

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 6-7, 2018**

**RESOLUTION**

RESOLVED, That the American Bar Association urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, subject to all statutory requirements, limitations, exceptions, exemptions, and defenses;

FURTHER RESOLVED, That the American Bar Association urges all courts and other appropriate government entities to interpret Titles II and III of the ADA as ensuring—subject to all statutory requirements, limitations, exceptions, exemptions, and defenses—that technology is accessible to and usable by all persons, including those with visual, hearing, manual, and other disabilities; and

FURTHER RESOLVED, That the American Bar Association urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities and, in particular, be accessible through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.



## REPORT

### **I. Introduction**

Ever-emerging technologies are transforming the way we live and work in the 21<sup>st</sup> century—connecting billions of people through the internet; improving access to goods and services; and redefining commerce, education, governance, and the workplace. However, technology is only beneficial if it reflects the diversity of everyone, and is useable by and accessible for people of all abilities.

Accessibility “refers to development, design, business processes and training that allow people who have disabilities to consume and interact with websites, mobile applications and other digital technology.”<sup>1</sup> Despite the fact that one in five Americans has a disability, websites, mobile applications, kiosks, and other technologies are frequently inaccessible. Individuals with disabilities are excluded from taking advantage of employment, educational, and commercial opportunities, engaging in social activities, and keeping abreast of what is happening in the world. Accordingly, digital accessibility is a civil rights issues.

With commerce shifting to the internet and mobile technologies, many litigants are asking courts to apply the Americans with Disabilities Act (ADA)<sup>2</sup> to the digital realm, which was in its infancy when Congress enacted the Act in 1990. Courts are divided on the ADA’s applicability to the internet and other technology. In 2010, the U.S. Department of Justice (DOJ) began the process of developing accessibility guidelines for public websites under Title III<sup>3</sup> of the ADA. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list,” and on December 26 officially withdrawn.<sup>4</sup>

It is against this backdrop of continuing uncertainty surrounding the ADA’s application to technology that we bring this resolution urging all courts and other appropriate government entities to interpret Titles II<sup>5</sup> and III of the ADA to apply to technology, and goods and services delivered thereby, regardless of whether it exists solely in virtual space or has a nexus to a physical establishment. We further urge all courts and appropriate government entities to interpret Titles II and III to ensure that technology is accessible to, and usable by, individuals with disabilities in a manner that protects their privacy and independence.

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<sup>1</sup> Lainey Feingold, *Disability Rights in a Digital World: Protecting digital accessibility ensures equal rights for disabled people*, ABA J. (Jan. 2018), [http://www.abajournal.com/magazine/article/disability\\_rights\\_digital\\_accessibility\\_feingold](http://www.abajournal.com/magazine/article/disability_rights_digital_accessibility_feingold).

<sup>2</sup> 42 U.S.C. § 12101 *et seq.*

<sup>3</sup> *Id.* §§ 12181-189.

<sup>4</sup> See <https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced>.

<sup>5</sup> 42 U.S.C. §§ 12131-165.

For purposes of the resolution, “technology” is defined as all new hardware, software, applications, websites, e-commerce and sharing economy entities, and other innovations, goods, or services arising therefrom. This resolution should not be construed in a limiting manner. As innovation is unpredictable, it is reasonable to assume that new and currently unforeseen technologies, software, and various tech-based goods and services will develop and emerge in the coming years. It is essential that the ADA and corresponding rights be understood to cover not only the technology of 1990, but also modern technology and new developments as they arise in the future.

The legal profession faces the same disruption from technology as other service professions, and new developments will profoundly impact the profession and the clients it serves. As technology changes the way legal services are accessed and delivered, innovation must be digitally inclusive for lawyers, their clients, law students, judges, and everyone else within the legal ecosystem. Accordingly, this resolution urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities and, in particular, be accessible through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

## **II. Need for the Resolution**

Technology is evolving at an exponential rate. The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are frequently inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world.<sup>6</sup> Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities can fully enjoy the goods, services, privileges, and advantages available to other members of the general public and are not marginalized by society.<sup>7</sup>

### *The ADA & Websites*

In 1990, Congress passed the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>8</sup> The ADA prohibits discrimination in all aspects of society—from employment to government services to businesses to telecommunications. Throughout the last two decades, there has been a debate about whether the ADA’s non-discrimination requirements apply to websites.

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<sup>6</sup> Jonathan Lazar & Paul Jaeger, *Reducing Barriers of Online Access for People with Disabilities*, 27:2 ISSUES IN SCIENCE & TECH (Winter 2011), <http://issues.org/27-2/lazar/>.

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 12101(b)(1).

The ADA ensures equal access to goods and services from “places of public accommodation,” which the Act defines as private entities that affect commerce and that fall into one of 12 business categories, including retail stores, hotels, restaurants, entertainment venues, and offices of lawyers.<sup>9</sup> However, since the internet as we know it today was functionally nonexistent when the ADA was drafted and enacted, the Act is unsurprisingly silent regarding the online and “cloud”-based provision of goods and services. Most cases involving the ADA and website accessibility arise under Title III of the ADA and turn on whether a website should be considered a “place of public accommodation.”

Throughout the country, courts have expressed differing opinions about whether Title III applies to the internet. The DOJ, the federal agency charged with promulgating regulations and enforcing Titles II and III of the ADA, has taken the position that Title II covers Internet web site access,<sup>10</sup> and that Title III covers access to web sites of public accommodations.<sup>11</sup> To date the DOJ’s position has manifested primarily in the forms of settlement agreements, amicus briefs, and statements of interest. For enforcement actions, the DOJ uses the World Wide Web Consortium’s Web Accessibility Content Guidelines (WCAG) 2.0, the most widely accepted standards for digital accessibility,<sup>12</sup> as a baseline for compliance with the ADA.

In 2010, the DOJ began the process of developing accessibility guidelines for public websites under Title III. These regulations would have clarified accessibility requirements for websites of public accommodations and state and local governments. However, in July 2017, the DOJ rulemakings were placed on the department’s “inactive list,” and on December 26 officially withdrawn, leaving courts and litigants—who had hoped for DOJ guidance—in a state of uncertainty.

The U.S. Courts of Appeals for the Third,<sup>13</sup> Sixth,<sup>14</sup> Ninth,<sup>15</sup> and Eleventh<sup>16</sup> Circuits interpret “places of public accommodation” under the ADA to only apply to places with physical structures. Therefore, in website accessibility cases arising in those jurisdictions, plaintiffs must establish that websites with goods or services are tied to a physical location, such as a retailer that sells its products in both an online store and a brick-and-mortar store. Under this view, the ADA would not govern businesses operating solely on the internet without any physical locations.

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<sup>9</sup> *Id.* § 12181(7).

<sup>10</sup> [https://www.ada.gov/regs2010/titleII\\_2010/titleII\\_2010\\_regulations.htm](https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm) ( under “Public Comments and Other NPRM Issues” heading there is a “Web site accessibility” subheading); [https://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.htm](https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm) (under “Public Comments and Other NPRM Issues” heading there is a “Web site accessibility” subheading).

<sup>12</sup> <http://www.w3.org/TR/WCAG20/>.

<sup>13</sup> *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998).

<sup>14</sup> *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

<sup>15</sup> *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

<sup>16</sup> *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1327-28 (11th Cir. 2004).

By contrast, the First<sup>17</sup> and Seventh<sup>18</sup> Circuits do not require that “places of public accommodation” involve a business with a physical structure, reasoning that the site of a sale is irrelevant; what matters is whether goods or services are offered to the public. In those jurisdictions, the ADA applies if that business meets one of the 12 categories the ADA considers a “place of public accommodation.” The ADA would therefore apply to businesses operating only on the internet.

Cases involving digital inclusiveness can also involve Title II of the ADA. Under Title II, qualified individuals with disabilities shall not be excluded from “participation in or be denied the benefits of the services, programs, or activities of a public entity.”<sup>19</sup> Title II’s requirements are commonly referred to as “program accessibility.” Unlike Title III, there is little dispute that covered websites, such as the websites of state and local governments, are subject to the ADA, and as previously mentioned the DOJ’s position on this question has been clear for some time.

In 2003, the DOJ published a technical assistance document called “Accessibility of State and Local Government Websites to People with Disabilities,” which states that under Title II state and local governments must provide equal access to programs, services, or activities, subject to the ADA’s standard exception.<sup>20</sup> The DOJ explains that one way for state and local governments to comply with the ADA is to ensure that a government website is accessible to people with disabilities. More recently, in 2010 the DOJ stated in its Advance Notice of Proposed Rulemaking, “There is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA.”<sup>21</sup>

Without further DOJ regulations, especially regarding Title III, courts will have to decide if and how the ADA applies to the accessibility of websites and other digital technology. To aid the courts, the first resolved clause would make the ABA’s position clear that the ADA should apply to websites and other digital technology, whether accessed over computers, mobile devices, or other means, under Titles II and III. The second resolved clause would ensure that, in removing barriers to access, courts and other appropriate government entities protect the privacy and independence of individuals with disabilities. The proposed resolved clauses work in tandem to balance accessibility and privacy in opening the digital frontier to everyone.

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<sup>17</sup> *Carparts Distribution. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F. 12, 19 (1st Cir. 1994).

<sup>18</sup> *Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. & Am. Fed’n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001).

<sup>19</sup> 42 U.S.C. § 12132.

<sup>20</sup> U.S. DEPARTMENT OF JUSTICE, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES (June 2003), <http://www.ada.gov/websites2.htm>.

<sup>21</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 142, 43464 (proposed July 26, 2010), <http://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf>.

### *Digital Barriers for Attorneys with Disabilities*

The legal profession evolves with the technology that transforms it, as legal technology companies forge the tools essential for lawyers to ply their trade. Unfortunately, many attorneys with disabilities do not have equal access to the digital tools so vital to their profession. Now and in the future, technology will define how lawyers find clients (and vice-versa); interact with them, other attorneys, and courts; practice law; and manage their businesses. The final resolved clause is intended to help dismantle these digital barriers by encouraging legal tech companies and law firms to ensure equal access to all attorneys and the public.

Attorneys and consumers must have equal access to all these tools, regardless of their abilities. To that end, the final resolved clause encourages lawyers, law firms, legal technology companies, or other entities involved in the delivery of legal services, to ensure accessibility. The resolution promotes the creation of technology equally accessible to people with a wide range of abilities and disabilities, including through assistive technologies that permit individuals with visual, hearing, manual, and other disabilities to meaningfully use this technology.

As the ABA Commission on the Future of Legal Services found, “[a]dvancements in technology and other innovations continue to change how legal services can be accessed and delivered.”<sup>22</sup> Failing to promote full and equal participation in the profession (ABA Goal III) or assure meaningful access to justice for all persons (ABA Goal IV) undermines the Association’s mission. These goals can only be accomplished if the legal profession and organizations that provide technology for the delivery of legal services are committed to digital accessibility and inclusion.

### **III. Existing ABA Policy**

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities.<sup>23</sup> A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

When the House adopted this policy, lawyers primarily provided legal services to the public and used technology far less extensively than today to deliver their services. Since then, many other legal services providers have used technology to create self-help tools for those needing legal help and gateways for more affordable legal advice.

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<sup>22</sup> *Id.* at 18.

<sup>23</sup> American Bar Association Resolution 07A108, [https://www.americanbar.org/content/dam/aba/directories/policy/2007\\_am\\_108.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_108.authcheckdam.pdf).

Moreover, technological tools have made lawyers more competent, economical, and efficient.

The proposed resolution is consistent with long-standing ABA policies articulated in the report accompanying this resolution. In February 1991, the ABA's House of Delegates made member benefits accessible to members with disabilities "to the maximum extent feasible," creating a task force to best implement the ADA within the ABA and the legal profession and making the ABA's programs and activities accessible to lawyers with disabilities.<sup>24</sup> In 1999, the ABA amended Goal IX—later changed to Goal III—to add lawyers with disabilities and to commit to the "full and equal participation" of lawyers with disabilities in the legal profession.

Thus, just as the ADA was enacted for a different time, so too was this policy. The surge in website accessibility lawsuits is trying to keep the ADA relevant and responsive to today's digitally-dependent world. The proposed resolution is meant to keep the ABA's position on the importance of digital inclusiveness, inside and out of the courts, current as well.

#### **IV. The Path to Digital Accessibility and Inclusion**

Although the DOJ has not promulgated web or digital accessibility standards, it has looked primarily to standards from the World Wide Web Consortium (W3C) for guidance. The W3C is an international body that develops web standards through its staff, member organizations, and the public. In 1997, the W3C launched the Web Accessibility Initiative (WAI) to achieve web functionality for people with disabilities by developing software protocols and technologies, creating guidelines for the use of technologies, educating the industry, and conducting research and development. Since then, the WAI has developed web and mobile technology standards, the WCAG 2.0, the most widely accepted standards for digital accessibility.<sup>25</sup>

WCAG 2.0 offers a vast array of recommendations to create web content more usable in general and more accessible to a people with disabilities, "including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these." A technical standard, the WCAG has 12 guidelines organized under four principles: perceivable, operable, understandable, and robust. Each guideline has the levels, A, AA, and AAA, of testable success criteria.<sup>26</sup> WCAG 2.0 AA is the level most widely followed.

While the WCAG standards initially focused upon the accessibility of websites, WAI working groups have expanded WCAG 2.0 AA to include guidance for mobile

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<sup>24</sup> ABA Resolution 91M102, [https://www.americanbar.org/content/dam/aba/directories/policy/1991\\_my\\_102.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/1991_my_102.authcheckdam.pdf).

<sup>25</sup> <http://www.w3.org/TR/WCAG20/>.

<sup>26</sup> <https://www.w3.org/WAI/intro/wcag.php#whatis2>.



technologies. Through an online guidance, “Mobile Accessibility: How WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile,” the WAI explains how WCAG 2.0 applies to mobile web content, mobile web apps, native apps, and hybrid apps using web components inside native apps. Thus, law firms and legal tech companies that build law-related websites and apps for the legal profession and consumers have ample guidance to ensure digital inclusion for everyone.

However, having the means to achieve digital accessibility and inclusion and the desire to do so are not the same thing. Businesses in general, and law firms and legal tech companies specifically, have been slow to embrace the principles of WCAG 2.0 AA and the moral imperative that is digital accessibility and inclusion. Through the proposed resolution, the ABA must urge courts and appropriate government entities to apply the ADA to attain maximum digital accessibility and inclusion—not only for websites, but also for all digital technology used in commerce and other spheres—and urge the legal profession and its technology partners to pledge their commitment to achieving this goal. As the world evolves through technology, no one in the profession—or the public it serves—should be left behind.

Respectfully submitted,

Robert T. Gonzales, Chair  
Commission on Disability Rights

August 2018

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Disability Rights

Submitted By: Robert T. Gonzales, Chair, Commission on Disability Rights

1. Summary of Resolution(s).

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act (ADA) to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Approval by Submitting Entity.

Approved by Commission on Disability Rights on March 23, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

Yes.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

In August 2007, the ABA House of Delegates adopted policy urging all those in the legal profession to make their websites accessible to persons with visual, hearing, manual, and other disabilities. American Bar Association Resolution 07A108, [https://www.americanbar.org/content/dam/aba/directories/policy/2007\\_am\\_108.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_108.authcheckdam.pdf). A decade later, technology has transformed the world significantly, requiring the ABA to broaden its perspective on digital inclusiveness. Commerce through technology is no longer restricted to websites, as people now, more than ever before, use mobile technologies to buy goods and service or to ply their trades.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation.

N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The policy will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

- Section of Civil Rights and Social Justice
- Section of Science & Technology Law
- Law Practice Division
- Business Law Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Amy Allbright, Director  
 ABA Commission on Disability Rights  
 1050 Connecticut Ave., NW, Ste. 400  
 Washington, DC 20036  
 202-662-1575 (office)  
[amy.allbright@americanbar.org](mailto:amy.allbright@americanbar.org)

12. Contact Name and Address Information. Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Robert T. Gonzales, Chair  
 Commission on Disability Rights  
 410-547-0900  
[r.gonzales@hyltongonzales.com](mailto:r.gonzales@hyltongonzales.com)

**EXECUTIVE SUMMARY**1. Summary of the Resolution

This resolution urges all courts and other appropriate government entities to interpret Titles II and III of the Americans with Disabilities Act to: (1) apply to technology, and goods and services delivered thereby, regardless of whether the technology exists solely in virtual space or has a nexus to a physical space, and (2) ensure that technology is accessible to and usable by individuals with disabilities in a manner that protects their privacy and independence. The resolution further urges that all technology relating to the provision of legal services be equally accessible to people with a wide range of abilities and disabilities.

2. Summary of the Issue that the Resolution Addresses

The need for digital inclusiveness is greater than ever. According to the U.S. Census Bureau, more than 56 million Americans have a disability. Yet, for many people with disabilities the internet, mobile applications, and other technologies are inaccessible. Technology has enormous potential for promoting social inclusion for individuals with disabilities, from facilitating telework and online education to keeping abreast of what is happening in the world. Accordingly, we must eliminate the virtual barriers that have been built, ensuring that people with disabilities are not marginalized by society.

3. Please Explain How the Proposed Policy Position will address the issue

The policy position will allow the ABA to comment on and encourage current and proposed legislation and administrative interpretation and guidance regarding the applicability of the Americans with Disabilities Act and other disability rights legislation to technology.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None at this time.