

Disability Rights Bar Association

Best Practices for the Litigation of Title III Cases¹

The Americans with Disabilities Act (ADA) is a powerful legal tool that enables people who are personally aware of the barriers they face to obtain injunctions requiring corrective action, but Title III, which applies to privately owned businesses, does not permit private claimants to recover damages. To enable those people to obtain counsel in cases that do not generate financial compensation, Title III permits prevailing parties to recover the costs of litigation, including attorneys' fees, from the defendant. Title III is a remedial statute whose primary goal is to ensure access moving forward, not to generate financial compensation for prior discriminatory acts or omissions.

Some states—including, California, Florida, and New York—have enacted laws piggybacking on the ADA that *do* allow the recovery of money damages for Title III violations, providing an incentive for people with disabilities and their representatives to take on the heavy burden of private enforcement of access rights when by all accounts, non-compliance with long-standing accessibility standards remains prevalent and widespread. However, this financial incentive has also resulted in a small number of plaintiffs and counsel who undertake Title III litigation primarily, if not solely, for the purpose of generating monetary settlements and without regard for ensuring access.

These situations, however rare they are, often become the public face of ADA litigation, which, in turn, has triggered legislative and judicial actions intended to “curb” Title III actions and undercut the rights of people with disabilities.

One of the missions of the Disability Rights Bar Association is to defend and advance the access rights of people with disabilities. As a mission-based Association, we strongly encourage our members to operate their legal practices in a manner that avoids any appearance of impropriety and ensures that actual access

¹ Many of these “best practices” are also applicable to other types of disability rights litigation. However, because Title III lawsuits are under increased scrutiny by legislators and judges, the DRBA Board felt it most urgent to address best practices in the Title III context.

is a goal pursued in every case. Our work should be held to the highest standards, so not to create fodder for individuals and entities who want to further limit ADA enforcement rights via legislative amendments and judicial practices.

To aid members in meeting these higher standards, the Board has developed the following “Best Practices” for the litigation of cases under Title III of the ADA. We ask that all members review and commit to conform their practices to these best practices.²

1. Purpose of Legal Action. The principal objective in cases brought under Title III and related statutes must be remedial. Lawsuits and demand letters that seek money *without* improving accessibility for people with disabilities - *even when state law provides a statutory basis for such damages* - are problematic and have been used by the defense bar to characterize ADA lawsuits as predatory and opportunistic. Although there may be some instances where a client is offered and accepts financial compensation in lieu of barrier removal, repeated settlements that do not create or improve access, particularly if they involve the same client, are a principal cause of public and judicial backlash, and should be avoided.

2. Particularized Pleadings. Disability rights cases frequently have common elements, and the same individuals and organizations may be involved as plaintiffs. While this is not inherently problematic, filing cookie-cutter complaints with vague factual allegations against multiple establishments can lead the courts and the public to question the veracity of the complaints (e.g. to question whether the plaintiff actually encountered or was aware of the claimed barriers). These doubts can result in cases being dismissed for lack of standing and/or failure to state a claim and contribute to a negative public perception of disability-rights litigation. To minimize suspicion and lessen the danger of early dismissal and criticism, complaints alleging violation of Title III should contain particularized allegations and enough factual content to demonstrate that the plaintiff has encountered and/or has actual knowledge of specific barriers to access at the

² *These guidelines do not displace the Rules of Professional Conduct. Rather, they are intended to address a specific area of practice with the purpose of creating a general set of practices that we believe will advance a disability rights agenda and best support the long-range interests of all our clients. That said, members are ultimately responsible for determining if or how the guidelines apply in a specific instance.*

establishment sued, and that they have a concrete and personal interest in the relief requested.

3. Fee Sharing. The Model Rules of Professional Conduct and the professional conduct rules of the Bars of all states prohibit lawyers from sharing legal fees with non-lawyers, including clients.³ In cases where the client does not seek or is legally not entitled to money damages, attorneys shall not share with the client any amounts recovered as attorneys' fees or litigation expenses other than reimbursing a client for any amounts the client may have paid or advanced as costs. In cases where money damages are recoverable, and fees and litigation expenses may be sought under both a contingency-fee contract and from defendants under the fee-shifting provisions of applicable statutes, the arrangements between attorneys and clients should be carefully specified in a written retainer agreement.

4. Conflicts of Interest. In an effort to limit their financial exposure, some defendants attempt to trade the cost of remedial action against any amount paid in fees and costs, creating a conflict of interest between attorney and client. While the precise scope of remedial actions and the amount of fees paid to the attorney generally are and should be subject to good-faith negotiation, the negotiations on each of those issues should be separate.

5. Closure or Withdrawal of Inaccessible Places or Service. Although closure or withdrawal of an inaccessible facility or service may remedy a violation, our objective is to facilitate the inclusion of people with disabilities in community life, not to close businesses or end services. Attorneys should not suggest closure or withdrawal except as a last-resort solution.

6. Confidentiality. Defendants frequently demand that settlements remain confidential. While there may be no public purpose in disclosing the fact and amount of monetary compensation or attorneys' fees recovered via settlement, it is generally advisable and beneficial that information regarding the non-monetary relief obtained be publicly available. Settlement of complaints without public indication that remedial relief was obtained is ill-advised, as it raises concerns about, and allows others to misrepresent, the propriety of such settlements.

³ See e.g. *ABA Model Rules of Professional Conduct Rule 5.4: Professional Independence of a Lawyer*.

7. Adding Claims Under State and Local Laws. State and local laws may contain provisions that are more advantageous to clients than federal laws, including monetary damages, and attorneys should investigate and consider those possibilities. However, state and local laws may also contain provisions that could, under certain circumstances, make clients more likely to be liable to pay the opposing parties' expenses and attorneys' fees than under federal law. Before either invoking or deciding not to invoke those state laws, attorneys should thoroughly familiarize themselves with the possible risks and explain the risks as well as the benefits to clients.

8. Importance of a Clear Retainer. Clear communication and well-drafted retainers can assist ADA attorneys in avoiding conflicts and conforming their practices to the above-listed best practices. When discussing retention with potential clients, members are strongly encouraged to fully discuss: (a) the mission of their practice; (b) the importance of achieving remediation and access in settlement; and (c) the value of public settlements. Members are further encouraged to include language in their retainers specifically addressing these issues.

Although this document is for guidance only, please be advised that if a member's practice is revealed to be grossly inconsistent with DRBA's mission, these best practices, or applicable Rules of Professional Conduct, the member may be subject, after notice and an opportunity to respond, to action by the DRBA Board, including but not limited to removal from the Association.