the hearing into several proceedings, held several weeks apart, to meet the party's need for extra time to review the evidence in written and audio formats in order to prepare for the next portion of the hearing.