

**WEBSITE ACCESSIBILITY CLAIMS:
STRATEGIES FOR DENTISTS**

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I. INTRODUCTION

Title III of the Americans with Disabilities Act (AwDA) is a federal law that, among other things, protects individuals with disabilities from discrimination by places of public accommodation. To ensure that individuals with disabilities have equal access to a public accommodation's goods and services, the law requires public accommodations to have accessible facilities (*e.g.*, accessible parking, wheelchair bathroom stalls) and, where needed, to provide extra services, free of charge, to ensure effective communication with people with disabilities (*e.g.*, sign language interpreter services). Dentists' offices are considered public accommodations covered by the AwDA.¹

While the AwDA serves a very important purpose and has opened doors for many people with disabilities, some attorneys have taken advantage of the law to make money. Title III of the AwDA allows individuals to file lawsuits for violations of the law and to recover their attorneys' fees if they win. Thousands of AwDA lawsuits are filed each year by a small group of lawyers and plaintiffs against businesses across the country. These suits usually allege that the businesses have physical access barriers that prevent wheelchair users from accessing a facility. While some of these lawsuits are legitimate, others are not. The cost of defending their cases can be far higher than the cost of paying the plaintiffs to quickly settle the case. Accordingly, many businesses make an economic decision and choose to settle these cases rather than fight them. These cases are called "drive by" lawsuits and were the subject of a recent 60-Minutes segment.²

In the past eighteen months, the "drive by" lawsuit concept has expanded to the Internet. Thousands of businesses across the country have received demand letters and lawsuits alleging their websites are not accessible to individuals with disabilities. These lawsuits and demand letters usually insist that the business make its website conform to a set of privately developed guidelines called the Web Content Accessibility Guidelines version 2.0, Level A and AA (WCAG 2.0 AA) and pay thousands of dollars in attorneys' fees and costs to avoid litigation. Dentists' offices are the latest targets of these demand letters. The purpose of this white paper is to provide our members and their legal counsel with general

¹ Section 504 of the Rehabilitation Act imposes the same obligations on recipients of federal assistance such as Medicare and Medicaid. Dentists who received reimbursement from these programs are likely covered by Section 504.

² https://www.youtube.com/watch?v=AU71CCQ_hg8.

information about these claims and strategies for handling them. Keep in mind, however, that this white paper is not legal advice and that only an attorney licensed to practice in your jurisdiction and familiar with the specific facts of your case can provide advice on how to handle a specific matter.

II. BACKGROUND ON WEBSITE ACCESSIBILITY CLAIMS

When the AwDA became law in 1990, the internet was in its infancy and no one considered the question of whether the law would cover the websites or other web-based applications of public accommodations. Today, public accommodations rely heavily on websites to provide access to their goods and services. For example, many dentists have websites that allow current or prospective patients to schedule appointments, get directions, or learn more about services provided, 24 hours a day, seven days a week.

As the use of websites by public accommodations has become more prevalent, disability rights advocates and the U.S. Department of Justice (DOJ) have adopted an aggressive enforcement agenda to motivate businesses to make their websites accessible to people with disabilities. Although there is still no legal definition of an “accessible” website, in practical terms, it is one that people with disabilities can use. For example, blind people may access websites with screen reader software that reads aloud what is on the screen to them. Such individuals use the keyboard to navigate and interact with the website. Deaf individuals need closed captioning to be able to understand online videos that have audio content. People who have low vision need high contrast between the background and foreground of a webpage. To have these features, a website must be designed and coded in a specific manner, using certain tools and techniques. Unfortunately, very few website developers actually know how to design and construct an accessible website and most websites today are not fully accessible to users with disabilities. What this means is that a person with a disability is not likely to be able to perform all of the functions that a non-disabled person would be able to perform on a website, such as locating a facility, booking an appointment, or filling out forms.

The early lawsuits and claims concerning website accessibility were brought by advocacy organizations, state attorneys general, and the DOJ. Many high-profile businesses agreed to make their websites accessible as a result of these efforts, including Netflix, Peapod, Expedia, HSBC, Charles Schwab, H&R Block, Disney, Safeway, CVS, Carnival Cruise Lines, and WeightWatchers, just to name a few. Starting in mid-2015 and continuing to the present, businesses have received thousands of demand letters and hundreds of lawsuits alleging that their websites are inaccessible. Most of the targeted businesses have chosen to settle

these claims either quickly or after some litigation. To date, defendants have been largely unsuccessful in persuading a court to dismiss these claims.³ The only exceptions are the cases brought in the Ninth Circuit⁴ where the defendant operated web-only businesses,⁵ and in one lawsuit in Florida where the plaintiff did not have an attorney.⁶

³ See, e.g. Order Denying Motion to Dismiss or, Alternatively, to Stay, *Sipe v. Huntington Nat'l Bank*, No. 2:15-cv-01083 (W.D. Penn. Nov. 18, 2015), ECF No. 21.; *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-CV-30024-MGM, 2016 WL 3561631 (D. Mass. Feb. 9, 2016), report and recommendation adopted, No. CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016) and *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023-MGM, 2016 WL 3561622 (D. Mass. Feb. 9, 2016), report and recommendation adopted, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (motions by Harvard and MIT to dismiss or stay website accessibility class action lawsuits denied because existing law and regulations provide a basis for the deaf advocates' claim that the universities violated Title III of the AwDA and Section 504 of the Rehabilitation Act by failing to provide closed captioning for thousands of videos on their websites); *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011) (certifying class of blind and partially sighted persons seeking declaratory and injunctive relief against resorts' owner-operator and purported owner-operator of websites associated with entertainment facilities); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1191 (N.D. Cal. 2007) (holding that there was a sufficient nexus between Target's website and its stores to be covered under Title III of the AwDA); *Davis v. BMI/BNB Travelware Co.*, 2016 WL 2935482, at *1 (Cal. Super. Ct. Mar. 21, 2016) (plaintiff presented sufficient evidence and legal argument to conclude Title III of the AwDA applied to the use of a website where plaintiff has demonstrated he sought goods and services from a place of public accommodation because he "demonstrated a sufficient nexus exists between defendant's retail store and its website that directly affects plaintiff's ability to access good and services."); See *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (online-only website and mobile applications providing a reading subscription service covered by Title III of the AwDA); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (online-only web-based subscription service for television and other programming covered by Title III of the AwDA)

⁴ The Ninth Circuit Court of Appeals has jurisdiction in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington

⁵ See *Cullen v. Netflix, Inc.*, Docket No. 13-15092 (9th Cir. Apr. 1, 2015), available at <http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/04/01/13-15092.pdf> (affirming district court's decision to grant defendant's motion to dismiss plaintiff's disability discrimination claims under two California state laws predicated on the AwDA); *Earll v. eBay Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (affirming district court's decision to grant defendant's motion to dismiss with prejudice plaintiff's AwDA and California Unruh Civil Rights Act claims)

⁶ See *Kidwell v. Florida Commission on Human Relations*, No. 2017 WL 176897, (M.D. Fla. Jan. 17, 2017)

III. THE LEGAL ARGUMENTS

Does Title III of the AwDA require dental offices or other public accommodations to have accessible websites? No court has ever decided this issue on the merits, though a number of courts have held that the law does extend to a public accommodation's website. Whether the law requires website accessibility and what that means are questions that remain unanswered, because all the cases thus far have settled before any court has ruled on the question. A plaintiff seeking to prove that an inaccessible website violates the AwDA would argue that the AwDA requires public accommodations to provide individuals with disabilities equal access to their goods, benefits, and services. The plaintiff would also cite to a provision in the law that requires a public accommodation to provide "auxiliary aids and services" to individuals with disabilities to ensure "effective communication" with the public accommodation. In other words, a plaintiff might argue that if a non-disabled person can access a website to schedule an appointment at 3:00 a.m. or complete forms before arriving at the office, and a disabled person cannot, the disabled person is not receiving the same benefits and services as the non-disabled person. As another example, a plaintiff might argue that if a website contains a video about a dental procedure that has audio but no captions, the person who is deaf is not receiving the same benefit or access as the person who can hear.

Because neither the AwDA nor its regulations contain a specific mandate that websites must be accessible, public accommodations can make the argument that they provide access to the goods, benefits, and services offered on a website in an alternative, equivalent manner, if they are in fact doing so. The telephone would be an example of an alternative means of access, but the question of whether it provides equal access has not been decided by any court. Businesses can also argue that making their website accessible imposes an undue burden. These defenses are discussed in greater detail in section V.C.2. below. However, it is important to keep in mind that litigating these defenses will almost always cost more than settling a "drive by" website lawsuit.

IV. AVOIDING POTENTIAL CLAIMS BY MAKING WEBSITES MORE ACCESSIBLE

Given the very active litigation environment for website accessibility, dentists should consider taking steps to avoid being a potential target of a plaintiff's attorney by seeking to ensure that (1) their websites can be used by

individuals with disabilities, and (2) to the extent they are not, provide an alternative channel for accessing all functions and information available on their websites. Consider the following best practices:

- Provide all functions and information on the website through an alternative means, such as the telephone.
- Train staff who interact with the public on how to handle complaints or comments on the accessibility of a website, and to provide assistance. For example, if a caller says she was unable to fill out a form on the website because she has a disability, the employee should complete the form for the caller while she is on the phone. If a caller says she could not read the information on the website about a procedure, the employee should read the information to the caller. If an individual who is deaf wants to view a video on the website but cannot hear the audio, consider having the video captioned. Providing a written transcript may also be an alternative if the audio does not have to be coordinated with the visual content in the video.
- Consider taking down your website temporarily, particularly if it is older or more complex, and working with a qualified consultant to replace it with a new, accessible website. The older and more complex your website is, the more expensive it may be to fix accessibility issues. If you wish to retain your current website, speak to your website developer about accessibility, and consider hiring a website accessibility expert consultant to conduct an audit of the website and make recommendations on the changes that will make it more usable by people with disabilities. In hiring a consultant for an audit, make sure that the consultant plans on using manual testing methods in addition to automated testing. Although automated testing is an important component of an audit, this approach alone may not capture even the majority of issues and will not prioritize them for you. Consider asking for an estimate in advance, and weighing the cost of a consultant against the cost of a new, accessible website. Older and more complex websites may be more expensive to evaluate and remediate.
- Because blind users tend to have the greatest difficulty accessing information on a website and historically are the group most likely to file lawsuits, changes to a website that improve access for this group should be prioritized. Such changes include: (1) being able to navigate to all portions of the site using a keyboard; (2) the use of correct alternative text for all images that are not simply decorative, and (3) proper labeling of form fields.

For more information on how screen readers used by blind users work, see <http://webaim.org/techniques/screenreader/> .

- Consider having an accessibility link at the bottom of each webpage that goes to a webpage called “Accessibility.” On that page, you can include language to the following effect: “We are committed to continuously improving access to our goods and services by individuals with disabilities. If you are unable to use any aspect of this website because of a disability, please call [*insert your phone number, including TTY if available*] and we will provide you with prompt personalized assistance.” Make sure the accessibility link is accessible (for example, make sure it will be identified by a screen reader). The American Dental Association’s accessibility webpage is available at <http://www.ada.org/en/accessibility>.

V. STRATEGIES FOR RESPONDING TO DEMAND LETTERS AND LAWSUITS

A request from a person with a disability for an accommodation relating to your website is not the same as a demand letter alleging violation of the AwDA. Being responsive to such requests and taking reasonable steps to provide the accommodation can help dental practices avoid demand letters.

A dental practice may receive, or have already received, a demand letter or a complaint filed in court alleging that your website is not accessible. Plaintiffs are not required to send a demand letter before filing a lawsuit in court, but many plaintiffs’ attorneys prefer to send demand letters because they require less work and do not involve a filing fee. A demand letter is usually sent by or behalf of a disabled person who claims that he or she has been unable use your website and demands that you make the website accessible and pay attorneys’ fees, costs, and damages (if there is a state law claim). If you receive a demand letter or are sued in court, it would be prudent to promptly contact a lawyer who is experienced in AwDA Title III matters rather than handling this matter yourself. In addition, you should review your insurance policies to determine whether there may be coverage for this claim and if notification is required, or contact the carrier’s risk management department.

The contract with the website developer may have required the developer to deliver a website that is accessible to individuals with disabilities or that conforms with WCAG 2.0 AA.

Here are some strategies to consider when a demand letter or lawsuit has been received:

A. Taking Down or Simplifying the Website

One strategy for responding to a demand letter or lawsuit alleging that a website is not accessible is to take down the website completely, or simplifying the website by just removing potentially inaccessible content (such as a video that lacks closed captioning). Title III of the AwDA only allows a plaintiff to sue for forward looking injunctive relief (not damages) and the case likely becomes moot if the website is no longer operational.⁷ Taking down a website can have a detrimental impact on business, however, and may not be an option for some dentists.

B. Settlement

In most cases, it will be far less expensive for a dentist to settle a claim asserted in a demand letter or lawsuit than to litigate it. The following are issues to consider in negotiating a resolution:

Payment. The amount of money required to settle a website accessibility claim will vary and may be negotiable

Commitment to Accessibility. Most claimants will also require the businesses to make some commitment to improving the accessibility of their websites as part of a negotiated resolution. The level of commitment varies widely. Some possible terms include: (1) considering accessibility in the development of new web pages, (2) conducting an audit of the site, (3) making the website more accessible; or (4) making an existing website conform with WCAG 2.0 AA. The level of commitment is usually negotiable and should reflect what you are willing and able to do.

⁷ See 28 C.F.R. Section 36.501(a); 450 F.3d 338, 342 (8th Cir. 2006) (holding that only injunctive relief is available under Title III of the AwDA and dismissing as moot claim of doctor who no longer needed injunctive relief because of his death); Kohler v. Southland Foods, Inc., 459 Fed. Appx. 617, 618 (9th Cir. 2011) (“When Southland closed the restaurant that was the subject of Kohler’s ADA action, the district court correctly terminated the action...because Kohler’s claims for prospective injunctive relief became moot once the restaurant ceased operation.”).

Confidentiality. Most businesses prefer to enter into confidential settlement agreements where neither party is permitted to disclose the terms of the agreement except in limited circumstances in order to avoid publicity.

Form of Agreement/Effect on Future Claimants. In this highly litigious environment, it is not unusual for a business to receive demand letters or be sued by more than one claimant about the same website. Unless a business has entered into a court-approved class action settlement of an AwDA Title III claim, settling a claim with one plaintiff is not going to preclude another plaintiff from filing a claim until the website is accessible to users with disabilities. In short, even if you pay to settle the case, you remain exposed to demands by other plaintiffs for as long as your website is not accessible. However, some non-class action resolution mechanisms are more likely to deter future claimants than others.

A *consent decree* is an agreement between the parties that a court adopts as its own order. Once the court approves a consent decree, its requirements become orders of the court directing the defendant to take action. A failure to take the required actions would be a violation of a court order with serious consequences. Aside from a class action settlement, the consent decree is most likely to deter future claimants, but only if the court has ordered the business to make its website accessible within a reasonable period of time. Future claimants will likely be deterred because the business will be able to argue that the requested relief in the second action (*e.g.*, make the website accessible), has already been ordered by one federal court and is moot.

A *settlement agreement* with one plaintiff, whether confidential or not, will not stop future claimants unless the business commits to making its website conform to the WCAG 2.0 AA within a reasonable time, and the business is in fact making progress towards that goal. Even then, such a settlement would not legally bar a future claimant from bringing his or her own AwDA Title III claim. However, a plaintiff's attorney may be wary of pursuing such a case because if the business is working on making its website accessible, the work may be done before a final judgment is issued and the case may become moot. If that is the case, then the plaintiff would not be entitled to recover his or her attorneys' fees.

C. Litigation

1. Cost of Litigation

Deciding to litigate a website accessibility case is an important and expensive decision. For this reason, it should be made with the advice of

experienced counsel. Like all lawsuits, this type of case can be costly to defend and the costs are not usually recoverable even if the defendant wins. Defendants in AwDA Title III cases must do more than just win the case to recover their fees; they must also prove that the lawsuit was frivolous. Plaintiffs have a lower burden. They only need to win in order to obtain an award of their reasonable fees and costs. Thus, a defendant that chooses to litigate and loses will be paying its own fees and costs as well as the plaintiff's. For this reason, it is extremely important for a defendant to determine whether it is likely to win such a lawsuit before deciding to litigate.

2. Arguments to be made in litigation

If you choose to litigate, your counsel will need to assess your case and develop arguments for your defense. Some arguments that may be applicable to your case are set forth below and may be useful to your counsel.

a. Challenge plaintiff's standing.

A plaintiff bringing an AwDA Title III lawsuit has to show that he or she is under a threat of imminent future harm as a result of the defendant's allegedly unlawful conduct in order to have standing to bring suit.⁸ This requirement exists because the only relief that a court can order under Title III of the AwDA is prospective relief, not damages for past injury. Thus, a plaintiff in an AwDA Title III suit must convince the court that he or she will encounter the website barriers in the imminent future if the court does not intervene and order the defendant to make its website accessible.

Most complaints filed by "drive by" plaintiffs do allege that they intend to use the challenged website again in the future and are therefore under a threat of imminent harm. However, when a defendant makes a "factual attack" on this claim on a motion filed under Federal Rule of Civil Procedure 12(b)(1), the court will probe the plaintiff's assertion and expect the plaintiff to submit evidence that he or she will have a reason to be visiting this website in the future. Because most dentists tend to serve patients within a limited geographical area, a plaintiff would have to demonstrate that he or she lives close enough to the business to patronize it. In other words, a plaintiff residing in Kansas would have likely have difficulty establishing standing to sue about the website of a dental office located in Virginia.

⁸ See for example *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Another possible standing attack focuses on whether the plaintiff has alleged that he has been harmed by specific barriers on a website. The plaintiffs in “drive by” website lawsuits tend to file fairly generic complaints in which they claim that they are unable to use a website because of unspecified barriers. They will then allege a laundry list of barriers on the website (usually discovered through automated testing by a third party), but will not actually specify which of the barriers they encountered and how this affected their ability to use the website. In physical barrier cases, some courts have found that providing a list of barriers, without explaining how the plaintiff was harmed by specific barriers, is not enough to establish standing to sue. No court has considered this concept in a website accessibility case, but there is no reason why the same principle should not apply. Standing was recently successfully challenged in a facility access case in Arizona involving the dismissal of over 1,000 lawsuits.⁹

Both of these arguments were made in the defendant’s brief in *Close v. Hilton Hotels Group, Inc.* For a copy of the brief, contact the ADA Legal Division at 312-440-2499.

b. Availability of alternative access channels (*i.e.*, the telephone).

Neither Title III of the AwDA nor its regulations actually say that a website has to be accessible or conform to any particular standard. Instead, the law requires that a dental practice provide equal access to its goods and services, and ensure “effective communication” with individuals with disabilities by providing necessary auxiliary aids and services. The DOJ has explicitly recognized that 24-7 telephonic access may be an effective alternative way of providing access to the goods, services, and information that is available on an inaccessible website.¹⁰ No court has ruled on the issue of whether providing telephonic access is sufficient under the AwDA or whether that access needs to be 24-7. This argument is made in the defendant’s brief in *Close v. Hilton Hotels Group, Inc.* For a copy of the brief, contact the ADA Legal Division at 312-440-2499.

⁹ Arizona Attorney General Press Release, *Judge Dismisses More Than 1,000 Lawsuits Targeting Small Businesses*, Feb. 17, 2017, <https://www.azag.gov/press-release/judge-dismisses-more-1000-lawsuits-targeting-small-businesses>.

¹⁰ *Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460 (July 26, 2010).

c. Making the website accessible is an undue burden.

Title III of the AwDA provides that a public accommodation does not have to provide any auxiliary aids or services that would impose an undue burden. 42 U.S.C. §12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a). “Undue burden” is defined as requiring “significant difficulty or expense.” No court has considered this defense in a website accessibility case, but in other contexts, this defense has been difficult to prove because it is highly fact-intensive and examines many different factors, including the resources of the public accommodation. Moreover, because the defense is fact-intensive, it is unlikely that a court would decide this issue on summary judgment and the case would have to go to trial.

d. The website is not perfectly accessible, but still usable by the plaintiff.

Lawsuits alleging that a website is not accessible will often allege that the website does not conform to the WCAG 2.0 AA as evidence that there is a violation of Title III of the AwDA. Courts must be reminded that WCAG 2.0 AA is not a legal standard contained in any law or regulation that applies to a dental office or other public accommodation. The test is whether a plaintiff is able to use a website to perform the functions that non-disabled people are able to perform. Thus, through the use of a website accessibility expert, a business may be able to show that its website is still usable by the disabled plaintiff, even if it does not conform to WCAG 2.0 AA. The availability of this argument can be determined at the outset of a case by an expert who can review the website with the plaintiff’s specific disability in mind. This defense is also very fact intensive defense and will require the use of experts and a possible trial.

e. A plaintiff can only seek relief for issues that relate to his or her disability.

It is well-settled law that a plaintiff can only seek relief under Title III of the AwDA for barriers that affect his or her disability. For example, a sighted wheelchair user does not have standing to sue for the absence of Braille signage at a restroom. The same concept should apply in website accessibility cases although no court has had the opportunity to address this question. This principle can be used to limit discovery and the relief sought in litigation.

VI. CONCLUSION

The use of websites and other public-facing technology in dentistry raises important legal compliance issues under Title III of the A wDA that should be reviewed with an attorney who is experienced with the law. For more information, please contact the ADA Legal Division at 312-440-2499.