

DENTAL LEGAL UPDATE

Flood of Website Accessibility Lawsuits under the ADA

by Jeanine Lehman, Attorney

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**The question arises –
are the websites of
dentists public
accommodations that
must be accessible to
the disabled?**

Health care practices across Texas are being targeted for alleged violations of the federal Americans with Disabilities Act (ADA), based on the accessibility of their websites. Dentists are likely to receive demand letters or lawsuits alleging that their websites violate the ADA because the websites do not satisfy accessibility standards for the protection of the disabled – primarily visual impairments, but also including hearing impairments if sound is used on the website, and possibly mobility impairments that interfere with operation of the physical components of a computer, such as a mouse. Dentists' offices are public accommodations under the ADA. Dentists' offices are subject to the ADA, including but not limited to wheelchair accessibility, tactile signage, and more. The question arises – are the websites of dentists public accommodations that must be accessible to the disabled?

The U.S. Department of Justice (DOJ) administers the public accommodations component of the ADA. The DOJ is considering rules for website accessibility for private businesses, but does not anticipate having those

rules until 2018. In the meantime, there has been a change in the U.S. President, which could affect rule-making. See:

https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html

However, DOJ rules are not required for lawsuits to occur. The ADA statute alone can be the basis of lawsuits. Originally, the website accessibility lawsuits targeted large companies. Some of those companies settled major lawsuits and revised their websites. Now, small businesses, including Texas health care providers, are being targeted by these lawsuits. For a Texas story, see:

<http://kxan.com/2016/12/21/austin-ada-attorney-now-targeting-websites/>

A lawsuit may also contain allegations that violation of the ADA is a violation of federal law for practices which accept federal money, i.e. Medicaid, Medicare, and CHIP, and that the money should be refunded to the government. These allegations

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Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at (512) 918-3435 or jeanine@jeanine.com

**Website Favorites**

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of Dental
Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental Association
www.ada.org

Website Lawsuits (cont.) --

may be a red herring. However, they raise the stakes and strike fear into the hearts of Texas health care providers.

Given the risk, dentists should consider meeting the Web Content Accessibility Guidelines (WCAG) 2.0 A or AA located at:

<https://www.w3.org/TR/WCAG20/#guidelines> and
<https://www.w3.org/WAI/WCAG20/quickref/>

or other appropriate accessibility standards. To do so, they will need a knowledgeable web developer.

If a dentist receives a demand letter from an attorney or an individual, or is named in a lawsuit or governmental notice, there are a number of options:

1. Call your insurance carrier.

Check to see if your insurance policy has “disciplinary proceedings” coverage. See if ADA coverage is included. If there is an allegation of federal program violations, i.e. Medicaid, Medicare, and CHIP, or the threat of a *qui tam* action to have you refund federal health program collections, see if your policy provides coverage. If you have coverage, your insurance carrier will provide or reimburse your costs of defense – but talk to your insurance agent, read your policy, and get written confirmation. That said, be

sure not to delay retaining an attorney.

2. Do not ignore the letter or the lawsuit. Be proactive. If you ignore the letter, you may be sued. If you ignore the lawsuit, you will automatically lose.

3. Settlement. The demand letters may request a sum like \$2,000 to seek to get you to pay rather than take the risk of a lawsuit. However, paying the money does not stop someone else from making the same claim and suing you. Indeed, a dentist who is an easy touch may find his name shared with others. If you do want to settle, it is advisable to have your own attorney represent you for the settlement and release.

4. Retain an Attorney. Retain a knowledgeable attorney to represent you and respond to the demand letter and lawsuit. The lawsuit will be filed in federal court, so your attorney needs to be admitted to federal court. Be sure to act expeditiously so that you do not miss court deadlines.

In October 2016, two website accessibility lawsuits were filed in federal court in San Antonio against urgent care centers by the same plaintiff. On February 13, 2017, U.S. District Court Judge Orlando Garcia ruled in favor of the urgent care center, Concentra Operating

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Website Lawsuits (cont.) --

Corporation, granting a motion to dismiss the lawsuit on the basis that the plaintiff lacked standing to bring suit because he failed to prove a concrete injury, i.e. that his disabilities (which apparently did not include visual or hearing impairments) affected his access to the website. The Judge also evaluated and found that the plaintiff failed the proximity test for standing, including due to the 60+ mile distance from the plaintiff's residence in Austin to the defendant's clinic, and no evidence that plaintiff was or intended to be a patient, or traveled in the area of the clinic. Because the case was decided on standing, Judge Garcia did not rule on if the website, itself, was a public accommodation, and indicated that issue was a matter of first impression in the federal Fifth Circuit (meaning the federal Fifth Circuit has not addressed that issue). Austin is also in the Fifth Circuit. On February 23, 2017, in the other case with the same plaintiff, the parties agreed to a joint stipulation of dismissal with prejudice – meaning the case was stipulated in favor of the defendant urgent care center, Hill Country Health Management, LLC.

The Texas Medical Association in its February 27, 2017 posting "Practice Websites Targeted in ADA Shakedown" noted that at least two dozen inquiries about website accessibility have been made to the TMA. See:

<https://www.texmed.org/Template.aspx?id=43960>

To address a surge of ADA accessibility compliance lawsuits in Stockton, in March 2016, U.S. Representative Jerry McNerney of California filed the COMPLI (Correcting Obstructions to Mediate, Prevent, and Limit Inaccessibility) Act, H.R. 4719, to prevent predatory lawsuits

from "high frequency litigants" that hurt small businesses, while not resolving the accessibility issues. Rep. McNerney's legislation would provide for a 90-day notice period to businesses, to allow them to come into compliance with the ADA, before any lawsuit or demand letter can be issued. This federal legislation has not yet been passed by Congress and is therefore, not yet law.

Jeanine Lehman is an Austin, Texas health law attorney who practices dental, health, employment, real estate, and business law.

Death & Incapacity in your Dental Practice

What happens to your dental practice if you die or become mentally incompetent? The Texas State Board of Dental Examiners (Board) provides guidance in Rule 101.11. The rule allows a person, who is the administrator or executor of a deceased dentist's estate, or a legally authorized representative of a dentist adjudicated to be mentally incompetent, to:

- (1) carry on the deceased or mentally incompetent dentist's practice for a reasonable period or
- (2) conclude the affairs of the practice, including the sale of any assets.

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The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally, nor is it applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2017 Jeanine Lehman.

Death & Incapacity (cont.) --

In 2014, the Board determined that a “reasonable period” means no more than 12 months from the date of death or the date of determination of mental incompetency. The rule also allows a licensed dentist to work for the executor, administrator, or legally authorized representative during the administration of the estate or the period of incompetency.

For the protection of your family, patients, employees, and practice, take steps now to smooth the transition.

First, if your practice is a sole proprietorship, recognize that the sole proprietorship ceases to exist upon your death. Upon death, your heirs need to rush to probate court to get an administrator or executor appointed to carry on the practice – adding significant expense. In the meantime, bills need to be paid, employment matters need attention, a substitute dentist needs to be hired, and many other matters need to be addressed. When the sole proprietor dies, the practice’s bank account is frozen and no checks may be written. Rather than having a sole proprietorship, you should own your practice in a professional entity, which survives your death; examples include the professional limited liability company,

professional corporation, and professional association. Being able to continue to write checks, have employees, and hire a substitute dentist are critical for continuity of patient care and for protecting the value of your practice until it can be sold.

Second, be sure to have an up-to-date Texas will, statutory durable power of attorney, medical power of attorney and related estate planning documents – signed, notarized and stored in a safe place where they can be located.

Third, if you have group practice or multiple owners of a dental building or condominium, have a signed Buy Sell Agreement for buying out a departing practice or real estate owner, including for reasons of death and incapacity.

Fourth, in associate dentist employment agreements, use noncompete and transfer of dental records ownership provisions to protect your practice’s value.

These steps should be taken now with the assistance of an attorney, who is knowledgeable in dental law matters.

In the next issue, this article will be continued.

**Have you moved?
Please send us a
change of address
to receive future
issues.**

**Please share this
newsletter with
your dentist col-
leagues, office
manager, and ad-
visors.**

Thanks!

**To receive this
newsletter by
email, call
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About Our Firm ... Call us at (512) 918-3435

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has been in private practice as the owner of her firm for over 25 years and has over 30 years’ experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at **(512) 918-3435**, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com. Suggestions for future newsletter topics and invitations to speak to professional groups are appreciated!