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Article

***65** "I'M OK-YOU'RE OK" [\[FN1\]](#): EDUCATING LAWYERS TO "MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP" WITH A CLIENT WITH A MENTAL DISABILITY

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The tools of the mind become burdens when the environment which made them necessary no longer exists.

---- Henri Bergson [\[FN2\]](#)

If you wish to converse with me, define your terms.

---- Voltaire [\[FN3\]](#)

I. INTRODUCTION

In a society where people are uncomfortable around people with mental disabilities, lawyers must take the lead in protecting their rights and treating them with respect. Discrimination remains prevalent in this country, but in most circumstances, the discrimination is subtle and covert. However, discrimination against people with mental disabilities is still overt. Because people are ignorant about mental disabilities, they are fearful of people who have such disabilities. Lawyers are just as uninformed as most citizens. Discrimination against people with mental disabilities continues to be a major problem, and they are under-represented by lawyers.

This Article discusses the importance of providing effective representation to clients with mental disabilities and the need for bar associations to provide further guidance to lawyers. The Article is limited to a discussion ***66** of those clients with mental disabilities who, with effective communication and accommodations, can participate in a discussion of their legal rights. The situation of clients whose mental incompetency requires a guardian or guardian ad litem is not addressed. First, the Article reviews and critiques ABA Model Rule of Professional Conduct 1.14, which requires a lawyer to maintain a "normal client-lawyer relationship" with the client under a disability. The Article will then discuss the definition of mental disability and the different classifications of such disabilities. The Article will review the historical treatment of people with disabilities and the legislative response to the mistreatment of people with disabilities which has impacted lawyers' professional responsibility to their clients with mental disabilities. Further, the Article discusses the importance of effective communication with clients with disabilities. Finally, the Article concludes that most lawyers are not properly educated to effectively represent people with mental disabilities and that ethical rules should provide additional guidance. Moreover, the American Bar Association needs to provide more emphasis on educating lawyers about the needs of people with disabilities. Lawyers should be required to participate in mandatory training regarding clients with mental disabilities.

II. OVERVIEW AND CRITIQUE OF ABA MODEL RULE 1.14: CLIENT UNDER A DISABILITY

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. [FN4]

The lawyer's responsibilities to a client do not change because the client has a mental disability. Pursuant to Rule 1.14 of the Model Rules, a lawyer must maintain, insofar as possible, a "normal" relationship with his client. [FN5] The Rule provides:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

***67** (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. [FN6]

A "normal relationship" is premised on the understanding that the lawyer can effectively communicate with his or her client and that the client understands the options available to him or her. A lawyer is required to provide effective communications with the client [FN7] and is required to abide ***68** by the client's wishes regarding the objectives of the representation. [FN8] Although a client with a mental disability may present special challenges to the lawyer, the lawyer must maintain a normal relationship and make a special effort to accommodate the needs of each client and assure that the client understands the consequences of decisions the client makes. [FN9] "Normal" does not necessarily mean that a lawyer interacts with a client with a mental disability in the same manner the lawyer would interact with a client who does not have a mental disability. [FN10] However, it does mean that the nature of the lawyer-client relationship is the same, and the lawyer must make sure that the client understands the legal issues so the client can make meaningful decisions.

Although Rule 1.14 is laudable because it recognizes the rights of a client with a mental disability and requires that a lawyer maintain a traditional attorney-client relationship with such clients, the rule fails to provide much guidance to lawyers in carrying out this endeavor. [FN11] In order for a lawyer to comply with Rule 1.14, the lawyer must have a clear understanding as to a "normal client relationship" and how it relates to the lawyer's responsibilities under the ethical rules. [FN12] Moreover, the lawyer has to discern when a client has a disability that triggers compliance with Rule 1.14. [FN13] In order for a lawyer to effectively represent a client with a disability, the lawyer has to be educated on the rights of clients with disabilities and the characteristics of people with mental disabilities. Like many people in society, lawyers must overcome their prejudices and misconceptions about the abilities of people with mental disabilities.

***69** III. DEFINITION OF MENTAL DISABILITY AND THE DIFFERENT CLASSIFICATIONS

A. Definition of Mental Disability

Lawyers must appreciate the importance of language in order to effectively represent a person with a mental disability. [FN14] The use of the appropriate language is not only important to avoid confusion and offending the person with the mental disability, it can also affect the legal rights and the support services that are needed to assist the person. [FN15] However, the definitions of terms used in the field of mental disability law are imprecise and often disputed. Even the term "mental disability" does not have a clear and precise meaning. [FN16] The term is frequently used to cover "a group of impairments that affect mental or cognitive functioning Included in this term are mental illness, mental retardation, and other developmental disabilities, cognitive impairments, learning disabilities, organic brain injuries, drug addiction, and alcoholism." The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) [FN17] utilizes the term "mental disorders," which includes mental retardation, psychotic

disorders, and various substance abuse disorders. [FN18] The DSM-IV acknowledges: "that no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." [FN19] There is a lot of overlap between "mental disability" and "mental disorder," but this Article will utilize the term "mental disability." The Article will particularly look at the following classifications: developmental disability, mental retardation, mental illness, and substance abuse. This is not meant to be an exhaustive list of mental disabilities, but only a list of some of the more prevalent ones.

***70 B. Developmental Disability**

A person who is diagnosed with a developmental disability will have "mental, cognitive, and physical impairments--or combinations of these impairments--that begin by early adulthood." [FN20] The impairment is "likely to continue indefinitely, and produce severe functional impairments that adversely affect one or more of an individual's major life activities." [FN21] "The term developmental disability encompasses all severe and chronic disabilities that manifest before the age [of] twenty-two and can include, but not be limited to" mental retardation, epilepsy, autism, and cerebral palsy. [FN22] A learning disability could fall within "developmental disability" "when [the] academic impairment is significantly below expected levels given the individual's intellectual functioning and schooling." [FN23] The category of people with a learning disability deserves close attention because of their prevalence in society [FN24] and because of the problems with misclassification. [FN25] A person with a developmental disability can have substantial limitations in such major life activities as self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. [FN26]

***71 C. Mental Retardation [FN27]**

A person who is diagnosed as having mental retardation will have a "significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." [FN28] Mental retardation manifests itself before age eighteen and is found in one to three percent of the population. [FN29] Significantly sub-average intellectual function is defined as an intelligence quotient (IQ) of about seventy or below as measured by a standardized intelligence test. [FN30] "Adaptive functioning refers to how effectively individuals cope with common life demands, and how well they meet the standards of personal independence expected of someone in that particular age group, sociocultural background and community setting." [FN31] There are four degrees of severity that reflect the level of intellectual impairment for a person with mental retardation: mild, moderate, severe, and profound. [FN32]

***72 D. Mental Illness**

A person with a mental illness "is an individual with an organic, mental or emotional disorder which substantially impairs the person's thought, perception of reality, emotional process, judgment, behavior, or ability to cope with the ordinary demands of life." [FN33] The term mental illness has been used to "describe[] a broad range of mental and emotional conditions that may interfere with a person's occupational, social and daily functions." [FN34] The intensity and duration of the disorder vary among individuals with mental illness and many times last only a brief period. [FN35] For some, the symptoms can be controlled effectively with medication or professional help and may go into remission. [FN36] "Severe mental illness, which includes schizophrenia, bipolar disorder, and severe depression, affect almost three percent of the adult population." [FN37] An example of a mental illness is a person who has an obsessive-compulsive disorder. A person diagnosed with an obsessive-compulsive [FN38] disorder has obsessions or

compulsions that are severe enough to be time-consuming (which is more than one hour a day), cause marked distress, or significantly interfere with the individual's normal routine, occupational functioning, or usual social activities and relationships with others. [FN39] Obsessive-compulsive disorder typically begins in adolescence or early adulthood but may begin in childhood. [FN40] Common examples of obsessive behavior are concerns about shaking someone's hand because of contamination, wondering whether you have hurt someone in a traffic accident or left the *73 door unlocked, or the need to have things in a particular order. [FN41] The compulsive activity is the attempt by the person to reduce or prevent the anxiety or distress, which causes a person to wash his or her hands so often that the skin is raw or to return to check a door every few minutes to ensure that it is locked. [FN42] Obsessive-compulsive disorders can affect a person's cognitive ability when performing tasks that require concentration and cause a person to avoid objects or situations, which could severely restrict general functioning. [FN43] Although mental illness is often confused with mental retardation, it is clearly a different condition. [FN44] "Mental illness is unrelated to intelligence and is a disturbance of thought process and emotions," while "mental retardation is not a disturbance of the thought process or emotions." [FN45] "Many forms of mental illness are temporary, cyclical, or episodic," while "[m]ental retardation by contrast, involves a mental impairment that is permanent." [FN46] Further, mental illness is a medical condition that can occur at any time in life, while mental retardation is not a disease or an illness, but a lifelong impairment, frequently developed at birth or as young children, of learning cognitive capacity. [FN47] Moreover, there is a significant danger in confusing mental illness and mental retardation, because the appropriate services to assist them are different. [FN48] While mental illness and mental retardation are different conditions, they are not mutually exclusive because there are some individuals who are mentally retarded and also mentally ill. This creates an additional burden in assuring that the individual receives appropriate services. [FN49]

*74 E. Substance Abuse

A person who is diagnosed with a substance-related disorder has mental and physical problems that result from abusing drugs (including alcohol [FN50]), the side effects of medication, including those available over the counter, or exposure to toxins. [FN51] The problems are often related to the improper dosage of the medication. [FN52] In addition, a person can be exposed to a number of chemical substances that can lead to a substance-related disorder. Volatile substances, such as fuel or paint, are classified as "inhalants" if a person is intentionally using it to become intoxicated, and they are considered "toxins" if a person is exposed to it by accident. [FN53] Although many individuals with substance related problems can maintain personal relationships and maintain jobs, they often have significant impairments and severe complications. [FN54] They often experience a decline in their general health, which includes malnutrition due to an improper diet and inadequate personal hygiene. [FN55] Some problems that are caused by intoxication or withdrawal may be further complicated by trauma related to impaired motor coordination or faulty judgment. [FN56] A person who is diagnosed with a substance-related disorder may be prone to violence or aggressive behavior, which may be manifested by fights or criminal activity. [FN57] Further, in addition to the potential injury that such a person could cause to others, they often cause injury and harm to themselves, which includes committing suicide. [FN58]

IV. HISTORICAL TREATMENT OF PEOPLE WITH MENTAL DISABILITY AND THE LEGISLATIVE RESPONSE

A. Historical Treatment of People with Mental Disability

The history of people with mental disability has gone through a substantial change, and the change has contributed to the ethical rule that requires lawyers to treat clients with disabilities as "normal" as reasonably possible. The practice in this country was once to

hide individuals with mental disability and to keep them away from "normal" people. In a society plagued *75 by xenophobia hysteria, individuals with a mental disability were segregated and excluded from society. [FN59] The treatment was cruel and inhumane. They were treated as if they had no value and their life was meaningless. The practice of mistreatment and exclusion was supported and endorsed by the American government. [FN60] The practice was prevalent throughout the country and "[i]n virtually every state, in inexorable fashion, people with disabilities--especially children and youth--were declared by state lawmaking bodies to be 'unfitted for companionship with other children,' a 'blight on mankind' whose very presence in the community was 'detrimental to normal' children, and whose 'mingling ... with society' was 'a most baneful evil.'" [FN61] The goal was to put individuals with mental disabilities "out of mind and out of sight." The blatant discrimination of individuals with mental disabilities left them feeling discarded and devalued. [FN62] Even the United States Supreme Court did not provide a refuge for citizens with mental disabilities. In *Buck v. Bell*, the Supreme Court joined in the mistreatment of individuals with mental disability with an insensitive and harsh ruling against a woman with a mental disability. [FN63] In 1927, Carrie Buck, via counsel, argued before the Supreme Court that her state-imposed sterilization, based on her mental disability, was unconstitutional. Justice Holmes described Ms. Buck as a "feeble-minded" woman who was a daughter of a "feeble-minded mother" and the mother of "an illegitimate feeble-minded child." [FN64] The court held that the state-imposed sterilization was constitutional. Justice Holmes wrote caustically:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State, ... in order to prevent our being swamped with incompetence. It is better *76 for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough. [FN65]

The Supreme Court told Ms. Buck that she was not a value to society and discarded her as an undesirable.

Fifty-eight years after *Buck v. Bell*, the Supreme Court joined in the present movement to treat individuals with mental disabilities with respect and recognized that they have a value to society and are entitled to self-determination. The NAACP's success in the Supreme Court's *Brown v. Board of Education* decision in 1954 inspired other organizations to adopt strategies for legal reform, and thereafter, expansion of law reform to other groups in society moved rapidly. [FN66] By the early 1970s, activists for individuals with mental disabilities began to challenge with success the inhumane treatment of individuals who were institutionalized. [FN67] Mental disability activists focused on the right to informed consent and freedom from exploitation and also addressed due process of law to housing, income, community support, and treatment that recognized personal autonomy and responsibility. [FN68]

In 1985, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that a city's effort to exclude people with mental retardation from its community violated the Equal Protection Clause of the Constitution. [FN69] Cleburne Living Center (CLC) sought permission from the City of Cleburne to run a group home for individuals having mental retardation. [FN70] The City informed CLC that a special use permit would be required for the operation of the group home in the location the home was located. [FN71] The City determined that the proposed group home should be classified as "hospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions." [FN72] After holding a public hearing on CLC's application, the City Council voted three-to-one to deny a special use permit. [FN73] The CLC filed suit in federal district court against the City of Cleburne alleging that the zoning ordinance was invalid because it violated the Equal Protection Clause. [FN74] The district court upheld the zoning ordinance, *77 concluding it to be "rationally related to the city's legitimate interests in 'the legal responsibility of CLC and its residents, ... the safety and fears of

residents in the adjoining neighborhood,' and the number of people to be housed in the home." [FN75] The Court of Appeals for the Fifth Circuit reversed, finding that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under an intermediate-level scrutiny. [FN76]

The Supreme Court, reversing the Fifth Circuit, declined to recognize mental retardation as a quasi-suspect class, and concluded that the level of review is whether the state legislation is rationally related to a legitimate state interest. [FN77] The Equal Protection Clause requires states to treat similarly situated people the same. [FN78] The general rule is that courts will uphold state legislation if it is "rationally related" to a legitimate state interest. [FN79] The courts have provided a different standard of review when a state statute is classified by race, alienage, or national origin. [FN80] When race, alienage, or national origin is at issue, the courts apply a "strict scrutiny" standard.

[FN81] If the legislation is classified by gender, the courts will apply an intermediate review and will uphold the legislation only if it is "substantially related to a sufficiently important government interest." [FN82] The courts have declined to apply a different level review in the treatment of persons based on age. [FN83]

The Supreme Court concluded that unlike race, national origin, alienage and gender, mental retardation, like age, was not entitled to a higher level of review. [FN84] The Court noted that people who are mentally retarded "range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one." [FN85] The Court further noted that there has been a legislative response to the "plight of those who are mentally retarded *78 [which] ... belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." [FN86] The Court concluded that individuals who are mentally retarded are not "politically powerless" and was concerned that applying a quasi-suspect classification would make it difficult to distinguish other groups who have immutable disabilities. [FN87]

Although the Supreme Court declined to apply a quasi-suspect classification for individuals who are mentally retarded, the Court concluded that the City of Cleburne's decision to deny a permit to the Cleburne Living Center could not survive muster under the rational relation standard. [FN88] Since the City of Cleburne did not require a special use permit for facilities such as apartment houses, fraternity or sorority houses, apartment hotels, nursing homes for convalescents or the aged, the Supreme Court had to decide whether there was a rational basis for requiring a permit for a home that housed individuals who are mentally retarded. [FN89] The Court noted that the City could treat them differently if the occupants in the home would threaten the legitimate interest of the City in a way that other permitted uses would not. [FN90] The Court concluded that "the record does not reveal any rational basis for believing that the ... home would pose any special threat to the city's legitimate interests." [FN91] Furthermore, the Court concluded that "[t]he short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." [FN92]

The Supreme Court finally acknowledged that discrimination against citizens with disabilities was a result of intentional invidious discrimination and not "the result of apathetic attitudes rather than affirmative animus." [FN93] The Supreme Court further acknowledged that persons with disabilities historically have been subjected to "discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws.'" [FN94] Because of the history of purposeful treatment against citizens with disabilities, the prejudice against them is deep rooted and difficult to reverse. [FN95] The injuries associated with the segregation and mistreatment of people with disabilities are analogous to segregation due to race, although the history does not include the same degree of violence associated with racial discrimination. [FN96] *79 Like race, the steps to eradicating the mistreatment required enforcement by the Supreme Court and Congress. [FN97]

B. Legislative Response to People with Mental Disability

In 1990, Congress provided the most comprehensive legislation to support the rights of citizens with disabilities when it enacted the American with Disabilities Act (ADA). [\[FN98\]](#) Congress noted that:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. [\[FN99\]](#)

The ADA has had a major impact in a variety of areas. Under Title I of the Act, people with disabilities are protected against discrimination in employment. [\[FN100\]](#) Under Title II of the Act, people with disabilities are protected against the denial of public services, which includes receiving a public education. [\[FN101\]](#) Title III provides protection against discrimination in public accommodations that are privately operated. [\[FN102\]](#)

The ADA followed legislative and judicial activities in the area of disability rights that began in the 1970s. [\[FN103\]](#) In 1973, the first major comprehensive federal law involving rights of people with disabilities, the Rehabilitation Act, was enacted. [\[FN104\]](#) Section 504 of the Rehabilitation Act provides: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" [\[FN105\]](#) The Rehabilitation Act covers many programs because it covers all state programs that receive federal funding and all states presently receiving federal funding for public educational programs. [\[FN106\]](#)

In 1975, Congress passed the Education for ***80** All Handicapped Children Act (EAHCA), [\[FN107\]](#) renamed the Individuals with Disabilities Education Act (IDEA), [\[FN108\]](#) placing emphasis on using the term "disability" rather than "handicap." [\[FN109\]](#)

The IDEA was enacted in response to the general advocacy movement to support the rights of people with disabilities and to two federal court decisions: Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania [\[FN110\]](#) and Mills v. Board of Education of District of Columbia. [\[FN111\]](#) The two cases established the precedent that education for children with disabilities is subject to constitutional protection under the Fourteenth Amendment, and more specifically, that children with disabilities are entitled to equal protection and due process. [\[FN112\]](#) The IDEA provides additional financial resources to states in order for the states to provide equal education opportunities to children with disabilities. [\[FN113\]](#) Although there are many other statutes that provide support for citizens with disabilities, the ADA, the Rehabilitation Act, and the IDEA are the major laws that allow citizens with disabilities to enter the mainstream of society.

[\[FN114\]](#)

While there has been some judicial support for citizens with disabilities, most of the laws that protect their rights are statutory. Consequently, it is important to engage in statutory interpretation to determine who will receive protection. Statutes that are designed to assist citizens with disabilities frequently have different definitions of the term "disability." Under the ADA, the term "disability" means: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; [\[FN115\]](#) (B) a record of such an impairment; or (C) being regarded as having such an impairment." [\[FN116\]](#) The term "mental impairment" means: "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, ***81** emotional or mental illness, and specific learning disabilities." [\[FN117\]](#) While under the IDEA, "children with a disability" means a child:

[A]s having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance ... an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. [\[FN118\]](#)

Further the Social Security Act, designed to provide monetary benefits to every insured individual who is "under a disability," [\[FN119\]](#) defines "disability" as an:

inability to engage in any substantial gainful activity by reason of any ... physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. [\[FN120\]](#) Because of the different definitions of "disability," it is important that lawyers closely review the statutes to assure appropriate protection.

V. LAWYER'S RESPONSIBILITY WHEN REPRESENTING A CLIENT WITH A MENTAL DISABILITY

As discussed earlier, a lawyer's duty to her client does not change because the client has a mental disability. However, a lawyer does need a heightened sense of awareness to the needs of a client with a mental disability and may need to be more diligent in assuring effective communications and respecting the objectives of the client. The lawyer should acknowledge that there are differences between clients with mental disabilities and clients *82 without mental disabilities; however, this acknowledgment is consistent with respect for the clients and their rights. The difference does not mean that the relationship between the lawyer and client is different, but it does mean the lawyer may have to change the way he or she communicates with the client to ensure that the client understands the legal issues so the client can make meaningful decisions. Lawyers have a tendency to usurp decisions that should be left to the client, and this problem is more prevalent when the lawyer is representing a client with a mental disability. [\[FN121\]](#) Throughout the lawyer-client relationship, the client retains the right to make the decision regarding the objective of the representation, but the lawyer retains the right to determine the means. [\[FN122\]](#)

Lawyers are faced with two potential approaches they can take in their representation of clients: One approach is for the lawyer to act in the "best interest" of the client, while another approach is to act as an "advocate" for the expressed interest of the client. In the "best interest" approach, the lawyer takes a paternalistic role and usurps the decisions of the client. A lawyer who takes this approach rationalizes that she has expertise and knows what is best for the client. [\[FN123\]](#) The "advocate" approach requires the lawyer provide legal advice in order to assure that the client has sufficient information to make an informed decision. The desired outcome is for the client to make the decision that is in his or her best interest. [\[FN124\]](#) The "advocate" approach is the widely accepted approach and provides for a client-centered relationship. [\[FN125\]](#) When representing a client with a mental disability, the "advocate" approach is consistent with the requirement that the lawyer maintain a "normal" lawyer-client relationship. [\[FN126\]](#) As a lawyer develops a relationship with his or her client, it is imperative that he or she has effective communication skills and that the lawyer makes the client feel that he or she is as important as the case. [\[FN127\]](#) The tone that is set in the initial meeting is important to establish the tone of the entire relationship. At the initial meeting, the lawyer must establish trust with the client and convey to the client the client's importance in the case. [\[FN128\]](#) The lawyer should also use this opportunity to measure the client's cognitive ability to assure that the client understands the matters being discussed. The lawyer may be able to answer the threshold questions as to whether the *83 client has an impairment. [\[FN129\]](#) However, the lawyer must find out the client's cognitive ability in a way that is not offensive and patronizing. The lawyer can establish a good relationship and learn about the client's legal problem and cognitive ability through effective communication.

When a lawyer is communicating with a client with a disability, it is important that the person is treated with respect. When a lawyer is referring to a person with a disability, it is important that the lawyer uses "people first" language. In "people first" language, the person is put first, and the disability is put second, therefore reflecting respect for the person. [\[FN130\]](#) For instance, the lawyer should say a "person with mental illness," as opposed to a "mentally ill person." It is important to the client for the lawyer to see the client first and not the client's disability. People with disabilities do not want to be portrayed as helpless or oppressed. [\[FN131\]](#) The lawyer must appreciate that the disability does not describe or identify the person, but the person may have a disability

which is one of many of his or her characteristics. [\[FN132\]](#)

If a lawyer does suspect that a person has a disability, the lawyer should determine whether the person has a communicative or a cognitive disability or both. [\[FN133\]](#) The lawyer should not be afraid to discuss the disability with the client and ask the client the best way to convey information. People frequently make presumptions about the limitations and skills of a person with a disability, where the best way to determine his or her limitations and skills is to ask the person directly. The lawyer should not direct questions to a third person when the client is present and can speak on his or her own behalf. However, if a lawyer learns that a client has a disability prior to an interview, it would be beneficial if the lawyer could learn as much as possible about the characteristics associated with the disability prior to an interview. [\[FN134\]](#)

Lawyers should be aware that many clients will not be candid and forthcoming about a mental disability because of the negative stigma attached to it, the misclassification of the disability, or because they have an honest perception that their disability is not relevant to the discussion. The denial of a disability is particularly prevalent with clients who have mental retardation. [\[FN135\]](#) Clients who are mentally retarded are hurt by being called *84 retarded and "will do almost anything to disconnect themselves from it."

[\[FN136\]](#) This effort to deny the disability will occur when a mentally retarded person is interacting with the police or any other person in the criminal justice system. Moreover, "many of these individuals will go to great lengths to hide their disability." [\[FN137\]](#)

When a lawyer is communicating with a client with mental retardation, the lawyer must be cognizant of the communication difficulties confronted by such clients. The client's ability to communicate and understand the judicial process will affect the client's rights and ability to seek appropriate justice. [\[FN138\]](#) There are a number of communications difficulties that will adversely affect the rights of a client with mental retardation. [\[FN139\]](#)

The following three examples highlight some of the problems that affect the rights of a client with mental retardation: eagerness to please, inability to understand abstract thoughts, and communication through mimicking. Individuals with mental retardation are eager to please others, particularly people in authority. Because individuals with mental retardation seek the acceptance of authority figures, they will accept the blame for things that they have not done. [\[FN140\]](#)

Obviously, in the judicial process such behavior can be dangerous. An individual with mental retardation may state that she or he has committed a crime or accept responsibility for a liability in a civil case. [\[FN141\]](#) Individuals *85 with mental retardation may be unable to understand abstract terms or concepts, and they may only think concretely. [\[FN142\]](#)

For example, if told the cliché "that's the way the cookie crumbles," a person with mental retardation may focus on the concrete word "the cookie" and may not understand the abstract concept of consequences. [\[FN143\]](#)

Or if asked by a police officer, "Do you waive your right to be silent and waive your right to have an attorney present?," individuals with mental retardation may quickly say yes and waive their rights because they may not understand the abstract meaning of the term "right." They may think of "right" versus "left." Further, they may not understand the term "waive," and think of the concept to "wave." [\[FN144\]](#)

Because of their abhorrence to the term "mental retardation" and the possible detection of their disability, they will not tell the police officer that they do not understand. [\[FN145\]](#)

Consistent with the desire to please others and the inability to understand abstract terms and concepts is the tendency of individuals with mental retardation to copy others. They will listen for words, look into the face of the person talking to them and copy the mood in order to give the "right" response. [\[FN146\]](#)

For instance, if a police officer said, "You weren't at home at 9:00 p.m., right?," they would listen to the tone of the officer's voice and seek to give the answer they think the officer wants and respond, "Yes." They also learn to communicate by affirming the choice that has been suggested to them last. [\[FN147\]](#)

In order to assure effective communication, *86 lawyers must be aware of these difficulties and take measures to get accurate information from individuals with mental retardation.

A lawyer's failure to be aware of the communications difficulty and failure to educate the courts on their client's needs can lead to an innocent person going to jail or being held civilly liable for something that they may not have done. This point can be illustrated by

two cases decided by the North Carolina Supreme Court two years apart in the 1980s. [FN148] In both cases, the defendants were mentally retarded, the defendants were charged with serious felonies which carried mandatory life imprisonment, and the prosecution relied heavily on the defendant's confession to get a conviction. [FN149] In the first case, State v. Massey, [FN150] the defendant was found guilty of murder in the first degree and armed robbery. The court concluded that "after being advised of his Miranda rights the defendant voluntarily, knowingly and intelligently waived his right to an attorney and voluntarily, knowingly and intelligently made a statement to the Deputy Sheriff." [FN151] The court recognized that the defendant was mildly retarded, but held that the trial court's refusal to provide funds for an additional psychiatric evaluation was not an error, where the defendant has been examined by a state psychiatrist. [FN152] Moreover, the court concluded that the "[d]efendant has not shown that there is a reasonable likelihood that an additional psychiatrist would have materially aided in the preparation and presentation of his case or that he was denied a fair trial." [FN153] The court made this finding despite the fact that the pivotal issue was whether the defendant had the capacity to "voluntarily" and "intelligently" waive his rights and whether his confession was made "knowingly" and "intelligently." [FN154] In the second case, State v. Moore, [FN155] the defendant was convicted of first-degree sexual offense, first-degree burglary, and assault with a deadly weapon with the intent to kill inflicting serious injury. The court concluded that the "[d]efendant showed that the credibility of his confession was pivotal in the state's case against him" [FN156] and that he had "a particularized need for the assistance of a psychiatrist in the preparation of his defense." [FN157] The court recognized that the defendant had an IQ of fifty-one, which places him at the lowest level of mild retardation and "that he [was] 'easily led and easily influenced' by those exercising authority." [FN158]

The difference in the two outcomes can be explained by the level of information provided to the North Carolina Supreme Court and the court's appreciation of the communication difficulties with individuals with mental retardation. [FN159] Former Chief Justice of the North Carolina Supreme Court, James G. Exum, candidly admits "that judges, by and large, don't know much about mental retardation." [FN160] He added that lawyers are not well informed, including defense counsel. [FN161] He stated:

[T]he difference in the outcome in the two cases rested in part on a difference in the level of general knowledge on the part of the court about mental retardation. But, more important, it rested on the specific factual and detailed information that counsel in Moore was able to gather and present at the trial level.

As is illustrated by these two cases, the judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in Moore for the edification of both the trial court initially and the appellate court ultimately. [FN162] Because the court was more fully informed in the Moore case, the court was better able to address the communication difficulties of the defendant who has mental retardation. In State v. Moore, the court stated that State v. Massey differed because the defendant in that case "failed to make a sufficiently specific demonstration *88 of his need for the assistance of a psychiatrist" and the "defendant did not specify the precise degree of his retardation, neither did he put on any evidence indicating the effect his particular mental condition might have had on his ability to understand either his rights or the implications of his statement." [FN163] Moreover, in State v. Moore, the court had a better appreciation of the needs of defendants with mental retardation and recognized that "even when a mentally retarded suspect's responses appear normal, his answers may not be reliable." [FN164] The court noted that:

many people with mental retardation are predisposed to 'biased responding' or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited. The form of a question can also directly affect the likelihood of receiving a biased response [FN165]

The court concluded that the assistance of a psychiatrist would enable the trial court to

better assess more fully and accurately the validity of the defendant's responses, particularly, in the instant case where the defendant waived his right in response to a series of "yes-no" questions. [FN166]

The two cases clearly illustrate that the judiciary as well as lawyers need education into the rights of an individual with mental retardation. [FN167] The lack of knowledge and information by the bench and bar could lead to continued injustice.

A. Determining the Client's Objective

The lawyer's first task during the initial meeting with the client is to determine the objective of the client. People come to lawyers because they have some legal problem and they need the lawyer's expertise to assist them in solving the problem. [FN168] It is at this first meeting, that the client-lawyer *89 relationship is established, even if the lawyer decides not to take the case. [FN169] The lawyer must appreciate that the appropriate phrase for the relationship being established is "client-lawyer" and not "lawyer-client" because it is the client's interests that are "primarily to be furthered." [FN170] The lawyer must immediately establish to the client that the client's interest and concerns are the primary reason to establish this relationship. [FN171] As stressed earlier, the primary reason for the relationship is the same when representing a client with a mental disability, and the lawyer must refrain from usurping the client's role. There are established ways for initiating the client-lawyer relationship; a lawyer representing a client with a mental disability does not have to abandon those methods, but may have to accommodate the particular needs of clients with mental disabilities. An effective way to determine the client's objective and legal problem is through a three-staged interview. The three stages are "Preliminary Problem Identification," "Chronological Overview," and "Theory Development and Verification." [FN172] The three-stage approach allows the lawyer to receive a thorough explanation of the legal problem and sufficient information to allow the lawyer to analyze the legal problem. [FN173] The three-stage approach is effective when representing a client with a mental disability because it allows the lawyer to establish respect and concern for the client's legal problems, as well as allows the lawyer to measure the skills and limitations of the client. [FN174] The lawyer should explain to the client that the interview will be conducted in a three-stage manner and explain to the client why the lawyers is proceeding in that manner.

During the "Preliminary Problem Identification stage," the lawyer asks the client open-ended questions to allow the client to relay the legal problem and the relief he or she seeks in a way that is most comfortable for the client. [FN175] In the "Chronological Overview stage," the lawyer asks the client to relay the legal problem in a systematic successive manner which begins when the legal problem was created to the present. [FN176] After the "Chronological Overview stage," and the lawyer moves to the "Theory Development and Verification stage," the lawyer determines the possible causes of action *90 available or defenses available. [FN177] While this approach may not work for all cases, it provides a good framework for most situations. [FN178]

B. Explaining the Role of the Lawyer to the Client and the Scope of the Representation

After the lawyer has decided to represent the client and has determined the client's legal problem, the lawyer should make certain that the client understands the roles of the lawyer and the client. Because a person with a mental disability may have some cognitive limitations, the lawyer should avoid any temptation to usurp the client's role and should ensure that the client understands that it is his or her role to make the decision regarding the objective of the representation. [FN179] Moreover, the lawyer should make sure the client understands the scope of the representation. For instance, if the lawyer is only representing the client for a personal injury suit that arises out of a slip and fall at a supermarket, the lawyer must make sure that the client understands the limitation of the representation. [FN180] The lawyer must make sure that the client understands the limitations placed upon the lawyer. Particularly the lawyer can only bring meritorious

claims that are based in law and fact. [FN181] To the extent that the client's mental disability may be used by the opposing party to attack the credibility of the client, the lawyer should have a candid conversation with the client about that possibility. [FN182] If the lawyer fails to explain the potential problems as soon as possible, it will lead to problems in the lawyer's relationship with the client and a lack of trust.

C. Lawyers Need to Consult Experts when Representing a Client who has a Mental Disability

Lawyers should solicit the assistance of experts when representing a client with a mental disability. If a lawyer is representing a client who has a cognitive disability, the lawyer should contact a disability rights advocate, *91 or other expert in the field, and find out the most effective way to communicate with a client with a cognitive disability. The lawyer will learn that there are many suggestions available that will allow him or her to start an effective relationship with such a client. [FN183] Moreover, the preparation by the lawyer will assure the client that he or she has a lawyer who will listen and in whom the client can trust. Further, if a lawyer has a client who has a mental illness, such as bipolar disorder, the lawyer should consult an expert. It is important for the lawyer to treat the person as an adult and respect the person's intelligence. An expert in the field has suggestions as to how to best communicate with a client who has a mental illness, like bipolar. [FN184] There may be times where the lawyer may need to postpone a session because of symptoms associated with bipolar disorder. Further, the client may request an objective that is inconsistent with the law. If so, the lawyer must respectfully explain the law to the client and the limitations on the remedies available. The lawyer's interaction with the client will require patience and understanding. Finally, as discussed earlier, if a lawyer represents a client who has mental retardation, the lawyer should consult an expert and be assured that he or she can provide effective communication. [FN185]

*92 VI. CONCLUSION

Until lawyers are sensitized to and educated on the needs of people with mental disabilities, they will be ill-equipped to provide adequate representation. Lawyers must avoid the temptation to substitute their judgment for the client's judgment, particularly when the lawyer is representing a client with a mental disability. Although the ethical rules have progressed in requiring lawyers to respect the rights of clients with disabilities, the rules need to provide more guidance. Furthermore, the American Bar Association and local bars, through continuing legal education and mandatory training, should provide more training for lawyers. Lawyers should be required to participate in mandatory training that allows them to be better informed about the communication needs of clients with mental disabilities and the characteristics associated with different mental disabilities.

[FN1]. THOMAS A. HARRIS, I'M OK--YOU'RE OK: A PRACTICAL GUIDE TO TRANSACTIONAL ANALYSIS (1969). "This book [was] the product of a search to find answers for people who are looking for hard facts in answer to their questions about how the mind operates, why we do what we do, and how we can stop doing what we do if we wish." Id. at xiii.

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[FN2]. Id. at 97.

[FN3]. Id. at 176.

[FN4]. MODEL RULES OF PROF'L CONDUCT pmb. para. 2 (2003).

[FN5]. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003).

[FN6]. Id. (emphasis added); see also THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROF'L RESPONSIBILITY (2003). The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983. They were amended through the years and were subject to substantial amendments in August 2001 and February and August 2002. Few, if any, jurisdictions have adopted the latest changes to the ABA Model Rules, though many may change in the future. The following proposed changes would not affect the discussion and analysis in this Article. The new additions are indicated by underlining, and deletions are indicated by the << strikethrough>>shaded portion<<end strikethrough>>:

Rule 1.14: Client <<strikethrough>>Under a Disability<<end strikethrough>> with Diminished Capacity

(a) When a client's <<strikethrough>>ability<<end strikethrough>> capacity to make adequately considered decisions in connection with << strikethrough>>the<<end strikethrough>> a representation is << strikethrough>>impaired<<end strikethrough>> diminished, whether because of minority, mental <<strikethrough>>disability<<end strikethrough>> impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) <<strikethrough>>A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when<<end strikethrough>> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.).

AM. BAR ASS'N, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: A SUPPLEMENT TO THE ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 50 (5th ed. 2003).

[FN7]. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2003). The following proposed changes to the Model Rules do not affect the discussion or the analysis in this Article. The new additions are indicated by underline and the deletions by the

<<strikethrough>>shaded portion<<end strikethrough>>. The Rule provides:

(a) A lawyer shall <<strikethrough>>keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information<<end strikethrough>>:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the

lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

AM. BAR ASS'N, *supra* note 6, at 12-13. Further, the term "[i]nformed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2003).

[FN8]. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.").

[FN9]. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996); see, e.g., *In re M.R.*, 638 A.2d 1274, 1284-85 (N.J. 1994) (recognizing that a client with a mental disability is afforded the same rights to advocacy as any other client would receive). The rule is premised on the understanding that a client with a mental disability, with proper advice and assistance, has the capability to participate in decision-making. The court noted that "[t]he attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." *Id.* at 1284; see also RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE § 15-2 (2001).

[FN10]. See discussion *infra* Section V.

[FN11]. See Daniel L. Bray & Michael D. Ensley, [Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney](#), 33 FAM. L.Q. 329, 338 (1999); see also Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 619-21 (1989-90).

[FN12]. Bray & Ensley, *supra* note 11, at 338.

[FN13]. *Id.* at 333-34.

[FN14]. See JOHN PARRY, AM. BAR ASS'N, MENTAL DISABILITY LAW: A PRIMER 1 (5th ed. 1995).

[FN15]. *Id.* Particularly, the lawyers must use appropriate language in speaking with their clients about their disability, as well as use appropriate language in the context of the representation, to the extent it comes up.

[FN16]. See PARRY, *supra* note 14, at 2-3; see also DONALD H.J. HERMANN, MENTAL HEALTH AND DISABILITY LAW IN A NUTSHELL 22 (1997).

[FN17]. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. The DSM-IV is an important and frequently cited source for mental health classification. See [Boldini v. Postmaster Gen. U.S. Postal Serv.](#), 928 F. Supp. 125, 130 (D. N.H. 1995) (stating that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association."); see also RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABILITY DISCRIMINATION HANDBOOK: STATUTES AND REGULATORY GUIDANCE 162 (3d ed 2000); HERMANN, *supra* note 16, at 25; PARRY, *supra* note 14, at 2.

[FN18]. DSM-IV, supra note 17, at 13-19.

[FN19]. Id. at xxi.

[FN20]. PARRY, supra note 14, at 5; see also Christine O'Connor Trottier & Jennifer Hodgson, Justice for Victims with Disabilities 21 (2001) (unpublished manuscript, on file with The Journal of the Legal Profession), at www.cladisabilitylaw.org/victims_w_disabilities/Manuscript & Cover.doc (last visited May 29, 2003). See DSM-IV, supra note 18, at 65, for a more detailed discussion on developmental disorders.

[FN21]. PARRY, supra note 14, at 5.

[FN22]. Trottier & Hodgson, supra note 20, at 22; see also PARRY, supra note 14, at 5.

[FN23]. DSM-IV, supra note 18, at 48 (emphasis added). "Learning Disorders are diagnosed when the individual's achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below than expected for age, schooling, and level of intelligence." Id. at 46.

[FN24]. See id. at 47 ("Approximately 5% of students in public schools in the United States are identified as having a Learning Disorder.").

[FN25]. See [Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1428-29 \(11th Cir. 1985\)](#) (finding evidence of misclassification and procedural violations, although there was insufficient evidence to demonstrate a substantive violation of § 504), abrogation recognized by [Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 \(11th Cir. 1992\)](#) (abrogating on issue other than misclassification); see also LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* § 2.32 (2d ed. 1997). Compare [Larry P. v. Riles, 495 F. Supp. 926 \(N.D. Cal. 1979\)](#) (enjoining the use of intelligence tests used in placing children in special classes for the educable mentally retarded on the grounds that they were racially and culturally discriminatory), aff'd in part, rev'd in part, [793 F.2d 969 \(9th Cir. 1984\)](#), with Parents in [Action on Special Educ. v. Hannon, 506 F. Supp. 831 \(N.D. Ill. 1980\)](#) (finding that intelligence tests were not racially and culturally discriminatory since they did not significantly affect the score of a child taking the test and were used in conjunction with statutorily mandated other criteria for determining an appropriate educational program for a child).

[FN26]. Trottier & Hodgson, supra note 20, at 21-22.

[FN27]. Mental retardation is a subset of developmental disability, but because of the number of issues particular to people with mental retardation, I have provided a separate discussion.

[FN28]. DSM-IV, supra note 18, at 39. The definition has evolved from the 1500s when individuals with mental retardation were referred to as "idiots":
[An idiot is] a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.
James W. Ellis & Ruth A Luckasson, [Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 416 \(1985\)](#) (citing SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 128 (1925) (quoting ANTHONY FITZHERBERT, *NATURA BREVIVM* (1534))).

[FN29]. DSM-IV, supra note 18, at 39; see also PARRY, supra note 14, at 6 (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEM OF SUPPORTS (9th ed. 1992)).

[FN30]. Id. Examples of standardized tests are Wechsler Intelligence Scales for Children Revised, Stanford-Binet, and Kaufman Assessment Battery for Children.

[FN31]. DSM-IV, supra note 18, at 40.

[FN32]. Id. at 40-42. Degrees of Mental Retardation: Mild Mental Retardation--A person with mild mental retardation is a person whose IQ is from 50-55 to approximately 70 with academic skills approximately those of a sixth grader. This group constitutes the largest segment (about 85%) of those with the disorder. With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in a supervised setting. Moderate Mental Retardation--A person with moderate mental retardation has IQ scores from 35-40 to 50-55. They are unlikely to progress beyond the second-grade level in academic subjects. This group constitutes about 10% of the entire population of people with mental retardation. With appropriate supervision, they can perform their own personal care and as an adult may live in the community in an appropriately supervised setting. Severe Mental Retardation--A person with severe mental retardation has IQ scores from 20-25 to 35-50. They profit to only a limited extent from instruction in pre-academic subjects, such as familiarity with the alphabet and simple counting. As adults, most adapt well in group homes or continue to live with their families. The group represents 3%-4% of individuals with mental retardation. Profound Mental Retardation- A person with profound mental retardation has IQ scores below 20-25 and has considerable impairments in sensorimotor functioning. Most individuals with this diagnosis have an identified neurological condition that accounts for their mental retardation. They may be able to perform simple tasks in closely supervised and sheltered settings. The group represents 1%-2% of people with mental retardation. Id.

[FN33]. [People v. Lang, 545 N.E.2d 327, 330 \(Ill. App. 1986\)](#).

[FN34]. Trottier & Hodgson, supra note 20, at 25-26.

[FN35]. Id.; see also PARRY, supra note 14, at 3.

[FN36]. Trottier & Hodgson, supra note 20, at 26.

[FN37]. PARRY, supra note 14, at 3. Schizophrenia involves a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring, affect, fluency and productivity of thought and speech, hedonic capacity, volition and drive and attention. See also, DSM-IV, supra note 18, at 274, 339, 350. A person with schizophrenia may also experience hallucinations where he or she has false sensory experiences. Id. There is no single symptom that is pathognomonic of schizophrenia. Id. Severe depression involves "changes going beyond effects on mood, possibly including body weight changes, sleep disturbance, restlessness or slowed movement, decreased energy, feelings of worthlessness and guilt, difficulty concentrating or thinking, loss of interest and pleasure in nearly all activities, and thoughts of death or suicide." PARRY, supra note 14, at 3. Bipolar disorder involves "cycling mood changes with periods of depression alternating with periods of mania. Manic episodes can include elevated mood, hyperactivity, rapid speech, inflated self esteem, decreased need for sleep, distractibility, and risk-taking behavior." Id.

[FN38]. DSM-IV, supra note 18, at 418. Obsessions are persistent ideas, thoughts, impulses, or images that are experienced as

intrusive and inappropriate and that cause marked anxiety or distress.

....

Compulsions are repetitive behaviors (e.g. hand washing, ordering, checking) or mental acts (e.g., praying, counting, repeating words silently) the goal of which is to prevent or reduce anxiety or distress, not to provide pleasure or gratification.

Id.

[FN39]. Id. at 419.

[FN40]. Id. at 420. ("Modal age at onset is earlier in males than in females: between ages 6 and 15 years for males and between 20 and 29 years for females.").

[FN41]. Id. at 418.

[FN42]. Id.

[FN43]. DSM-IV, supra note 18, at 419.

[FN44]. Ellis & Luckasson, supra note 28, at 423.

[FN45]. Trottier & Hodgson, supra note 20, at 26.

[FN46]. Ellis & Luckasson, supra note 28, at 424.

[FN47]. Id.; see also Trottier & Hodgson, supra note 20, at 26.

[FN48]. Ellis & Luckasson, supra note 28, at 424-25.

Perhaps the most significant danger of confusing mental illness and mental retardation in the criminal justice systems is the failure to understand that psychiatric treatment appropriate for mentally ill people will do nothing to assist a retarded person who is not mentally ill. If the treatment is being provided to influence the mentally retarded defendant's competence to stand trial or to render the individual nondangerous, the failure to provide habilitative services tailored to the defendant's needs may result in needlessly protracted, possibly lifelong, confinement.

Id. at 424.

The Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (AC/MRDD) defines habilitation as 'the process by which the staff of an agency assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their own persons and of their environments and to raise the levels of their physical, mental, and social function. Habilitation includes, but is not limited to, programs of formal, structured education and treatment.'

Id. at 493 n.57.

[FN49]. Id. The authors note that the service delivery systems frequently fail to provide for the needs of an individual who is mentally retarded as well as mentally ill. They also note that mental retardation facilities often refuse to serve persons with the behavioral disorders these individuals may manifest, and mental illness facilities often lack any expertise or programming for the habilitation of mentally retarded persons.

[FN50]. PARRY, supra note 14, at 9. Alcoholism is a disease producing progressive physical, emotional, and social changes and can lead to physical and cognitive impairments and possibly death. Id.

[FN51]. DSM-IV, supra note 18, at 175.

[FN52]. Id.

[FN53]. Id.

[FN54]. Id. at 189.

[FN55]. Id. at 190.

[FN56]. DSM-IV, supra note 18, at 190.

[FN57]. Id.

[FN58]. Id. ("Approximately one-half of all highway fatalities involve either a driver or a pedestrian who is intoxicated. In addition, perhaps 10% of individuals with Substance Dependence commit suicide, often in the context of a Substance-Induced Mood Disorder.").

[FN59]. Timothy M. Cook, [The Americans with Disabilities Act: The Move to Integration](#), 64 TEMP. L. REV. 393, 399-403 (1991).

[FN60]. Id.

[FN61]. Id. at 400-01 (citing to laws from Mississippi, Washington, Vermont, California and Oregon).

[FN62]. ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 4-5 (1996). The authors provide a poem by one of the founders of the self-advocacy movement, Rae Unzicker:

To be a mental patient is to be stigmatized, ostracized, socialized, patronized, psychiatrized.

To be a mental patient is to have everyone controlling your life but you. You're watched by your shrink, your social worker, your friends, your family. And then you're diagnosed as paranoid.

To be a mental patient is not to die--even if you want to--and not to be hurt, and not to be scared, and not to be angry, and not to be vulnerable, and not to laugh too loud--because, if you do, you only prove that you are a mental patient even if you are not.

And so you become a no-thing, in a no-world, and you are not.

Id. at 5 (quoting Rae Unzicker, *On My Own: A Personal Journey Through Madness and Re-Emergence*, 13 PSYCHOSOCIAL REHAB. J. 71 (1989)).

[FN63]. See [Buck v. Bell, 274 U.S. 200 \(1927\)](#).

[FN64]. *Id.* at 205. Justice Oliver Wendell Holmes wrote this opinion during a time when people with mental disabilities were referred to as "imbeciles," "idiots," "mental defectives," "blight on mankind," "not much above the animal," "a parasitic, predatory class," "danger to the race," and "a blight and a misfortune both to themselves and to the public." LEVY & RUBENSTEIN, supra note 62, at 2-3.

[FN65]. [Buck, 274 U.S. at 207](#) (emphasis added).

[FN66]. See JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 1-2 (1978); LEVY & RUBENSTEIN, supra note 62, at 3; see also David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEG. ETHICS 283, 292 (1995).

[FN67]. LEVY & RUBENSTEIN, *supra* note 62, at 2-3.

[FN68]. *Id.* at 3.

[FN69]. 473 U.S. 432 (1985).

[FN70]. *Id.* at 436.

[FN71]. *Id.*

[FN72]. *Id.*

[FN73]. *Id.* at 437.

[FN74]. *Cleburne Living Ctr.*, 473 U.S. at 437.

[FN75]. *Id.* at 439.

[FN76]. *Id.* at 437-38 (citing *City of Cleburne v. Cleburne Living Ctr.*, 726 F.2d 191 (5th Cir. 1984)).

[FN77]. *Id.* at 442.

[FN78]. *Id.* at 439 (quoting *Plyer v. Doe*, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.")).

[FN79]. *Cleburne Living Ctr.*, 473 U.S. at 440.

[FN80]. *Id.*

[FN81]. *Id.*

[FN82]. *Id.* at 441.

[FN83]. *Id.*

[FN84]. *Cleburne Living Ctr.*, 473 U.S. at 446. Justice Marshall, in a powerful concurring opinion, stated that individuals who are mentally retarded deserve a higher level of scrutiny. He wrote, "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'" *Id.* at 460 (citations omitted). He noted that "the mentally retarded have been subjected to a 'lengthy and tragic history of segregation and discrimination that can only be called grotesque.'" *Id.* at 461 (citations omitted). He added that "[a] regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.*

[FN85]. *Id.* at 442.

[FN86]. *Cleburne Living Ctr.*, 473 U.S. at 443.

[FN87]. *Id.* at 445.

[FN88]. [Id. at 446.](#)

[FN89]. See [id. at 447-48.](#)

[FN90]. [Cleburne Living Ctr., 473 U.S. at 448.](#)

[FN91]. [Id.](#)

[FN92]. [Id. at 450.](#)

[FN93]. Compare [id. at 454](#) (Stevens, J., concurring), and [id. at 462](#) (Marshall, J., concurring in part and dissenting in part), with [Alexander v. Choate, 469 U.S. 287, 296 \(1985\)](#) (acknowledging that the discrimination against citizens who were mentally disabled was invidious and abandoned its early statement that it was unintentional).

[FN94]. [School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 \(1987\)](#) (citation omitted).

[FN95]. [Cook, supra note 59, at 407-08.](#)

[FN96]. [Id. at 409-10.](#)

[FN97]. [Id.](#) (noting "Congress regarded Brown [v. Board of Education] as an equally important basis for eradicating disability segregation as it had been in striking down classification based upon race.").

[FN98]. [42 U.S.C. §§ 12,101-12,213 \(2000\).](#)

[FN99]. [Id. § 12101\(7\).](#)

[FN100]. [Id. §§ 12111-12117.](#)

[FN101]. [Id. §§ 12131-12134.](#)

[FN102]. [Id. §§ 12181-12189.](#)

[FN103]. See ROTHSTEIN, [supra note 25, at 74](#); see also TUCKER, [FEDERAL DISABILITY LAW 4](#) (2d ed. 1998).

[FN104]. [Pub. L. No. 93-112, 87 Stat. 355](#) (codified as amended at [29 U.S.C. §§ 701-796 \(2000\)](#)).

[FN105]. [29 U.S.C. § 794\(a\) \(2000\).](#)

[FN106]. See ROTHSTEIN, [supra note 25, at 75.](#)

[FN107]. [Pub. L. No. 94-142, 89 Stat. 773](#) (codified at [20 U.S.C. §§ 1405-06, 1415-20 \(2000\)](#)).

[FN108]. [Pub. L. No. 101-476, 104 Stat. 1103.](#)

[FN109]. ROTHSTEIN, [supra note 25, at 79.](#) The term has been considered offensive because it derives from the view that a person with a disability has to beg to survive and has a "cap" in his or her "hand" to beg for money, ergo "handicap."

[FN110]. [334 F. Supp. 1257 \(E.D. Pa. 1971\).](#)

[FN111]. [348 F. Supp. 866 \(D. D.C. 1972\)](#).

[FN112]. ROTHSTEIN, *supra* note 25, at 76 (citing [Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 \(1982\)](#)), which "noted that the legislative history of the EAHCA indicates that its purpose is 'to provide assistance to the States in carrying out their responsibilities under the Constitution.'").

[FN113]. *Id.* at 76. IDEA is not a fully federally funded program, so there remain many children with disabilities who have special educational needs that are not met.

[FN114]. See TUCKER, *supra* note 103, at 4; see also ROTHSTEIN, *supra* note 25, at 14-18 (listing chronologically the major developments in disability law).

[FN115]. It is important to note that an impairment must "substantially limit one or more major life activities" to rise to the level of a "disability" under the ADA. [42 U.S.C. § 12102\(2\)\(A\)](#).

The major life activities limited by mental impairment differ from person to person. There is no exhaustive list of major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments. COLKER & TUCKER, *supra* note 17, at 163.

[FN116]. [42 U.S.C. § 12102\(2\)](#).

[FN117]. [29 C.F.R. § 1630.2\(h\)\(2\) \(2003\)](#). It is important to note that not all the conditions discussed earlier per the DSM-IV are disabilities, or even impairments for purposes of the ADA. "For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of 'disability.'" COLKER & TUCKER, *supra* note 17, at 162 (noting that "[t]hese include various sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.") (citing 42 U.S.C.A. § 1211(b) (1994) and [29 C.F.R. § 1630.3\(d\) \(1996\)](#)). Further, "[w]hile DSM-IV covers conditions involving drug abuse, the ADA provides that the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use." COLKER & TUCKER, *supra* note 17, at 162 (citing 42 U.S.C.A § 12210(a) (1994)).

[FN118]. [34 C.F.R. § 300.7\(a\)\(1\) \(2003\)](#).

[FN119]. The Supreme Court has concluded that the statutory definitions of disability, although different, are often consistent with each other and that a receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop the recipient from pursuing an ADA claim. However, an ADA plaintiff must explain why her SSDI claim is consistent with her ADA claim. *Cleveland v. Policy Mgmt. Sys. Corp.*, 426 U.S. 795 (1999).

[FN120]. [42 U.S.C. § 423\(d\)\(1\)\(A\) \(2000\)](#).

[FN121]. Herr, *supra* note 11, at 611 (noting "[f]or many lawyers, the temptation to be paternalistic is acute when representing clients with developmental or other mental disabilities.").

[FN122]. *Id.*; see also Bray & Ensley, *supra* note 11, at 338.

[FN123]. Bray & Ensley, *supra* note 11, at 340-41.

[FN124]. *Id.* at 338.

[FN125]. See, e.g., Bray & Ensley, *supra* note 11, at 338-42; Herr, *supra* note 11, at 615; DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

[FN126]. Bray & Ensley, *supra* note 11, at 341.

[FN127]. See BINDER & PRICE, *supra* note 125; NOELLE C. NELSON, *CONNECTING WITH YOUR CLIENT: SUCCESS THROUGH IMPROVED CLIENT COMMUNICATIONS TECHNIQUES* (1996); ANDREW S. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976).

[FN128]. NELSON, *supra* note 127, at 1-2.

[FN129]. See Bray & Ensley, *supra* note 11, at 333; see also WATSON, *supra* note 127, at 126.

[FN130]. PARRY, *supra* note 14, at 1: ROBERT PERSKE, *UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM* 12 (1991); Trottier & Hodgson, *supra* note 20, at 12.

[FN131]. Trottier & Hodgson, *supra* note 20, at 12.

[FN132]. PARRY, *supra* note 14, at 1.

[FN133]. *Id.*

[FN134]. *Id.* Attorneys Trottier and Hodgson suggest consulting with an expert. Trottier & Hodgson, *supra* note 20, at 12. Although many experts can be expensive, there are a lot of disability rights advocates who can provide assistance at little to no cost.

[FN135]. Ellis & Luckasson, *supra* note 28, at 430. The authors note that "[i]t is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities or out of defensiveness about their [disability] Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation." *Id.*

[FN136]. PERSKE, *supra* note 130, at 19. The author recalls a person who is mentally retarded saying, "[b]eing called retarded hurts. As soon as you are labeled retarded, you are treated differently. You get shoved to the back of the line. Others stop talking to you." *Id.*

[FN137]. Ellis & Luckasson, *supra* note 28, at 431; see also PERSKE, *supra* note 130, at 20.

[FN138]. RONALD W. CONLEY ET AL., *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS* 2 (1992); PERSKE, *supra* note 130, at 15; Ellis & Luckasson, *supra* note 28, at 445-52; see also Deborah Greenblatt, *Assisting People with Mental Retardation in the Criminal Justice System: Identifying, Understanding and Communicating with People who have Cognitive Impairments Within the Criminal Justice System* (unpublished manuscript, on file with The Journal of the

Legal Profession).

[FN139]. See PERSKE, *supra* note 130, at 15 and Greenblatt, *supra* note 138, at 26, for a more detailed list and discussion.

[FN140]. PERSKE, *supra* note 130, at 15.

[FN141]. See *id.* at 16. Perske provides the following illustration:

Records show how 37-year-old David Vasquez tried to please Arlington, Virginia, detectives. On January 4, 1984, they approached Vasquez while he was cleaning tables at a McDonald's restaurant and took him to headquarters. With a tape recorder running, the detectives described to Vasquez the murder of a woman who had been raped and strangled with a cord from a venetian blind.

Vasquez repeated several times that he didn't know anything about the crime, until the detectives told him they had found his fingerprints in the apartment. Too naive to believe that policemen would lie, he broke down and cried for his mother. Then he tried to tell them what they wanted to know. Excerpts from the recording transcript, published in *The Washington Post*:

Shelton: "Did she tell you to tie her hands behind her back?"

Vasquez: "Ah, if she did, I did."

Carrig: "Whatcha use?"

Vasquez: "The ropes?"

Carrig: "No, not the ropes. Whatcha use?"

Vasquez: "Only my belt."

Carrig: "No, not your belt Remember ... cutting the venetian blind cords?"

Vasquez: "Ah, it's the same as rope."

Carrig: "Yeah."

Moments later, the detectives asked Vasquez about the actual murder:

Shelton: "Okay, now tell us how it went, David-tell us how you did it."

Vasquez: "She told me to grab the knife, and, and, stab her, that's all."

Carrig (raising his voice): "David, no, David."

Vasquez: "If it did happen, and I did it, and my fingerprints were on it ..."

Carrig: (slamming his hand on the table and yelling): "You hung her!"

Vasquez: "What?"

Carrig (shouting): "You hung her!"

Vasquez: "Okay, so I hung her." (Priest, 1989)

As the pressure increased, Vasquez suddenly seemed to go into a trance. With eyes turned glassy, he stared at a spot on the table. In this dreamlike state, his meek, pleading voice became low-pitched and steady as he described how he had killed the woman. That eerie statement persuaded the prosecutor to go for the death penalty. Vasquez' court-appointed defense attorneys, however, talked him into pleading guilty and forgoing a trial, in exchange for a sentence of second-degree murder (40 years) and burglary (15 years).

Later, police connected the crime to the real murderer, and Vasquez received a pardon on January 4, 1989- five years to the day after the detectives had approached him at McDonald's.

Id.

[FN142]. It is important to stress that the skill level and the limitations of people who have mental retardation varies, so every person who has mental retardation will not respond in the same manner. See DSM-IV, *supra* note 32.

[FN143]. See PERSKE, *supra* note 130, at 16; Greenblatt, *supra* note 138, at 26.

[FN144]. PERSKE, *supra* note 130, at 16.

[\[FN145\]](#). See Ellis & Luckasson, *supra* note 28.

[\[FN146\]](#). See PERSKE, *supra* note 130, at 17; Greenblatt, *supra* note 138, at 26-27.

[\[FN147\]](#). See PERSKE, *supra* note 130, at 17; Greenblatt, *supra* note 138, at 26-27.

Perske provides the following example:

Q: "Were you with John?"

A: "Yes."

Q: "Were you with your family?"

A: "Yes."

Q: "You couldn't have been with both of them" Which is it?"

A: (Silence)

Q: "Were you with your family or were you with John?"

A: "With John"

Q: "Let's run that one by again; were you with John or were you with your family?"

A: "Family."

PERSKE, *supra* note 130, at 17.

[\[FN148\]](#). CONLEY ET AL., *supra* note 138, at 2.

[\[FN149\]](#). *Id.*

[\[FN150\]](#). [342 S.E.2d 811 \(N.C. 1986\)](#).

[\[FN151\]](#). [Id. at 821](#).

[\[FN152\]](#). [Id. at 816](#).

[\[FN153\]](#). *Id.*

[\[FN154\]](#). See *id.* at 823. In ruling on the defendant's motion to dismiss, the court made the following findings:

Defendant's voluntary written confession reveals that Al Simpson was killed during the robbery of his store by defendant and his brother. The victim was found shot to death outside his store. The cash register was empty and two empty .22 caliber shells were found at the murder scene. Defendant's car had been seen parked in the vicinity of the victim's store around the time of the shooting. A .22 caliber rifle, later identified as the murder weapon, was found in defendant's home. Defendant admitted to his father that he had shot the victim.

[Massy, 342 S.E.2d at 823](#).

[\[FN155\]](#). [364 S.E.2d 648 \(N.C. 1988\)](#).

[\[FN156\]](#). [Id. at 653](#). The court further noted:

Since [the victim] could not identify her assailant, the central issue before the jury was the perpetrator's identity. Aside from defendant's confession, and the palm print found at the scene of the assault which allegedly matched a palm print of defendant's, the state had little evidence linking defendant to the crimes in question. Thus, the state's case rested, heavily, on the jury's acceptance of defendant's confession as true.

Id.

[\[FN157\]](#). *Id.*

[\[FN158\]](#). *Id.*

[\[FN159\]](#). CONLEY ET AL., *supra* note 138, at 2-4.

[\[FN160\]](#). *Id.* at 1.

[\[FN161\]](#). *Id.* at 2.

[\[FN162\]](#). *Id.* at 3-4.

[\[FN163\]](#). [Moore, 364 S.E.2d at 653.](#)

[\[FN164\]](#). [Id. at 655.](#)

[\[FN165\]](#). [Id. at 655-56](#) (citing Ellis & Luckasson, *supra* note 28, at 428).

[\[FN166\]](#). [Id. at 656.](#) The Court further noted that: Responses by the mental retarded to "yes-no" questions posed by persons in authority present special problems. According to one study, the danger of response bias in this situation is so great that questioners should abandon altogether the use of "yes-no" questioning techniques.

Id. (citing Ellis & Luckasson, *supra* note 28, at 428 n.72).

[\[FN167\]](#). CONLEY ET AL., *supra* note 138, at 2-4. Former Chief Justice James G. Exum states:

As is illustrated by these two cases, the judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in Moore for the edification of both the trial court initially and the appellate court ultimately.

Id. at 4.

[\[FN168\]](#). CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 145-46 (1986).

[\[FN169\]](#). *Id.* at 147 ("[A] lawyer who spends a half hour speaking to a client in order to determine whether or not to represent the client, and who decides not to, still incurs significant professional and legal duties. Most prominently, the lawyer incurs a duty of confidentiality.").

[\[FN170\]](#). *Id.* at 145 n.1.

[\[FN171\]](#). NELSON, *supra* note 127, at 1 ("[I]t is important that you begin to earn your client's trust the minute he or she walks in the door the first time.").

[\[FN172\]](#). BINDER & PRICE, *supra* note 125, at 53.

[\[FN173\]](#). *Id.* at 54.

[\[FN174\]](#). See *id.* at 57-59 (stating that this approach "increases the likelihood that the lawyer will quickly be perceived by the client as someone who is empathetic and therefore someone to be trusted with troublesome information ... [and ensures that] the client ... has an opportunity at the beginning of the interview to relate whatever the client sees as important.").

[\[FN175\]](#). *Id.* at 53 ("The lawyer refrains from imposing any particular order on the client's presentation and allows the client to proceed in a free-flowing narrative.").

[\[FN176\]](#). BINDER & PRICE, *supra* note 125, at 53-54. Here, the lawyer does not seek a detailed explanation of the events. See *id.*

[FN177]. *Id.* at 52. In many situations the lawyer will not be able to complete the theory development and verification in the initial meeting. See *id.* at 99.

[FN178]. *Id.* at 58 ("Not every interview will lend itself to the three-stage approach [and sometimes] the lawyer will need to inquire into an auxiliary matter before endeavoring to fully ascertain the client's problem and legal position.").

[FN179]. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003). The lawyer should make a particular effort to assure that the clients with mental disabilities understand the process and be mindful of suggestions for effective communications with citizens with mental disabilities. See *infra* notes 183-85.

[FN180]. See MODEL RULES OF PROF'L CONDUCT R.1.2(c) (2003) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

[FN181]. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

[FN182]. One of the most important things for lawyers in civil rights cases is to explain to the client what the law provides and what the law does not provide. Because civil rights cases are often emotional issues for victims, sometimes it is difficult for a people to understand although in their heart they believed they were treated differently because of their race, color, religion, gender or disability, it may be impossible to prove it in court.

[FN183]. See Trottier & Hodson, *supra* note 20, at 28.

Tips for effective communication with people who have cognitive disabilities [are]:

1. Be understanding, calm and patient when waiting for a person to respond. Take time to assure they understand what is being said.
2. Make eye contact.
3. Use clear and simple language that expresses one idea at a time.
4. Use concrete terms rather than abstract language.
5. Do not use compound or complex sentences that may be difficult to follow or have more than one part.
6. Be prepared to give the person the same information more than once and in different ways;
7. Do not ask leading questions. People with cognitive disabilities may be eager to please and may say what they think you want to hear.
8. Have the person repeat back to you or explain in their own words what you have said to make sure there is a mutual understanding.
9. Treat adults as adults and do not speak in a loud voice.

Id.

[FN184]. See *id.* at 30-31.

Tips for effective communication with people who have mental illness [are]:

1. Speak clearly and directly using simple communication. Some mental illness may make processing sounds or information difficult.
2. Treat the individual with respect, offering to shake hands and make the individual feel valued and comfortable.
3. Make eye contact, be relaxed, and be aware of body language.
4. Listen attentively, reflect what you have heard, and then let the person respond.
5. Treat adults as adults. Do not patronize, condescend or threaten the individual.
6. Be patient and calm when waiting for a response. Do not make decisions or assume what the person's preferences may be.
7. Do not blame the person with mental illness. A person who experiences some mental illness may not be able to conform to the norms of society.
8. Let the person know you are prepared to believe them. This will enable them to relax

and speak clearly with out defensiveness.
Id.

[\[FN185\]](#). See Trottier & Hodson, *supra* note 20, at 29.

Tips for effective communication with people who have mental retardation [are]:

1. Limit distractions.
2. Make eye contact a priority.
3. Limit the number of people in the conversation.
4. Ask questions in a number of ways; ask the person to repeat things back to you as they understand them.
5. Do not use compound or complex sentences requiring the individual to respond to more than one idea.
6. Wait for a response before continuing; do not ask a series of question or make multiple statements without waiting for a response. Be patient.
7. Begin by asking questions that a person of appropriate age, gender and geographical location should know to determine the level of basic knowledge of the individual.
8. Do not begin a sentence with an introductory phrase that could make the question more difficult to understand.
9. Be careful when expressing "time" as this is an abstract concept. Use concrete rather than abstract explanations.
10. Simplify written instructions and signs; explain everything orally.
11. Remember that individuals with mental retardation are highly suggestible and may answer "yes" to every question asked.
12. Ask the individual about [his or her] interests and activities to establish trust prior to formal conversation.
13. Be aware that a person with mental retardation may smile or laugh inappropriately since [he or she] may think this will get approval.

Id.

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