

Advocacy Strategies for Hearing Access

John F. Waldo, Attorney

Counsel to Association of Late Deafened Adults

Washington State Communication Access Project

Oregon Communication Access Project

johnfwaldo@hotmail.com

- Some communication problems can only be addressed by a specific federal agency. Those are:
 - Problems with TV captioning and captioning of online material that has been on TV. Complain to the Federal Communications Commission (FCC). Online complaint form walks you through the process.
<https://consumercomplaints.fcc.gov/hc/en-us>
 - Airlines in flight and at gates, complain to the Department of Transportation. Online form available at
 - <https://airconsumer.dot.gov/escomplaint/ConsumerForm.cfm>

- Accessibility requirements that apply to private businesses open to the public and to state and local governments are contained in the Americans with Disabilities Act (ADA). ADA empowers us to act in two ways to implement the benefits and protections of the law.
 - Individuals or groups may complaint to the Department of Justice (DOJ), which may conduct investigations, reach settlements or (occasionally) take the subject to court
 - Individuals or groups may take private actions, including going to court

- What does ADA require from public entities?
 - Government entities may not discriminate on the basis of disability with respect to any “programs or services,” interpreted as essentially anything the agency does.
 - State and local governments of any type are covered by Title II of ADA, federal agencies (other than Congress and the courts) are covered by Section 504 of the Rehabilitation Act – requirements essentially identical.
 - Governments must provide communication access unless they can demonstrate that doing so would impose an “undue burden,” a term with no fixed definition.
 - Government entities must give “primary consideration” to the type of access being requested.

- What does ADA require from private businesses?
 - ADA Title III, the applicable law, is somewhat convoluted.
 - First, ADA defines by example “auxiliary aids and services,” which are “interpreters or other effective methods of making aurally delivered material available to individuals with hearing impairments.”
 - Then, ADA says discriminatory acts include “the failure ... to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services”
 - The ADA goes on to provide the defenses available to private businesses, continuing “unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the ... services ... being offered or would result in an undue burden.”

- The language of Title III and the implementing regulations present two enormous and continuing problems.
 - First, none of the terms are defined, so it's possible to argue about whether communication is "effective" (and from whose perspective), whether an alteration is "fundamental" or "incidental," and where the line lies between an "undue" and a "due" financial burden.
 - Second, the regulations allow the business to select from among possible aids and services, so long as the selected method provides "effective" communication.
- The end result is that our rights in any specific situation are what a court or the DOJ declares them to be.

There is no such thing as an ADA “police” force. Implementing our rights is up to us. We have two options – asking the DOJ for help, or doing it ourselves. Department of Justice has two basic enforcement arms – the Disability Rights Section and the 93 United States Attorneys’ offices. At present, high-level political leadership in both of those arms is completely absent, which makes action on novel issues less likely. To get an idea of what DOJ has been doing, go to ada.gov and click on the “enforcement” tab.

- Primary areas of DOJ enforcement interest as it relates to communication:
 - Health care, particularly hospitals
 - Criminal-justice issues – police, jails and prisons
 - State and local governments, and particularly public meetings where communication is necessary to participate in the democratic process.

Unlike private individuals, DOJ can seek money damages for the affected people.

DOJ's settlements require "effective communication," but seldom specify the type of auxiliary aids and services to be offered.

- Asking DOJ for assistance

- DOJ has an extensive online help capacity. The entry portal is https://www.ada.gov/filing_complaint.htm
- DOJ does have a free mediation program that will put complainants and respondents together with a facilitator to try to work out a solution. Mediation may allow complainants to seek a particular kind of aid or service.
- It is to our benefit to ensure that the DOJ attorneys, particularly in the Disability Rights Section, remain fully employed. I would therefore suggest that any complaints in the areas where DOJ has been active – health services, public meetings and criminal-justice matters – be directed to DOJ.

- Private enforcement – truly self-help for the hard of hearing
 - ADA permits and encourages individuals facing communications barriers (and advocacy organizations) to initiate actions that will meet their needs – we have the motivation to act and the knowledge of what will and won't work
 - Private individuals cannot recover money damages (except in workplace-discrimination cases), only get an order to “do it right” in the future
 - BUT in an attorney represents a private claimant and prevails, the business must pay the attorney (the reverse, though, is not the case),
 - SO, private individuals with a valid claim can find legal help that costs them nothing.

- Where to find legal help

- Every state has a Protection and Advocacy organization (P&A) with attorneys that represent people with disabilities. You can usually find your state agency by searching for “Disability Rights (state name).” There is also an umbrella group, the National Disability Rights Network (ndrn.org) with a listing of state P&As.
- Many private attorneys (as well as many P&A attorneys) belong to the Disability Rights Bar Association, disabilityrights-law.org. Membership is restricted and applicants are screened. As a result, the DRBA attorneys are highly capable and reputable.
- If you want to locate an attorney with particular expertise in the kind of issue you are facing, please feel free to get in touch with me, johnfwaldo@hotmail.com. I may be able to help, or can put you in touch with someone who might.

- Here are some novel and emerging areas that may be best suited for private action
 - Access to live theaters for every performance
 - Streaming services into movie theaters
 - Retail counters, especially the Post Office
 - Sports stadiums and arenas
 - Musical concerts, lectures and comedy presentations
 - Public transportation other than airlines
 - Funeral homes
 - Loud restaurants and stores

- A three-step approach to advocacy – Step One
 - The affected individual or organization should contact the business or government entity directly, explain who we are, what we need and why, and ask for a response within a specific time frame. Running the “ask” communication by a lawyer is likely a good idea, but the initial communication can and should allude to the ADA, but should not threaten legal action.
 - If the response is positive, keep the dialogue going. This approach solves a lot of problems.

- A three-step approach to advocacy – Step Two
 - If the response to the Step One communication is either “no” or if there is no answer, Step Two is a letter from a lawyer. A Step Two letter that a lot of disability-rights lawyers (including me) use is to invite the entity to engage in Structured Negotiation (SN), which is essentially mediation without a mediator.
 - In SN, the parties meet face to face and take a cooperative and collaborative approach to resolving a problem.
 - The focus should be on the “fix,” not on the “fight,” and the idea is to create ongoing relationships.
 - If the SN invitation is accepted, the attorney drafts a contract covering the matters to be discussed and the time frame involved. The contract states that because SN is an alternative to court action, the business will pay the claimants’ attorney(s). Even though there is some cost involved, SN is much faster and cheaper than litigation.
 - If SN results in a solution, the parties make a joint announcement about the outcome without ever mentioning the existence of a dispute. It’s a win-win result in which everybody looks good.

- A three-step approach to advocacy – Step Three
 - If SN is refused, or if it is accepted but does not yield a solution, Step Three is to go to court.
 - BUT, that’s not the end of SN. Court rules require that very soon after a case is filed, the judge must hold a status conference, at which the Court must, among other things, explore possible alternative methods of resolving the problem. What I’ve done at that conference is tell the Court about SN, and offer it again. Judges like that, which means it’s likely to happen.
 - In other words, filing a lawsuit need not and should not end efforts to reach a collaborative, win-win resolution.

- What kind of accommodations do we ask for?
 - I have in the past asked for captioning, for a number of reasons
 - In situations involving spoken content, captioning provides effective communication across a broad range of hearing-loss needs
 - Assistive-listening devices (generally required) are sufficient only for mild to moderate losses
 - Sign interpretation is vital for some people, but not helpful for others
 - Similarly, loops are very helpful for some, but of no use to people who are profoundly Deaf or for people without a t-coil.
 - But this track is about loops, so ...

- Advocating for loops – the challenge
 - Remember that private businesses may select from among various ways of providing “effective communication.”
 - If we ask for one thing and they offer another, we’ll have to show that what they offer is *not* effective.
 - A demand for loops is a tough sell legally because loops alone WILL NOT satisfy ADA obligations any more than will ASL interpretation alone.

- Advocating for loops – some possible opportunities
 - Government entities must give “primary consideration” to our specific requests, which means that (in theory, at least) a city, county, public university or other government agency must explain why it *can't do* what we ask
 - There are some situations in which loops will be effective but captions won't. Two that come to mind are:
 - Where the requester has both hearing and visual impairments, or
 - Where the aurally delivered information is non-verbal, namely, music, and finally

- If you are in the Western United States
 - The Ninth Circuit Court of Appeals has said that ADA requires more than just a bare minimum of accommodation. Rather, focusing on the objective of ADA to provide “full enjoyment,” that court has said that ADA requires businesses to do whatever is reasonable to provide an experience “akin to” that of people without disabilities.
 - That rule makes it at least possible to argue for installed loops, which virtually eliminate hassles and the need to self-identify, giving us an experience more like that of people without hearing loss.
 - The Ninth Circuit is the largest in the country, encompassing the states of Hawaii, Alaska, Washington, Oregon, California, Arizona, Nevada, Idaho and Montana.