ACCOMMODATIONS FOR ALL—THE IMPORTANCE OF MEANINGFUL ACCESS TO COURTS FOR PRO SE LITIGANTS WITH MENTAL DISABILITIES

I. INTRODUCTION

The Americans with Disabilities Act (ADA) requires all public entities, including courts, to provide reasonable accommodations to individuals with disabilities to ensure equal access to programs and to prevent discrimination. Unfortunately, there has been little attention paid to reasonable accommodations for mental disabilities under the ADA because "after the ADA passed . . . the statute as applied to physical disabilities received the most attention."[1] However, the percentage of complaints filed under the ADA alleging discrimination based on mental disabilities is steadily increasing.[2] Currently, the National Alliance on Mental Illness estimates that "approximately 1 in 25 adults in the U.S.–-9.8 million, or 4.0%–experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities." Thus, these individuals qualify for protection under the ADA.[3] Due to the increasing prevalence of mental disabilities in America, it is imperative for the Colorado court system to consider how to accommodate these individuals like other public entities have, especially when individuals with mental disabilities are representing themselves pro se in civil proceedings.

In Colorado, despite the work of Colorado Legal Services and attorneys taking pro bono cases, the overwhelming majority of individuals in civil adjudicative proceedings represent themselves.[4] Recent statistics show that:

> [i]n Colorado domestic relations cases over the last three years, roughly three-quarters of litigants were unrepresented. In two-thirds of domestic relations cases, there was no lawyer on either side. In county court civil cases, consisting primarily of collections, evic-

1. U.S. COMM'N ON CIVIL RIGHTS, No. 005-907-00594-4, SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? (2000), www.usccr.gov/pubs/ada/ ch5.htm.

2. *See id.* (discussing that from 1992-1999 charges filed with the EEOC for discrimination based on mental disabilities began to outpace charges filed based on physical disabilities).

3. NAT'L ALL. ON MENTAL ILLNESS, *Mental Health by the Numbers*, https://www.nami.org/learn-more/ mental-health-by-the-numbers (last visited Mar. 22, 2018).

4. William Hood and Dan Cordova, *The Colorado Equal Access Center: Connecting Unrepresented Litigants to Legal Resources through Technology*, THE COLO. LAWYER, October 2016 at 55.

> tions, and restraining orders, the pro se rate for responding parties held steady at 98% over the same period of time.[5]

In 2016, Colorado Supreme Court Chief Justice Nancy Rice sought to respond to "the challenges facing unrepresented civil litigants" by connecting these litigants to legal resources through technology.[6] However, this effort fails to fully support those litigants that are amongst the 260,000 Colorado residents estimated to have mental disabilities.[7] In order for the Colorado Supreme Court to fully provide equal access to justice for these individuals, it must re-evaluate the current deficit in court rules addressing disability accommodations.

In 2004, former Chief Justice Mullarkey of the Colorado Supreme Court signed Directive 04-07, *Access to Court Services and Programs for People with Disabilities*, to "ensure equal access and full participation" in the Colorado judicial system for individuals with disabilities.[8] Although the Colorado Judicial Department's resource guide for providing reasonable accommodations to people with disabilities specifically discusses how "providing a coach or support person at the proceeding" may be a necessary accommodation for individuals with cognitive or developmental disabilities,[9] it does not have the force of a formal court rule. The only court rules regarding disability accommodations in Colorado govern court interpreters for individuals with hearing impairments.

This article argues the Colorado Supreme Court should adopt a comprehensive court rule providing individuals with mental disabilities otherwise unrepresented in civil proceedings individualized assistance, by a skilled individual appointed by the court, to ensure meaningful access to the legal process for all Coloradans. Part two addresses the federal law requirements public entities, including courts, must comply with under Title II of the ADA. Part three briefly describes how skilled support persons are widely used by courts to accommodate individuals with physical disabilities. In contrast, part four discusses how other public entities use skilled individuals as reasonable accommodations to support individuals with mental disabilities. Finally, part five proposes that Colorado adopt the "suitable representative" model recently created by the Washington Office of Administrative Hearings.

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5. *Id.*
6. *Id.*
7. Jennifer Brown, *Breakdown: Mental Health in Colorado*, DENVER POST, http://extras.denverpost.com/mentalillness/index.html (last visited Apr. 2, 2018).
8. COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATIONS FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 4 (2004).
9. *Id.* at 9.

II. TITLE II OF THE ADA REQUIRES ALL PUBLIC ENTITIES TO ACCOMMODATE INDIVIDUALS WITH DISABILITIES.

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[10] Courts must "broadly construe" the ADA because it is a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society."[11] Title II of the ADA prohibits public entities from discriminating against a "qualified individual with a disability" by excluding the individual from participation in services, programs, or activities of the public entity or denying the individual the benefits of such services, programs, or activities.[12]

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services for the participation in programs or activities as provided by the public entity."[13] Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[14] A mental impairment may be "any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability."[15]

Under Title II, public entities, including courts, must ensure their services, programs, and activities are "readily accessible and usable" by people with disabilities when viewed in the entirety.[16] A public entity can make programs accessible by modifying policies, practices, or procedures or by providing auxiliary aids and services, also known as accommodations, to the individual with a disability.[17] Moreover, courts have interpreted the access requirement under Title II to require provision of an affirmative accommodation to ensure "meaningful access to a public service."[18] Specifically, a public entity must furnish an accommodation "where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."[19] The public entity shall give "primary consideration" to the accommodation requested by the individual with a

10. 42 U.S.C. § 12101(b)(1) (2012).
11. Kinney v. Yerusalim, 812 F.Supp. 547, 551 (E.D. Pa. 1993).
12. 42 U.S.C. § 12132 (2012).
13. 42 U.S.C. § 12131(2) (2012).
14. 42 U.S.C. § 12102(1) (2012).
15. 28 C.F.R. § 35.108(b)(1)(ii).
16. 28 C.F.R. § 35.150(a).
17. *See* 28 C.F.R. § 25.130(b)(7)(i); *see also* 28 C.F.R. § 35.104 (providing examples of auxiliary aids and services).
18. Nunes v. Massachusetts Dept. of Correction, 766 F.3d 136, 145 (5th Cir. 2014) (quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 273–76 (2d Cir. 2003)).
19. 28 C.F.R. §35.160(b)(1).

disability, however the administrative authority may decide if an "equally effective" alternative accommodation will be made.[20]

A public entity is not required to make modifications that "would fundamentally alter the nature of the service, program, or activity" or impose an undue burden or hardship on the program provider.[21] "The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program."[22] The public entity bears the burden to prove that the accommodation would fundamentally alter or cause an undue burden.[23] Courts have determined that if a public entity provides an accommodation in one context, it is not unreasonable to provide that accommodation in all facets of the program.[24]

III. SKILLED INDIVIDUALS ARE COMMONLY USED TO ACCOMMODATE INDIVIDUALS WITH PHYSICAL DISABILITIES IN STATE COURTS.

Title II regulations provide several examples of skilled individuals supplying services to facilitate the participation of an individual with a disability in a public entity's program, including, but not limited to, interpreters, notetakers, and readers as "auxiliary aids and services" to accommodate individuals with disabilities.[25] Many states include provisions in state court rules about disability accommodations codifying a process to manage accommodation requests generally.[26] However, the majority, including Colorado, only discuss accommodations in the context of providing interpreters, focusing on providing accommodations for individuals with hearing impairments.[27] Like interpreters, notetakers, and readers, Colorado should create an accommodation that employs skilled persons to assist individuals with mental disabilities. Thus, allowing those with mental disabilities to meaningfully participate in civil court proceedings.

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20. 28 C.F.R. § 35.160(b)(2); *see also* COLO. JUDICIAL DEP'T, ACCESS TO THE COURTS: A RESOURCE GUIDE TO PROVIDING REASONABLE ACCOMMODATION FOR PEOPLE WITH DISABILITIES FOR JUDICIAL OFFICERS, PROBATION, AND COURT STAFF 3 (2004), https://www.thearc.org/file/ADAresourceguide.pdf (asserting "the courts are to give primary consideration to the accommodation requested by the person with the disability").

21. 28 C.F.R. § 35.130(b)(7)(i); *see, e.g.*, Galusha v. New York State Dep't of Envtl. Conservation, 27 F. Supp. 2d 117, 117 (N.D.N.Y. 1998).

22. Easley by Easley v. Snider, 36 F.3d 297, 305 (3rd Cir. 1994).

23. 28 C.F.R. Pt. 35, App. A. § 35.164; *see also* Center v. City of West Carrollton, 227 F. Supp. 2d 863, 867 (S.D. Ohio 2002).

24. Soto v. City of Newark, 72 F. Supp. 2d 489, 496 (D.N.J., 1999) (holding that it was a reasonable accommodation for a municipal court to provide sign-language interpreters at weddings when the municipal court provided sign-language interpretation at other functions).

25. 28 C.F.R. § 35.104.

26. *See, e.g.*, CA ST ALL COURTS Rule 1.100; FL ST J ADMIN Rule 2.540; Md Rule 1.332.

27. *See, e.g.*, AK R ADMIN Rule 6.1; AZ ST GILA SUPER CT Rule 4; NJ Directives DIR. 01-17.

IV. UNDER TITLE II, SKILLED INDIVIDUALS ARE A REASONABLE ACCOMMODATION FOR INDIVIDUALS WITH MENTAL DISABILITIES.

a. Other public entities use skilled individuals to accommodate individuals with a mental disability.

Under Title II, public entities use skilled individuals to accommodate individuals with mental disabilities. For example, the Title II Technical Assistance Manual describes how a public entity may have an obligation to provide "individualized assistance" to an individual with a mental disability to participate in programs.[28] In the illustration, the manual uses the example of an application process for county benefits that "is extremely lengthy and complex."[29] The manual asserts that, because of the complexity of the process, individuals with mental disabilities may not be able to complete the application without individualized assistance or other accommodations. Thus, these individuals are "effectively denied benefits to which they are otherwise entitled."[30] Therefore, the county has an "obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits."[31]

Additionally, public post-secondary education institutions are public entities under Title II that have developed several accommodations to support individuals with mental disabilities using skilled individuals. Academic experts urge higher education institutions to "appoint individuals who can assist [students with mental disabilities] as note-takers, reader, scribes, or other essential roles."[32] Additionally, experts from the University of Washington identify several accommodations for students with mental disabilities, including assigning a classmate to be a volunteer assistant, notetakers, and alternate formats for exams and homework.[33]

Employing a skilled individual as an accommodation to support persons with mental disabilities navigate the civil court system is analogous to programs that public universities and county assistance programs are already expected to use as public entities. Although many state judiciaries have yet to adopt similar programs, they still have the legal obligation to ensure individuals with mental disabilities are meaningfully participating in judicial proceedings.

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28. U.S. DEP'T OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL loc. II-3.600 (1993) (ebook).

29. *Id.*

30. *Id.*

31. *Id.*

32. *College Guide for Students with Psychiatric Disabilities: How Schools Accommodate Students with Psychiatric Disabilities*, http://www.bestcolleges.com/resources/ college-planning-with-psychiatric-disabilities/ (last visited Mar. 19, 2018).

33. ALFRED SOUMA, ET AL., ACADEMIC ACCOMMODATIONS FOR STUDENTS WITH PSYCHIATRIC DISABILITIES 3 (2012).

b. A few courts, including federal administrative courts, are beginning to address accommodations for individuals with mental disabilities.

As the demand grows for reasonable accommodations for individuals with mental disabilities in the judicial system, courts must ensure compliance with federal law. A few court systems, including the federal administrative courts, have started to recognize the importance of making accommodations for individuals with mental disabilities. First, in *Franco-Gonzales v. Holder*, a California district court held that mental disabilities may impede an individuals' ability to meaningfully access immigration removal proceedings. Thus, the court concluded, individuals with mental disabilities are entitled to a "qualified representative" as a reasonable accommodation under federal disability law.[34] Here, the court concluded that after a "fact-specific individualized analysis of the disabled individual's circumstances and the accommodations that might allow meaningful access to the program" it was a reasonable accommodation to provide these individuals a qualified representative, an attorney providing services pro bono or at the government's expense.[35]

Similarly, some state court systems recognize the importance of providing accommodations for individuals with mental disabilities. The Washington State Court system has General Rule 33 which provides that reasonable accommodations may include "as to otherwise unrepresented parties to the proceeding, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability."[36] Washington's General Rule 33 also requires a court to "make its decision on an individual-and-case-specific basis with due regard to the nature of the applicant's disability and the feasibility of the requested accommodation."[37]

Additionally, some states and advocacy organizations have recognized the importance of non-attorney support persons to assist individuals with disabilities in court proceedings. The Judicial Council of Georgia identifies support service providers, individuals who assist persons who are deaf-blind or those who have intellectual, or other cognitive disabilities with court appearances.[38] The Judicial Council of Georgia's ADA Handbook provides that "[i]n addition to helping reduce the anxiety of court proceedings for a person with cognitive or intellectual disabilities, a support person may also assist the person by explaining court proceedings in simple terms, explaining paperwork or follow-up obliga-

34. 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010).
35. *Id.* at 1054–58.
36. WASH. GR 33.
37. *Id.*
38. JUDICIAL COUNCIL OF GA., ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES: A GUIDE FOR GEORGIA COURTS (2017).

tions, or identifying signs of confusion or misunderstanding."[39] The Council's recommendations are based in part on a report by The Arc, the largest national advocacy organization for individuals with cognitive and intellectual disabilities, that discusses different ways that states can support these individuals in judicial proceedings.[40]

Just as these other courts, Colorado should adopt a court rule that specifically sets forth a process to accommodate individuals with mental disabilities in the civil court system. Without proper guidance on accommodations, individuals with mental disabilities will likely be unable to navigate the complex civil litigation process and meaningfully access their rights in Colorado courts. Colorado must act to ensure equal access for all individuals with disabilities, physical and mental, to Colorado courts.

V. THE "SUITABLE REPRESENTATIVE"—A PROPOSED MODEL

Earlier this year, the Washington State Office of Administrative Hearings amended its "Accommodation" rule in the administrative code to conform with Washington State Court General Rule 33.[41] The administrative code does not identify "representation by counsel" as an accommodation for otherwise unrepresented individuals with disabilities in administrative hearings.[42] Rather, the code defines a "suitable representative" as an individual who is qualified under the code "to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the adjudicative proceeding."[43]

A suitable representative may be appointed if, after considering several factors pertaining to the individual's capacity for understanding procedural rights and ability to engage in the proceedings, an ADA coordinator determines that a party is "unable to meaningfully participate in the adjudicative proceeding as a result of the disability."[44] If, after considering these factors, the ADA coordinator determines that the party is unable to meaningfully participate in the adjudicative proceeding, the coordinator will determine if a suitable representative is the "most appropriate accommodation."[45] If so, the ADA coordinator "will identify an

39. *Id.*

40. THE ARC OF THE U.S., THE ARC'S JUSTICE ADVOCACY GUIDE: AN ADVOCATE'S GUIDE ON ASSISTING VICTIMS AND SUSPECTS WITH INTELLECTUAL DISABILITIES 11–12 (2006) (noting Vermont's "Communication Specialist" program "that is similar to an ASL interpreter for someone who is deaf which allows the person with a disability to communicate effectively with attorney, judge, court staff and others in the judicial system").

41. *See* WASH. ADMIN. CODE. § 10-24-010 (2018).

42. *See id.*

43. WASH. ADMIN. CODE. § 10-24-010(2)(b) (2018).

44. WASH. ADMIN. CODE. § 10-24-010(7) (2018).

45. WASH. ADMIN. CODE. § 10-24-010(8) (2018).

individual to assist the party at no cost to the party" as a suitable representative.[46]

A suitable representative is not an attorney, rather it is an individual the ADA coordinator appoints that receives "uniform qualification training, or demonstrate[s] equivalent experience or training, as established by the chief administrative law judge."[47] The individual is identified after consideration of the party's preferences, the "knowledge of or the ability to attain knowledge of" procedural rules and substantive issues, the "experience and training in advocating for people with disabilities", and the "individual's availability to meet the timelines and duration of the particular adjudicative proceeding."[48] No individual that is employed by the office of administrative hearings or is prohibited by law from representing the party is eligible to be appointed as a suitable representative.[49] Additionally, the party must accept the appointment in writing and be given the opportunity to contact the ADA coordinator if he or she disagrees with the appointment.[50]

Colorado should adopt an accommodation process for individuals with mental disabilities akin to Washington's suitable representative because it affords these individuals meaningful access to the Colorado justice system. The suitable representative model is analogous to interpreters and readers already required by the vast majority of court rules for individuals with physical disabilities. Moreover, while some state and federal courts require the appointment of legal representation for certain individuals with mental disabilities, the suitable representative program employs a skilled individual to accommodate the party without having to provide costly legal representation. Finally, the suitable representative model will likely improve judicial efficiency by helping an individual without other representation navigate a process that might otherwise be daunting and exclusionary because of their disability.

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46. WASH. ADMIN. CODE. § 10-24-010(10) (2018).
47. WASH. ADMIN. CODE. § 10-24-010(20) (2018).
48. WASH. ADMIN. CODE. § 10-24-010(11) (2018).
49. *Id.*
50. *Id.*

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