

Silent Witnesses - AAC and legal capacity

Short Abstract

Court cases involving people actually using communication aids are rare, and protocols to govern their use are generally absent. While many jurisdictions have a standard protocol for the employment of sign language interpreters, there is no such standard for the use of AAC -- partly because the discipline is relatively new, and partly because AAC takes many forms.

This lack of standards leaves far too much depending on the opinions of individual judges, who are unlikely to have any understanding of the field and may share common and longstanding societal prejudices against people without speech.

Within the past few years, for example, two judges in two criminal jury trials in two different jurisdictions made diametrically opposite findings about the use of low-tech eye-gaze for people with minimal speech.

In each case the potential witness was an adult male diagnosed as having cerebral palsy with athetoid movements. In the first case the witness was permitted to use an E-tran eyepointing board with word completion protocols; in the second the court refused to entertain any use of eye-gaze, on the ground that it was subjective.

Expert witnesses can be called to explicate AAC methods, but contested hearings are unlikely to clarify any existing confusion in the minds of the officials concerned. Hard cases make bad law, and lawyers are not the obvious choice to lay down what is best practice in AAC.

ISAAC should lend its resources to the development of a legal best practice position statement.

Long abstract

Court cases involving people actually using communication aids are rare, and protocols to govern their use are generally absent. While many jurisdictions have a standard protocol for the employment of sign language interpreters, there is no such standard for the use of AAC -- partly because the discipline of AAC is relatively new, and partly because AAC takes many forms.

This lack of standards leaves far too much depending on the opinions of individual judges, who are unlikely to have any understanding of the field and are quite likely to share common and longstanding societal prejudices against people without speech.

Within the past few years, for example, two judges in two criminal jury trials in two different jurisdictions made diametrically opposite findings about the use of low-tech eye-gaze with people with minimal speech.

In each case the potential witness was an adult male diagnosed as having cerebral palsy with athetoid movements. In the first case the witness was permitted to use an E-tran eyepointing board with word completion protocols; in the second the court refused to entertain any use of eye-gaze, on the ground that it was subjective.

In Case One an expert witness testified in court before the judge and jury and demonstrated the use of an E-tran eye-pointing board for spelling messages. She explained how slow the process was, and how desirable it was for the user's communication partners to complete obvious words. The prosecution

and defence lawyers not only accepted this but also allowed the E-tran user to have a supplementary board containing necessary words and phrases. The E-tran user went on to testify for the prosecution for many days with the assistance of independent communication partners who held up his board, and spoke each letter, word and sentence for the jury and the court transcript. He was subject to cross-examination in the usual way.

In the second case the AAC user was an important witness for the defence. Before the jury was empanelled the judge refused to entertain any use of eye-gaze, on the ground that it was subjective. The judge made this ruling without observing the prospective witness and despite being provided with information about Case One by an expert witness. The judge gave the AAC user three days to develop a non-eye-gaze AAC strategy. With great difficulty he was able to use his hands to point to widely spaced items such as Yes and No, and cards displaying words and letters, held at his eye level because of head control issues. The judge rejected this strategy on the ground that the targets were held, and refused to allow the potential witness any time to trial appropriate mounts. The expert witness was directed to say nothing to the jury about the attempts to enable the witness to communicate or the restrictions imposed by the judge. The jury was consequently left believing that the witness was totally unable to communicate.

Particular legal problems occur when, as in the second case, AAC is brought up in the context of determining legal capacity. The law presents us with a number of circumstances where there is a need to determine a person's legal capacity; whether, for example, they are capable of being prosecuted for an offence, or of defending themselves in court, or of consenting to a contract or a physical contact (bearing in mind that almost any physical contact without consent constitutes an assault)

The legal test of capacity is whether the person is capable of forming an intention to enter into the relationship in question. This in practice tends to reduce itself to an estimate of their intellectual capacity, which is in many cases closely linked to the person's communication.

There are a number of legal cases where people who have been at one period assessed as being intellectually disabled were after receiving AAC able to demonstrate full capacity, and a number of other cases in which people who were reported to have communicated through AAC were found not to have done so, or not to have demonstrated full capacity.

The intrinsic legal problem in dealing with people with communication handicaps is to define the circumstances in which a person with no communication, or whose communication is disputed, should bring into effect procedures designed to test their communication, given that their lack of uncontested communication leaves them unable to initiate such procedures for themselves.

Issues of communication are in practice overlaid on formal or informal structures of guardianship. People whose communication is absent or insecure are generally under the control of others, at least to the extent that their carers can restrict their interactions with third parties. Someone whose access to communication therapists is restricted may find difficulties in developing, demonstrating or maintaining communication skills.

Even where expert witnesses are called on to explicate AAC methods, contested hearings may be expected to add to any existing confusion in the minds of the officials concerned. Hard cases make bad law, and lawyers are not the obvious choice to lay down what is best practice in AAC.

The basic procedures of AAC are surprisingly ill-defined, and it is not easy to point to an authoritative statement of, for example, the circumstances in which particular eye-gaze solutions are appropriate and what their protocols should be. Nothing short of a clear statement is capable of providing certainty in these disputes.

ISAAC has a role to play in bringing together people – users, therapists and carers - with experience in these circumstances, and should lend its resources to the development of a legal best practice position statement.

Balandin, S. (2000). Witnessing without words. In T. Shaddock et al (Eds.), *Intellectual disability and the law: Contemporary Australian issues* (pp. 31–40). Newcastle: ASSID

Borthwick, C. (1998, August). Gagged in the box— non-speech communication and the law. Paper presented at the Eighth Biennial ISAAC Conference, Dublin.

Toefy, F. (1994, June). Communication board used in South African courts. *Communicating Together*, 19.

Togher, L; Balandin, S; Young, K; Given, F; Canty, M. (2006) Development of a Communication Training Program to Improve Access to Legal Services for People With Complex Communication Needs *Top Lang Disorders* 26:3, 199–209

The authors disclose they have no financial or other interest in objects or entities mentioned in this paper.



The U.S. Society of Augmentative & Alternative Communication is approved by the Continuing Education Board of the American Speech-Language-Hearing Association (ASHA) to provide continuing education activities in speech-language pathology and audiology. See course information for number of ASHA CEUs, instructional level and content area. ASHA CE Provider approval does not imply endorsement of course content, specific products or clinical procedures.



Program Planner/Instructional Personnel Relationship Disclosure Form

In compliance with American Speech-Language Hearing Association's Continuing Education Board's Requirements, ISAAC Conference 2016 requires program planners and instructional personnel to disclose information regarding any relevant financial and non-financial relationships related to course content prior to and during course planning.

Based on the information provided, ISAAC Conference 2016 will engage the program planner /instructional personnel in a guided interview process which seeks to understand how the relevant financial or nonfinancial relationship may influence the content of the course.

Program Planner/Instructional Personnel's Name:

Course Title:

HIPAA REQUIREMENTS

To comply with the Health Insurance Portability and Accountability Act (HIPAA), we ask that all program planners and instructional personnel insure the privacy of their patients/clients by refraining from using names, photographs, or other patient/client identifiers in course materials without the patient's/client's knowledge and written authorization.

I am in compliance with these policies: (INITIAL HERE)

Relevant financial relationships are those relationships in which the individual benefits by receiving a salary, royalty, intellectual property rights, gift, speaking fee, consulting fee, honoraria, ownership interest (e.g., stocks, stock options, or other ownership interest, excluding diversified mutual funds), or other financial benefit. Financial relationships can also include "contracted research" where the institution gets the grant and manages the funds and the individual is the principal or named investigator on the grant.

Do you have relevant financial relationships to disclose?

No Yes (if yes complete Financial Relationship Disclosure Form)

Relevant non-financial relationships are those relationships that might bias an individual including any personal, professional, political, institutional, religious or other relationship. May also include personal interest or cultural bias.

Do you have relevant non-financial relationships to disclose?

No Yes (if yes complete Non-Financial Relationship Disclosure Form)

I attest that the information in this disclosure is accurate at the time of completion and I agree to notify ISAAC Conference 2016 (conference2016@isaac-online.org) of any changes to this information between now and the scheduled presentation date. **I also understand that all completed Disclosure Forms must be incorporated within my paper proposal, as part of my Long or Extended abstract upload to the ISAAC Conference 2016 paper submission system.**

Signature

Date



The U.S. Society of Augmentative & Alternative Communication is approved by the Continuing Education Board of the American Speech-Language-Hearing Association (ASHA) to provide continuing education activities in speech-language pathology and audiology. See course information for number of ASHA CEUs, instructional level and content area. ASHA CE Provider approval does not imply endorsement of course content, specific products or clinical procedures.



Program Planner/Instructional Personnel Relationship Disclosure Form

In compliance with American Speech-Language Hearing Association's Continuing Education Board's Requirements, ISAAC Conference 2016 requires program planners and instructional personnel to disclose information regarding any relevant financial and non-financial relationships related to course content prior to and during course planning.

Based on the information provided, ISAAC Conference 2016 will engage the program planner /instructional personnel in a guided interview process which seeks to understand how the relevant financial or nonfinancial relationship may influence the content of the course.

Program Planner/Instructional Personnel's Name:

Course Title:

HIPAA REQUIREMENTS

To comply with the Health Insurance Portability and Accountability Act (HIPAA), we ask that all program planners and instructional personnel insure the privacy of their patients/clients by refraining from using names, photographs, or other patient/client identifiers in course materials without the patient's/client's knowledge and written authorization.

I am in compliance with these policies: (INITIAL HERE)

Relevant financial relationships are those relationships in which the individual benefits by receiving a salary, royalty, intellectual property rights, gift, speaking fee, consulting fee, honoraria, ownership interest (e.g., stocks, stock options, or other ownership interest, excluding diversified mutual funds), or other financial benefit. Financial relationships can also include "contracted research" where the institution gets the grant and manages the funds and the individual is the principal or named investigator on the grant.

Do you have relevant financial relationships to disclose?
 No Yes (if yes complete Financial Relationship Disclosure Form)

Relevant non-financial relationships are those relationships that might bias an individual including any personal, professional, political, institutional, religious or other relationship. May also include personal interest or cultural bias.

Do you have relevant non-financial relationships to disclose?
 No Yes (if yes complete Non-Financial Relationship Disclosure Form)

I attest that the information in this disclosure is accurate at the time of completion and I agree to notify ISAAC Conference 2016 (conference2016@isaac-online.org) of any changes to this information between now and the scheduled presentation date. **I also understand that all completed Disclosure Forms must be incorporated within my paper proposal, as part of my Long or Extended abstract upload to the ISAAC Conference 2016 paper submission system.**

Signature

Date