When Witnesses Can't Take the Stand:

Legal Pathways to Ensure Their Voice is Heard

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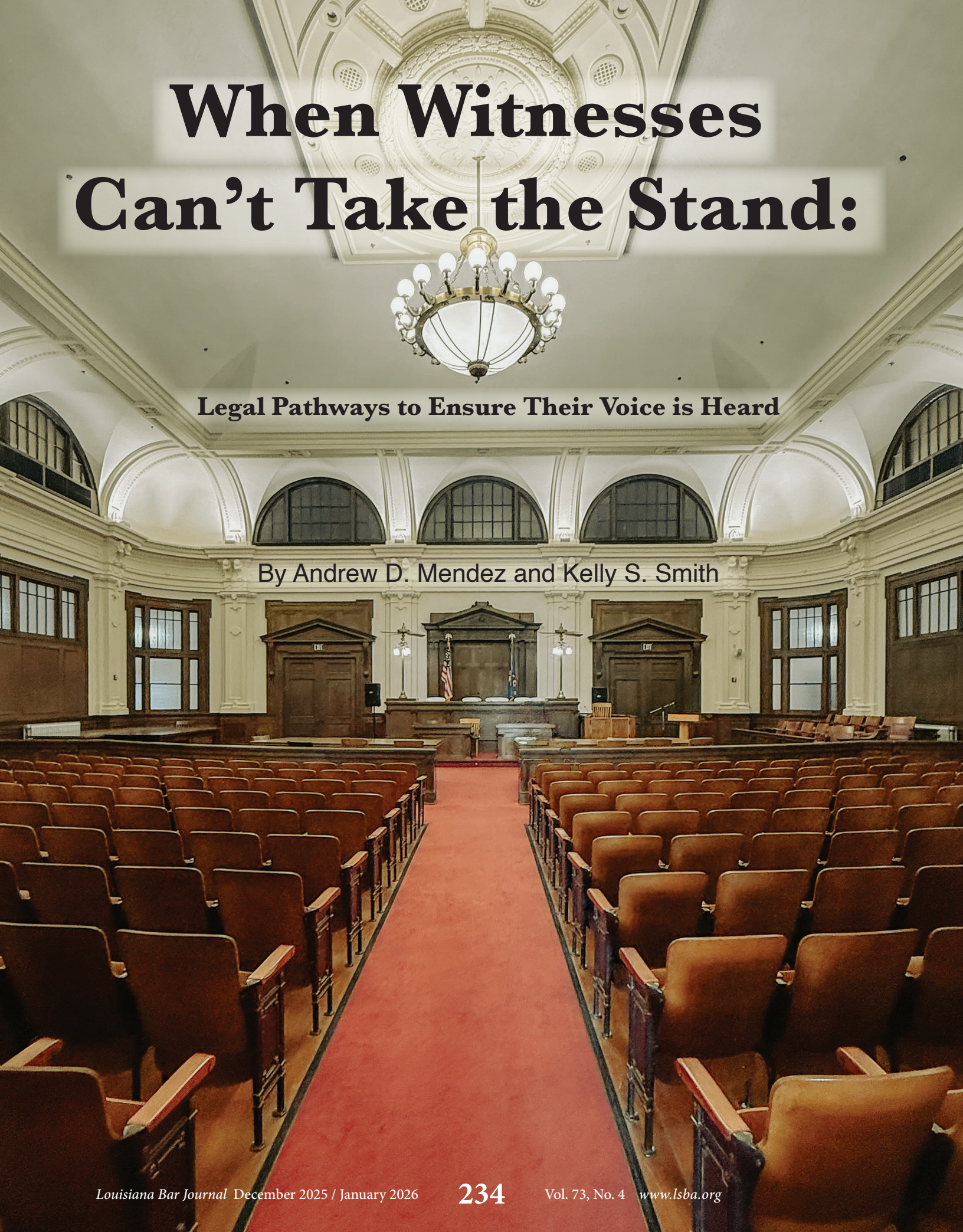

For litigators, going into court and speaking to judges and juries is part of the job. But for some people, testifying in a courtroom can present an insurmountable obstacle. Mental health conditions such as agoraphobia or post-traumatic stress disorder (PTSD) can make testifying in person nearly impossible and potentially detrimental. When your client or witness has such a condition, what are your options to accommodate their unique needs while keeping the case moving forward?

This article explains how the Americans with Disabilities Act[1] (ADA) and Louisiana District Court Rule 5.1 work together to ensure accessibility and non-discrimination in Louisiana courts for individuals with disabilities, particularly those with mental health disorders. It then evaluates Louisiana Code of Civil Procedure article 1450 as another pathway to seek accommodations through use of a deposition in lieu of live testimony and discusses the evidence required to support such a request.

Americans with Disabilities Act and Louisiana District Court Rule 5.1

The ADA prohibits discrimination against individuals with disabilities in employment, public services and public accommodations. In the context of court proceedings, this means courts must take steps to ensure that individuals with qualifying mental health disabilities can effectively participate in their own case or in providing testimony.

Under the ADA, a mental illness qualifies as a disability if: (1) it substantially limits a major life activity; (2) the individual has a record or history of such a limitation; or (3) the individual is regarded as having such an impairment. Most accommodation cases involve the first category, where the impairment substantially limits a major life activity. Without sufficient evidence of a substantial limitation (or a record or perception thereof), a court may find that a condition is not a qualifying disability under the ADA and that no accommodation is necessary. In *Mazzini v. Strathman*, for example, the Louisiana 4th Circuit found that a woman who testified she had severe allergies and depression, but did not introduce any medical evidence or evidence of a substantial limitation in a major life activity, did not carry her burden to show that her conditions qualified as disabilities under the ADA.[2] The court explained that "depression is not per se a disability, and in order for depression to constitute a disability under the ADA, it must substantially limit a major life activity."[3] When requesting accommodations under the ADA, include evidence that the witness both has a disability and that it substantially limits a major life activity.

Louisiana District Court Rule 5.1 governs access to judicial proceedings. Subpart (a) requires that "[t]he facilities, services, and programs of the court shall be readily accessible to persons with disabilities." The ADA works together with Rule 5.1 to ensure accessibility and non-discrimination for individuals with disabilities in Louisiana court facilities, services and programs. Additionally, Rule 5.1(b) provides that courts having fifty or more employees shall develop, promulgate and maintain a problem-resolution process and designate a responsible court officer or employee to coordinate access to court programs and services by persons with disabilities and to resolve complaints regarding such access.

Appendix 5.1A to Rule 5.1 provides an ADA Form to request accommodations. The form requires the applicant to provide:

► A description of the specific accommodation requested;

► The impairment necessitating the accommodation;

► Any special requests or anticipated problems; and

► Whether the applicant requests their identity be kept confidential.

The court can grant and arrange the accommodation, offer an alternative form of accommodation, or deny the accommodation. A court may deny the accommodation if:

► The applicant does not have a covered disability;

► The accommodation creates an undue burden on the court; or

► The accommodation would fundamentally alter the nature of the service, program, or activity.

These denial grounds align with the limitations on public entities' accommodation duties under the ADA.[4]

Applicants can ask for any accommodation under the ADA and on the Rule 5.1 request form, and there is a range of accommodations a court may allow. In *Bergmann v. Nguyen*, for example, the Louisiana 4th Circuit discussed a trial court's accommodations for a plaintiff who sought accommodations under the ADA without any evidence of his disability other than his claim that he was disabled.[5] Nonetheless, the trial court allowed the plaintiff to choose where to sit to testify, allowed him to move several times so that he could see the defendant better as she testified, suspended and continued the trial to a later date to allow the plaintiff to organize and better prepare, and assured the *pro se* plaintiff that the court would read the transcripts of prior proceedings because he did not know how to impeach a witness.[6] The appellate court found that, despite the litigant's failure to prove a disability entitling him to the ADA's protections, the trial court accommodated "reasonable requests for assistance," and did not err by declining to provide other, unspecified requested accommodations.[7]

A lawyer could use the Rule 5.1 request form to help a client who has difficulty testifying in person by asking for an accommodation that addresses the client's unique limitations, such as testifying in an empty courtroom or (as is sometimes done with minors) in the judge's chambers. If the client is more comfortable with a remote hearing, testifying via videoconferencing could be an option. Since COVID-19 began, many courts and lawyers have become more comfortable using technology in the courtroom to facilitate proceedings; however, use of technology in the courtroom varies by the courtroom and judge, and some district courts have established rules governing its use.

Perpetuation Deposition in Lieu of Testimony Under La. C.C.P. art. 1450(A)(3)

Louisiana law vests courts with authority to order the perpetuation deposition of testimony for a sick witness, and La. C.C.P. article 1450 allows the use of a deposition where the witness is unavailable for trial, or where exceptional circumstances make it desirable, in the interest of justice and with due regard to the importance of presenting testimony orally in open court, to allow a deposition to be used.[8] This may provide another option for clients who are unable to testify live due to a mental health condition by allowing use of a deposition in lieu of live testimony. Although there is no caselaw specifically addressing whether a mental health condition could justify using a deposition in lieu of live testimony, Louisiana courts have permitted use of a deposition where a witness is unavailable due to illness.

A witness is "unavailable" for purposes of Article 1450(A)(3) if they meet the definition of that term found in Louisiana Code of Evidence article 804(A).[9] Article 804(A) provides that a declarant is "unavailable as a witness" when they "cannot or will not appear in court and testify," including when they are "unable to be present or to testify at the hearing because of death or then existing physical or mental illness, infirmity, or other sufficient cause." A determination of unavailability is within the trial court's discretion, and courts have emphasized that the party seeking to use the deposition must provide sufficient evidence of unavailability. For example, in *Sullivan v. City of Baton Rouge*, the court required proof of a witness's health condition to establish unavailability and rejected the use of a deposition when the only evidence presented was the witness's statement that he was no longer available for trial testimony on the advice of his cardiologist.[10]

Louisiana courts have found that a witness is unavailable in varying circumstances, including where testifying would harm a minor abuse victim by undoing the progress made with therapy,[11]

where a witness had dementia,[12] where a witness had prostate cancer[13] and where a witness had difficulty walking and was unable to travel to the courthouse to testify.[14] While Louisiana appellate courts have not directly addressed whether a mental health condition could render a witness unavailable for purposes of Article 1450(A)(3), other jurisdictions have done so. For example, the 11th Circuit found a witness unavailable where a doctor testified that they could not function in a stressful situation due to a medical condition,[15] and a California appeals court found that a witness who had a panic disorder and agoraphobia, causing sudden onsets of shortness of breath, chest pain, dizziness and extreme fear, was unavailable to testify at trial.[16] Similarly, the Middle District of Pennsylvania found that a plaintiff was unavailable based on a treating physician's testimony that they would "not be able to [withstand] court proceeding[s] due to mental instability and difficulties [coping] with stress."[17] And, a California District Court quashed a trial subpoena for a third party witness whose anxiety "in connection with the underlying litigation was so severe that he had to quit his job and seek medical attention" and whose doctor had advised against testifying "for the foreseeable future."[18]

Any attorney asking the court to find a witness unavailable to permit the use of a deposition in place of live testimony should provide evidence of both the client's mental health condition and its impact on their ability to testify, such as a statement from their doctor or medical records. Statements made by an attorney alone to establish unavailability may not be enough. Jurisprudence is mixed in how much weight courts give to attorney representations regarding unavailability.[19] Some courts have held that a lawyer's representations based on personal knowledge regarding their efforts to locate a witness are sufficient to establish unavailability under article 1450.[20] In contrast, the Louisiana 1st Circuit found that a lawyer's representations regarding their client's claim that a doctor advised them not to attend trial was insufficient.[21]

Additionally, a deposition being used pursuant to Article 1450(A)(3) must be "admissible under the Louisiana Code of Evidence applied as though the witness were then present and testifying," and the opposing party must have been "present or represented at the taking of the deposition…or had reasonable notice thereof." The opposing party must also have had the opportunity to cross-examine the declarant.[22] Advance planning, transparency, and notice to the opposing party are crucial to ensure that these threshold requirements are met and to minimize any later objection by the opposing party based on a lack of

opportunity to cross-examine the declarant.

Finally, where an accommodation is denied by a state trial court, the party that is thereby deprived of testimony could seek supervisory writs of review from the Court of Appeal. Of course, interlocutory review is discretionary,[23] and most writ applications are denied. Nonetheless, where a witness' testimony is crucial and the lack of accommodation could preclude them from testifying (or testifying effectively), seeking writs should be considered.

Conclusion

Obtaining accommodations for a client who is unable to testify in person seems daunting, but Rule 5.1 and Article 1450 may provide a starting point. While Louisiana courts are generally receptive to accommodating physical disabilities, little authority guides a decision to accommodate mental health considerations by deviating from standard courtroom procedures in civil cases. No litigant should lose a case, or be deprived of witness testimony, because they or one of their witnesses has a mental health condition that precludes them from testifying in the usual fashion. Attorneys should be prepared to seek accommodations where necessary, and to support accommodation requests with evidence to ensure everyone can participate in the judicial process.

Footnotes

1. 42 U.S.C § 12101 i

2. 2013-0555, pp. 8-9 (La. App. 4 Cir. 4/16/14), 140 So. 3d 253, 258-59.

3. *Id*.

4. *See* 28 C.F.R. 35.150(a).

5. *Bergmann v. Nguyen*, 2024-0093, pp. 4-5 (La. App. 4 Cir. 12/30/24), 407 So. 3d 762, 765-66.

6. *Id.*

7. *Id*.

8. La. C.C.P. art. 1431; La. C.C.P. art. 1450(A)(3).

9. *See* La. C.C.P. 1450 cmt. B.

10. *Sullivan v. City of Baton Rouge*, 2014-0964 (La. App. 1 Cir. 1/27/15), 170 So. 3d 186.

11. *See Folse v. Folse*, 98-1976, pp. 6-7, 15-16 (La. 6/29/99), 738 So. 2d 1040, 1044, 1048-49.

12. *See 1026 Conti Condominiums, LLC v. 1025 Bienville, LLC*, 2015-0301, p. 8 (La. App. 4 Cir. 12/23/15), 183 So. 3d 724, 729 n. 3.

13. *See Hillyard v. Cornelius*, 2020-0428, p. 10 (La. App. 1 Cir. 3/25/21), 2021 WL 1135494, at *4-5 (unpublished).

14. *Quealy v. Paine, Webber, Jackson & Curtis, Inc*., 464 So. 2d 930 (La. App. 4 Cir. 1985), *writ granted*, 467 So. 2d 528 (La. 1985), and *aff'd in relevant part, rev'd in part*, 475 So. 2d 756, 762 n.7 (La. 1985).

15. *See Parrott v. Wilson*, 707 F.2d 1262, 1268-69 (11th Cir. 1983).

16. *See People v. Mays*, 95 Cal. Rptr. 3d 219, 231, 233-34 (Cal. Ct. App. 2009), *as modified on denial of reh'g* (June 3, 2009).

17. *Sheetz v. Wal-Mart Stores, Inc.,* No. 4:15-CV-02210, 2018 WL 8344383, at *1 (M.D. Pa. Mar. 28, 2018) (unreported).

18. *Forouzan v. BMW of N. Am., LLC*, No. CV173875DMGGJSX, 2018 WL 6431004, at *1 (C.D. Cal. Aug. 27, 2018) (unreported).

19. *Bourgeois v. A.P. Green Indus., Inc*., 06-0087, p. 21 (La. App. 5 Cir. 7/28/06), 939 So. 2d 478, 494; *Rodriguez-Zaldivar v. Leggett*, 2021-0478, p. 7 (La. App. 4 Cir. 9/28/22), 366 So. 3d 515, 521, *writ granted, judgment vacated and set aside on other grounds*, 2022-01688 (La. 2/7/23), 354 So. 3d 658

20. *See, e.g., Ball v. Capital City Cornichon Corp*., 11-1862 (La. App. 1 Cir. 5/2/12), 2012 WL 1550545 (unpublished opinion) (allowing the statement of an attorney that a witness was unavailable to suffice for introduction of testimony); *Dunning v. Dapco Ventures, L.L.C.,* 01-2366 (La. App. 1 Cir. 11/8/02), 834 So. 2d 448 (allowing the use of deposition testimony of a witness when an attorney stated that he was unable to subpoena the witness to testify at trial); *Snell v. United Parcel Services, Inc.,* 543 So .2d 52 (La. App. 1 Cir. 1989),

21. *Sullivan v. City of Baton Rouge*, 2014-0964, pp. 8-9 (La. App. 1 Cir. 1/27/15), 170 So. 3d 186, 194.

22. *See Graves v. Freeman*, 2015-0041 (La. App. 1 Cir. 9/21/15); 2015 WL 5546969, at *2 (unpublished) (citing *Trascher v. Territo*, 11-2093 (La. 5/8/12); 89 So.3d 357, 364).

23. Cf. *In re McDonough*, 930 N.E.2d 1279, 1288 (Mass. App. 2010), in which Massachusetts' highest court mandated interlocutory review of orders denying accommodation of a witness' disability in criminal cases, on the grounds that such orders implicate substantive rights of the witness under the ADA and state constitutional protections for disabled persons. The *McDonough* court suggested such procedures may apply in civil cases as well. *Id*. at 1287, n. 19.

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