

members. To reduce anxiety, allow a support person to be physically near the individual when he or she is testifying.

- If legal circumstances allow, consider videotaping the testimony of a victim or witness who may have trouble functioning if he or she is forced to testify in open court.

3. Other Strategies for Compliance Throughout the Judicial Process

Stage 1

Arraignment / Pre-Trial Release

- Consider using alternatives to jail custody based on the individual's unique needs, (e.g., placement in a specialized program for offenders with mental retardation, community service hours, etc.).
- Judges should consider appointing to individuals with mental retardation counsel who are experienced in defending people with mental retardation.



Stage 2

Determining Competency To Stand Trial

- If there is a good faith doubt about a defendant's competency at any time throughout judicial proceedings, it is suggested that an evaluation by a psychologist with expertise in mental retardation and forensics be ordered.
- When experts are necessary, it is recommended to use individuals who have professional education, experience and current knowledge in the field of mental retardation, as well as experience in a court.
- When determining if a person has mental retardation, it is advisable to use each of the three parts of AAMR's definition of mental retardation (occurs before age 18, significantly below average intellectual functioning and limitations in two or more adaptive skill areas) to guard against relying on the individual's IQ alone.
- It is recommended to use checklists to determine the various tasks a person with mental retardation should be able to perform. The "CAST-MR" (Competence Assessment for Standing Trial for Defendants with Mental Retardation) is one example of a specialized instrument for defendants with this disability.

Stage 3

Pre-Trial & Trial

- Specialized services for people with mental retardation are recommended to aid communication and promote informed representation.

- Attorneys should be able to recognize if a client has mental retardation, know how to communicate with the individual and how to adequately represent him or her.
- Expert witnesses should ideally have training on issues relating to mental retardation and be familiar with court proceedings.
- Counsel and the court should pay careful attention to the question of whether or not a defendant with mental retardation is competent to plead guilty, or whether a guilty plea is truly voluntary.
- Where appropriate, attorneys should ensure that juries are aware that nonverbal behaviors, such as staring, sleeping and smiling, exhibited by a defendant with mental retardation does not necessarily demonstrate a lack of remorse.

Stage 4

Sentencing

- Judges should be aware that, according to the ABA Criminal Justice Mental Health Standards, courts should consider mental retardation as a mitigating factor during sentencing. (American Bar Association, 1986, Criminal Justice Mental Health Standards. Washington, DC: Author)
- Where incarceration is necessary, the least restrictive environment should be considered if the defendant does not pose a danger to self or others. For example, a community-based treatment program for offenders with mental retardation may be more appropriate than a high-security institutional setting.
- Courts should consider using alternatives to sentencing, such as probation and other diversionary community-based programs, when deciding the disposition. Alternatives to sentencing may include community service hours, adult home care, specialized home care with habilitation classes, and careful monitoring and coordination of services.
- Courts should keep a list of local resource agencies that can assist them when questions arise about a victim, witness or defendant who has mental retardation.
- When incarceration is the only alternative, the individual's disability should be taken into consideration and a safe, habilitative setting should be provided.



When needing information on resources in your community, contact the following organizations:

- State or Local Chapter of The Arc
- State Protection and Advocacy Organizations

- State Mental Health/Mental Retardation Agencies
- Independent Living Centers
- Residential Programs for Offenders
- Office of Vocational Rehabilitation
- School-Based Programs

FOR INFORMATION ON TRAINING:

All staff should be trained in how to work effectively with people who have mental retardation. *Defendants, Victims and Witnesses With Mental Retardation* is a training curriculum written specifically for judges to increase their understanding of people who have this disability. This document provides good recommendations on working with people who have mental retardation, but these are not always a requirement of the ADA. To obtain the curriculum, contact:

National Judicial College
University of Nevada, Reno
Reno, Nevada 89557
1-800-255-8343

This brochure contains information taken from the training curriculum *Defendants, Victims and Witnesses With Mental Retardation* produced and published by The National Judicial College.

For further information, contact:

The Arc of the United States
500 E. Border Street, Suite 300
Arlington, Texas 76010
(817) 261-6003
(817) 277-0553 (TDD)
(817) 277-3491 (fax)
thearc@metronet.com (e-mail)
<http://TheArc.org/welcome.html>



For technical assistance and ADA documents concerning title II, contact:

Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(800) 514-0301 (voice)
(800) 514-0383 (TDD)
(202) 514-6193 (electronic bulletin board)

Disability Rights Education and Defense Fund, Inc. (DREDF) operates an ADA telephone information line to assist state and local government agencies in understanding ADA requirements. Call 510-644-2555 for more information.

Regional Disability and Business Technical Assistance Centers (funded by National Institute on Disability and Rehabilitation Research) provides technical assistance on all titles of the ADA. Call 1-800-949-4232 Voice & TDD to be connected to the center serving your particular state.



When People With Mental Retardation Go To Court

The Americans with Disabilities Act (ADA) requires that state and local courts not discriminate against people with disabilities. This includes individuals with mental retardation. However, police officers and court officials often fail to identify an individual as having mental retardation. And even when the courts are aware someone has mental retardation, court personnel may not be aware of how to ensure this individual receives non-discriminatory treatment as outlined under the ADA.

This brochure describes the ADA and what courts can and should do to ensure that people with mental retardation receive fair and equal treatment.

Defendants with mental retardation are often inadequately represented because court officials do not understand this disability, or because appropriate steps are not taken to understand the capabilities and limitations of an individual who has mental retardation. Defendants with mental retardation are often tried without sufficient assessment of their competence to stand trial.

KNOW THE ADA

Title II of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12131 which went into effect January 26, 1992, prohibits state and local governments from discriminating against people on the basis of a mental or physical disability.

People with mental retardation are protected under the ADA. Further, activities of state and local courts are covered under title II of the ADA. Accordingly, judges, attorneys and other court personnel must understand that the ADA requires reasonable modifications in policies, practices or procedures when necessary to ensure that an individual with mental retardation is not subject to discrimination based on disability.

This document provides general information to promote voluntary compliance with the ADA. It was prepared under a grant from the U.S. Department of Justice. While the Disability Rights Section has reviewed its contents, any opinions or interpretations in the document are those of The Arc and do not necessarily reflect the view of the Department of Justice. The ADA itself and the Department's ADA regulations should be considered for further, more specific guidance.

Title II of the ADA, 42 U.S.C. § 12132, requires that:

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.

This prohibition requires Courts to ensure that individuals with disabilities, including mental retardation, are not discriminated against in the services, programs or activities of a Court system. In addition to this general rule, the title II regulations require Courts to take affirmative measures to avoid discrimination. Specifically, Court personnel are required to make "reasonable modifications in policies, practices and procedures" when necessary to avoid discrimination based upon disability. A reasonable modification may include any modification necessary to avoid discrimination and enable effective participation in Court proceedings. However, the ADA does not require modifications which would fundamentally alter the nature of the activity or proceeding.

MENTAL RETARDATION DEFINED

Mental retardation manifests before age 18 and involves significantly below average intellectual functioning combined with limitations in two or more of the following skill areas:

- caring for oneself
- home-living
- social skills
- community use
- self-direction
- health and safety
- leisure and work
- use of basic reading, writing and arithmetic¹

Important Note

Most people with mental retardation do not like being called "retarded" or even having the word "retardation" used in reference to their disability. When speaking to the individual, use the phrase "person with a disability."

Many people with mental retardation have difficulty in their ability to learn, process information and independently care for themselves. However, most individuals with mental retardation can live independently in the community. Only a few people are so seriously affected that they would require supervised living arrangements. Whether the individual has a mild or severe disability, all people with mental retardation are covered under the ADA, and often need assistance.

¹Mental Retardation Definition, Classification and Systems of Supports, 9th edition, American Association on Mental Retardation, Washington, D.C., 1992

KNOW THE DIFFERENCE BETWEEN MENTAL RETARDATION AND MENTAL ILLNESS

- Mental retardation refers to below average abilities to learn and process information. Mental illness refers to a person's thought processes, moods and emotions.
- Mental retardation generally occurs before a person reaches adulthood. Mental illness can occur at any time in a person's life.
- Mental retardation refers to below average intellectual functioning or IQ. Mental illness has nothing to do with intelligence.
- Mental retardation is usually lifelong and is not subject to cure. Mental illness may be temporary, cyclical or episodic and may be curable.
- Services required by people with mental retardation usually involve training, education and other support services provided by educators, psychologists, vocational specialists, etc. Services required by people with mental illness include treatment and medical or psychological therapy provided by psychologists, psychiatrists, etc.

KNOW THE SOLUTION

Minimize the difficulties encountered by many individuals with mental retardation in courtroom proceedings by using these suggested practical and inexpensive ways to comply with the ADA.



1. Identification/Screening

Although there is no one way of knowing if a person has mental retardation, there are some traits to look for when identifying an individual with this disability.

WHAT TO LOOK FOR

Communication the individual may...

- Have difficulty reading or writing.
- Have a limited vocabulary.
- Have a speech impairment.
- Have a short attention span.
- Have difficulty understanding or answering questions.

Behavior the individual may...

- Act inappropriately with peers or the opposite sex.
- Be easily influenced by and eager to please others.

- Be easily frustrated.
- Have difficulty with the following tasks:

- Giving accurate directions
- Making change
- Using the telephone and telephone book
- Telling time easily
- Reading and writing

NOTE: Look for **clues** in the individual's behavior that show a decreased ability to reason and think independently. If you notice any suggestive behaviors, assume the person does have mental retardation and use the steps in this brochure to help ensure communication with the person is clear.

In the courtroom the individual may...

- Not be competent to stand trial (i.e., difficulty understanding judicial proceedings, unable to understand charges, unable to assist counsel).
- Not be competent to confess (i.e., unable to understand Miranda warnings, extremely vulnerable to pressure during interrogation, unable to give an accurate and reliable confession, overly eager to please authority figures by confessing).
- Not be competent to plead guilty (i.e., unable to understand legal terms, unable to understand consequences of actions, plead guilty without understanding why and is only doing so for approval).



In addition, the person may...

- Say what he or she thinks others want to hear.
- Have difficulty describing facts or details.
- Not want a disability noticed by a lawyer, judge or jury.
- Be confused about who is responsible for the crime and "confess" even though innocent.
- Smile inappropriately and make other non-verbal cues that mistakenly suggest a lack of remorse.

SCREENING STRATEGIES

When reviewing an individual's record, look for obvious inferences to a disability such as a history of special education, diagnostic testing, etc. Also look for other less obvious signs such as:

- School failure.
- References to "kind of slow."
- Previous requests for competency hearing.
- Previous appointments of experts.
- History of employment (involvement in vocational rehabilitation, sheltered workshop, etc.).

2. Simplify Communication

There are some simple, low-cost tips that will enable good communication with people who have mental retardation. Using these suggested tips will not only benefit communication with people who have mental retardation, but they will also aid communication with people who have other disabilities, such as traumatic brain injuries, learning disabilities and Alzheimer's disease. Following are some suggestions:

GENERAL TIPS...

- Speak directly to the person.
- Keep sentences short.
- Use simple language, speak slowly and clearly.
- Ask for concrete descriptions (colors, type of clothing, etc.).
- Break complicated series of instructions or information into smaller parts.
- Whenever possible use pictures, symbols and actions to help convey meaning.

COURTROOM TIPS...

- Use simple wording that doesn't include complex terms.
- Take time giving or asking for information and repeat questions more than once if necessary when conducting interviews or trials.
- Always use open-ended, non-leading questions when questioning a person with mental retardation.
- Ask questions in a straightforward, non-aggressive manner.
- Consider setting aside additional time for people with mental retardation to understand trial communications. For example, the attorney of an individual with mental retardation may need additional time to explain carefully what the judge is saying to a person with mental retardation.
- Many people with mental retardation cannot read, or read well, so allow the person with mental retardation to use audio tapes of materials that otherwise may only be in a written format.
- Use a support person (a relative, friend or professional who can better understand the person's communication skills) or assistive device when needed to ensure that an individual with mental retardation understands trial activities. One example of an assistive device is a communication board for people who have speech impairments.
- When testifying, allow the person with mental retardation access to emotional support when appropriate via counselors, friends or family.