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Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone

Abstract

Court systems are exploring and beginning to adopt online dispute resolution (ODR) systems, and it is critical that they make digital accessibility a priority. Even though we need to pay close attention to ODR developments in court systems, we cannot overlook the fact that there are ODR providers in the private sector whose systems also must be accessible for persons with disabilities. Plaintiffs filed more ADA Title III website accessibility lawsuits in federal court for the first six months of 2018 than in all of 2017. There were at least 1053 such lawsuits in the first six months of 2018, compared to 814 in all of 2017. As websites have become more sophisticated, access to them has worsened. This article will revisit the question of what digital accessibility standards are legally required. Although the threat of legal liability for failing to satisfy well-respected privately promulgated standards is still real, making a website digitally accessible will make it easier for everyone to use and may attract new users. Websites, mobile applications, software platforms, and other technologies will be accessible when developed and designed to internationally recognized accessibility standards. A host of best practices related to business processes and training are available to ensure accessibility for ODR systems. This Article offers ODR system designers, practicing neutrals such as mediators and arbitrators, information technology professionals, private and public decisionmakers, and policymakers essential information and tools to build and maintain systems that work for everyone. It is extremely important that the ODR community focus on digital accessibility at this moment, because ODR systems are not only being implemented in the United States; they are being adopted around the world.

Keywords

Disability, Digital access, Online dispute resolution, Americans With Disabilities, Accommodations, Accessibility

Disciplines

Civil Rights and Discrimination | Disability Law | Dispute Resolution and Arbitration

Digital Accessibility and Disability Accommodations in Online Dispute Resolution: ODR for Everyone

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I. INTRODUCTION¹

Court systems are exploring and beginning to adopt online dispute resolution (ODR) systems, and it is critical that they make digital accessibility a priority. Even though we need to pay close attention to ODR developments in court systems, we cannot overlook the fact that there are ODR providers in the private sector whose systems also must be accessible for persons with disabilities.

Digital accessibility “is the ability of a website, mobile application or electronic document to be easily navigated and understood by a wide range of users, including those users who have visual, auditory, motor, or cognitive disabilities.”² Monitoring digital accessibility, however, involves unique challenges. Unlike the situation when someone builds or remodels a physical structure, there is no need to acquire permits or licenses. No one will be reviewing your website to ensure compliance with a set of standards. Individuals who want to build a website can do it alone. They do not need a general contractor or specialists like plumbers and electricians.³ Additionally, when the Americans with Disabilities Act of 1990 was passed, it was national news and the goal of making physical structures accessible was a conspicuous concern. The emergence of the internet, however, was not accompanied by an equivalent concern for digital accessibility. It obviously requires far less money and time to create a website, mobile application, or electronic document than it takes to build a physical structure. A website requires only one person to build it. Although access to the necessary hardware can be a barrier, the cost to create a website can be quite minimal. Everything one needs may be available without charge at public libraries and other venues. Consequently, ensuring digital accessibility for every website requires either the regulation or the cooperation of millions of individuals. The task may appear overwhelming, but a conscious effort to achieve digital accessibility will result in an online environment that is inviting and more understandable for all users, regardless of whether they have a disability. Finally, digital accessibility will ensure that persons with disabilities are not excluded from participating in the online world that becomes more essential every day.

¹ This article is a revision and expansion of a more conversational piece co-authored with Lainey Feingold, a nationally recognized disability advocate. Ms. Feingold can be reached at her website <https://www.lflegal.com/>, which contains substantial disability related information.

² Margaret Rouse, *Digital Accessibility*, TECH TARGET: WHATIS.COM, <https://whatis.techtarget.com/definition/digital-accessibility> (last updated May 2016).

³ Individuals can build physical structures by themselves. For example, determined individuals can and have built homes by themselves. That is the rare exception, however. And those structures are almost always modest. I am not aware of any individuals who have built a 70-story office building by themselves.

Although online dispute resolution (ODR) systems have been available for at least twenty years, until recently they functioned primarily as alternative dispute resolution (ADR) processes separate and distinct from court systems.⁴ But a rapidly expanding number of court systems have adopted, or are designing, court-integrated ODR processes.⁵ Because the number of ODR systems is guaranteed to increase, we must be especially careful to ensure that ODR systems are accessible to persons with disabilities. Individuals who use computers and mobile devices but cannot see a screen, hear a video, hold a mouse, or have other disabilities may not be able to use an ODR system unless we pay close attention to digital accessibility.

The success of any ODR system is contingent upon accessibility. Users must have access to computers, tablets, or smartphones, for instance,

⁴ See Ethan Katsh, *ODR: A Look at History*, <https://www.mediate.com/pdf/katsh.pdf> (last visited June 21, 2019).

⁵ I currently am serving as the System Designer for the New York State Unified Court System to create an ODR process that will become a fully integrated component of that court system. Other court systems using ODR include: (1) British Columbia Civil Resolution Tribunal, Province-wide; (2) Clark County Family Court, Las Vegas, NV; (3) Franklin County Small Claims, Columbus, Ohio; (4) Fulton County Small Claims, Atlanta, GA; (5) New York State Unified Court System Consumer Debt, Statewide; (6) Ohio Court of Claims, Statewide; (7) Ottawa County Family Court Compliance, Grand Rapids, Michigan; (8) Travis County Small Claims, Austin, TX; (9) Utah Courts Small Claims, Statewide; (10) Tlaxcala Supreme Court, Mexico; (11) Faulkner and Van Buren County District Courts, Faulkner and Van Buren County, AR; (12) Sherwood District Court, Sherwood, AR; (13) DeKalb County State Court – Traffic Division, DeKalb County, GA; (14) Village of Ford Heights, Cook County, IL; (15) Jefferson County District Court, Louisville, KY; (16) 15th District Court, Ann Arbor, MI; (17) 74th District Court, Bay County, MI; (18) 10th District Court, Calhoun County, MI; (19) 65A District Court, Clinton County, MI; (20) Clinton Township, MI, 41B District Court; (21) 54B District Court, East Lansing, MI; (22) 21st District Court, Garden City, MI; (23) 20th Circuit Court, Grand Haven, MI; (24) 61st District Court, Grand Rapids, MI; (25) 31st District Court, Hamtramck, MI; (26) 32A District Court, Harper Woods, MI; (27) 30th District Court, Highland Park, MI; (28) 55th District Court, Ingham County, MI; (29) 22nd District Court, Inkster, MI; (30) 12th District Court, Jackson County, MI; (31) 4th Circuit Court, Jackson, MI; (32) 62B District Court, Kentwood, MI; (33) City of Lansing – Income Tax Division, Lansing, MI; (34) 54A District Court, Lansing, MI; (35) 16th District Court, Livonia, MI; (36) 1st District Court, Monroe County, MI; (37) 50th District Court, Pontiac, MI; (38) 46th District Court, Southfield, MI; (39) 23rd District Court, Taylor, MI; (40) 14A District Court, Washtenaw County, MI; (41) Washtenaw County Friend of the Court, Washtenaw County, MI; (42) 29th District Court, Wayne, MI; (43) 14B District Court, Ypsilanti Township, MI; (44) Cleveland Municipal Court, Cleveland, OH; (45) Franklin County Municipal Court, Franklin County, OH; and (46) Farmers Branch Municipal Court, Farmers Branch, TX. *Courts Using ODR*, THE NAT'L CTR. FOR TECH. AND DISPUTE RESOLUTION, <http://odr.info/courts-using-odr/> (last visited June 21, 2019).

that have the technological capacity to interact with an ODR platform. And just as importantly, the ODR platform must be designed so individuals are not excluded simply because of their disability.

The Americans with Disabilities Act of 1990 (ADA) was passed because “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁶ Enacted almost thirty years ago, one of the primary purposes of the ADA was to make certain that buildings and their means of access were navigable for persons with disabilities. That focus made sense in 1990 and remains an important concern today. Tremendous amounts of time and energy have been spent providing specific instruction concerning disability accessible architectural design. The 2010 ADA Standards for Accessible Design update to the original 1990 standards, for instance, includes 279 pages of very specific design requirements for a wide variety of facilities and accessories that include drinking fountains, carpet pile height, locker rooms, clear floor or ground space, knee and toe clearance, holding cells, parking places, saunas, fishing piers, and miniature golf courses.⁷ This detailed concern with physical accessibility has provided opportunities for persons with disabilities that were never previously available. But as we approach the third decade of the twenty-first century, we must make certain that we are making the same effort to ensure digital accessibility.

One might hope that concerns about equity and inclusion alone would be sufficient motivation to guarantee digital accessibility. That hope has not materialized, and many websites continue to be inaccessible. In November 2017, for example, the Information Technology and Innovation Foundation noted that of the 468 most popular federal websites, only sixty percent were accessible to users with disabilities.⁸ Problems ranged from poor contrast to a lack of labels, which makes it difficult for persons with vision impairments who rely on a screen reader to navigate those websites.⁹ Consequently, there is a rapidly increasing possibility that websites not digitally accessible will be sued. A July 2018 Seyfarth Shaw report confirms this possibility by reference to ADA Title III¹⁰ lawsuits:

⁶ Americans with Disabilities Act, 42 U.S.C. § 12101(a)(2) (1990).

⁷ 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, 65–67, 68, 81, 90–91, 97, 98, 102, 104–05, 107–11, 206 (Dept. of Justice 2010), <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf>.

⁸ Daniel Castro et al., *Benchmarking U.S Government Websites*, INFO. TECH. AND INNOVATION FOUND. 4 (Nov. 2017), <http://www2.itif.org/2017-benchmarking-us-government-websites.pdf>.

⁹ *Id.*

¹⁰ 42 U.S.C. § 12182.

Plaintiffs filed more ADA Title III website accessibility lawsuits in federal court for the first six months of 2018 than in all of 2017. There were at least 1053 of such lawsuits in the first six months of 2018, compared to 814 in all of 2017. If the filings continue at this rate, there could be more than 2000 website accessibility lawsuits filed in federal court for 2018.¹¹

One obvious question is, given the fact that the ADA was enacted almost thirty years ago, why has it taken so long for a significant number of lawsuits to be brought against websites that are not accessible?

For years, many potential plaintiffs were waiting for the U.S. Department of Justice to issue their interpretation of the ADA about [] websites. That never happened.

And after the DOJ once again extended its deadline in 2015, “it felt like that clarification was never going to come,” Helland said. A wave of lawsuits hit the federal court system that year and the next.

Others point to the way websites have developed. In many cases, as websites have become more sophisticated, access to them has actually worsened.¹²

In this continually evolving area of website accessibility, however, it is difficult to define liability exposure clearly. On June 20, 2018, 103 members of the House of Representatives wrote a letter requesting Attorney General Jeff Sessions to “state publicly that private legal action under the ADA with respect to websites is unfair and violates basic due process principles in the absence of clear statutory authority and issuance by the department of a final

¹¹ Minh N. Vu et al., *Website Access and Other ADA Title III Lawsuits Hit Record Numbers*, SEYFARTH SHAW (July 17, 2018), <https://www.adatitleiii.com/2018/07/website-access-and-other-ada-title-iii-lawsuits-hit-record-numbers/>.

¹² Ted Vezner, *Minnesota Sees First Website Access Suit*, PIONEER PRESS (Oct. 8, 2008), <https://www.twincities.com/2018/10/07/minnesota-websites-sued-lawsuit-disability-advocates/>.

rule establishing website accessibility standards.”¹³ The letter asserts that “unresolved questions about the applicability of the ADA to websites as well as the department’s abandonment of the effort to write a rule defining website accessibility standards, has created a liability hazard that directly affects businesses in our states and the customers they serve.”¹⁴

On September 25, 2018, the U.S. Department of Justice Office of Legislative Affairs responded to the Congressional request by first reminding Congress that on December 26, 2017, the Department of Justice published a Notice of Withdrawal of Four Previously Announced Rulemaking Actions in the Federal Register and that two of those rulemakings related to website accessibility.¹⁵ “The first withdrawn rulemaking (RIN 1190-A61) covered accessibility of web information and services of public accommodations. The second withdrawn rulemaking (RIN 1190-AA65) covered accessibility of web services of state and local governments.”¹⁶

The Office of Legislative Affairs letter further explains that the Department first articulated its interpretation that the ADA applies to public accommodation websites over twenty years ago, which is consistent with the ADA’s Title III requirement of equal accessibility for persons with disabilities.¹⁷ The letter, however, then states: “Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.”¹⁸

Thus, apparently at this moment, noncompliance with commonly accepted, but privately promulgated, web content accessibility standards—such as WCAG 2.1 Guidelines developed by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C)¹⁹—may not necessarily result in ADA liability. With the recent confirmation of Supreme Court Justice Brett Kavanaugh, I am quite certain I am not alone in my belief that the Court

¹³ Letter from the Congress of the United States, to Attorney Gen. Jeff Sessions (June 20, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf>.

¹⁴ *Id.*

¹⁵ Letter from the U.S. Dep’t of Just., Office of Legis. Aff., to Rep. Ted Budd (Sep. 25, 2018), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Web Content Accessibility Guidelines 2.1*, WORLD WIDE WEB CONSORTIUM (June 5, 2018), <https://www.w3.org/TR/WCAG21/>.

has become more firmly conservative. As a result, the Court may not require businesses to comply with currently available, privately promulgated digital accessibility standards. This Article will revisit the question of what digital accessibility standards are legally required. But suffice to say that the sands are continually shifting.

I prefer the carrot to the stick, however. Although the threat of legal liability for failing to satisfy well-respected privately promulgated standards is still real, making a website digitally accessible will make it easier for everyone to use and may attract new users. It is simply a good business decision.

While accessibility is a civil and human right of persons with disabilities, which will be discussed below, accessible ODR platforms and content do not provide benefits only to people with disabilities. Accessibility may be essential for some individuals, but many accessibility design features will be helpful and useful for everyone. Curb ramps at roadway intersections help parents with strollers as well as wheelchair users. Similarly, captioned video content benefits anyone in a noisy environment as well as individuals who are deaf or have limited hearing. A well designed, easy to navigate website may benefit aging baby boomers in addition to people with cognitive and other disabilities. The simple fact is that universally designed digital content can benefit everyone.

Digital accessibility is achievable. Regardless of whether compliance is mandatory, substantial guidance is available. Websites, mobile applications, software platforms, and other technologies will be accessible when developed and designed to internationally recognized accessibility standards. A host of best practices related to business processes and training are available to ensure accessibility for ODR systems.

The purpose of this Article is to offer ODR system designers, practicing neutrals such as mediators and arbitrators, information technology professionals, private and public decisionmakers, and policymakers essential information and tools to build and maintain systems that work for everyone. It is hoped that readers will be encouraged to share ideas for making ODR a model of accessibility across the globe.

It is extremely important that the ODR community focus on digital accessibility at this moment, because ODR systems are not only being implemented in the United States; they are being adopted around the world. The British Columbia Civil Resolution Tribunal (CRT), for instance, accepts small claims cases under five thousand dollars and condominium disputes.²⁰ The CRT offers two distinct stages. It first offers a “Solution Explorer,” which

²⁰ CIVIL RESOLUTION TRIBUNAL, <https://civilresolutionbc.ca/> (last visited June 21, 2019).

is an expert system that educates users about their dispute by asking progressively more detailed and focused questions.²¹ Once users are educated about the nature of their dispute, it suggests options for resolution.²² By August 2018, there had been 43,719 explorations by users attempting to resolve their dispute online.²³ The second stage offered by the CRT is an ODR process where the parties engage with each other to resolve their dispute. By August 2018, the CRT had accepted 7,142 disputes and resolved 4,574.²⁴ With this level of user engagement, we can expect that ODR increasingly will be used to resolve disputes that previously were addressed in the traditional civil court system.

II. PEOPLE WITH DISABILITIES USE TECHNOLOGY AND NEED ACCESSIBILITY

Any discussion of accessibility must start with the people who depend on it: individuals with disabilities. Technology provides unprecedented potential for social and civic participation and engagement by persons with disabilities. Persons with disabilities can use digital tools, but only when websites, mobile applications, conferencing platforms, and other technologies are designed and developed with accessibility in mind.

One of the challenges when it comes to accommodating disabilities are the differences among disabilities. People with disabilities need to access ODR systems in a variety of ways. For instance:

- Not everyone can hear. Accessible websites and mobile apps must provide captions for all video content.
- Visually-impaired individuals may be able to hear video content, but they may not be able to find the video player on the page, operate the controls, or adjust the volume. Video will be useless for visually-impaired individuals unless it is accessible.²⁵ If equivalent alternative text (“alt text”) is not provided for all images, then any information communicated through images will be inaccessible for persons who use screen readers.²⁶ Individuals without vision impairments who turn

²¹ CIVIL RESOLUTION TRIBUNAL, *Getting Started*, <https://civilresolutionbc.ca/how-the-crt-works/getting-started/> (last visited June 21, 2019).

²² *Id.*

²³ *CRT Statistics Snapshot, August 2018*, CIVIL RESOLUTION TRIBUNAL (Sept. 12, 2018), <https://civilresolutionbc.ca/crt-statistics-snapshot-august-2018/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

off video and images because they have low or expensive bandwidth also will benefit from alt text.²⁷ Audio description is another valuable accessibility service that will augment the audio portion of a presentation with essential information when the video portion is not available.²⁸ “During existing pauses in dialogue, audio description provides information about actions, characters, scene changes, and on-screen text that are important and are not described or spoken in the main sound track.”²⁹

- Many people have difficulty using a mouse. Instead they rely on a standard keyboards or on a specialized keyboard that allows characters to be entered with one hand like a chord on a piano. Some people with disabilities cannot use their hands but instead rely on a mouthstick or eye tracking to input data. Voice recognition software (like Dragon Dictate) allows for voice activated input. A variety of assistive technologies are available.³⁰ These alternative input methods may not work unless a site (including an ODR system) is designed and developed with accessibility standards that, among other things, require all functionality to be available without use of a mouse.³¹
- People with visual impairments—and the one in twelve men who are color blind³²—either cannot see color at all or cannot distinguish between certain colors. Developers and designers should not to use color as the only means of conveying information. When using color to differentiate elements, provide additional identification that does not rely solely on color perception. Use an asterisk in addition to color to indicate required form fields, for example, and use labels to distinguish areas on graphs.³³ Light gray text on a white screen may

²⁷ Tim Berners-Lee, *Accessibility*, WORLD WIDE WEB CONSORTIUM (W3C), <https://www.w3.org/standards/webdesign/accessibility> (last visited June 21, 2019).

²⁸ *Understanding Success Criterion 1.2.5: Audio Description (Prerecorded)*, WEB ACCESSIBILITY INITIATIVE, <https://www.w3.org/WAI/WCAG21/Understanding/audio-description-prerecorded.html> (last visited June 11, 2019).

²⁹ *Id.*

³⁰ *See Motor Disabilities: Assistive Technologies*, WEBAIM, <https://webaim.org/articles/motor/assistive#intro> (last updated Oct. 12, 2012).

³¹ To experience what inaccessibility feels like, readers are encouraged to put away a mouse for fifteen minutes and use only the space bar; tab and enter keys; and up, down, left, and right arrows to navigate a webpage. Readers will quickly discover which site owners have thought about accessibility.

³² *Colour Blindness*, COLOUR BLIND AWARENESS, <http://www.colourblindawareness.org/colour-blindness/> (last visited June 21, 2019).

³³ *Tips for Getting Started Designing for Web Accessibility*, WEB ACCESSIBILITY INITIATIVE (Jan. 9, 2019), <https://www.w3.org/WAI/tips/designing/>.

be difficult to read for many viewers. Accessibility principles embrace color contrast requirements that enhance readability for everyone.³⁴

- Accessible websites are well-advised not to have blinking and flashing content, simply because many users find it distracting or annoying.³⁵ However, more importantly, a website with these features may be unusable for people with epilepsy or certain cognitive disabilities.³⁶

Around the world, consistently higher numbers of people will access ODR systems from mobile devices. An impressive 95% of Americans now own mobile phones, 77% own smartphones, and among those 77%, one-in-five accesses the internet only through his or her smartphone without traditional home broadband service.³⁷ As with computers, disabled people can access mobile devices—even without a keyboard—assuming websites and applications are designed to mobile accessibility standards.

Both Apple and Android publish accessibility standards so developers can build applications that work for everyone. General guidance and specific information about building accessible websites are available at Accessibility on iOS³⁸ and Accessibility on Android.³⁹

III. ACCESSIBILITY IN ODR

Regardless of whether ODR systems are developed by large corporations, small businesses, neutrals who work independently, or courts, all systems should become aware of, and comply, with generally accepted digital accessibility standards. Sir Tim Berners-Lee, inventor of the World Wide Web, speaking in 1997 at the launch of the web accessibility initiative put it succinctly when he said “[t]he power of the Web is in its universality.

³⁴ See *Accessible Technology: Providing Sufficient Color Contrast*, UNIV. OF WASH., <https://www.washington.edu/accessibility/checklist/contrast/> (last visited June 21, 2019).

³⁵ *Id.*; *Accessible Technology: Avoiding Flashing or Flickering Content*, UNIV. OF WASH., <https://www.washington.edu/accessibility/checklist/flashing-content/> (last visited June 21, 2019).

³⁶ *Accessible Technology: Avoiding Flashing or Flickering Content*, *supra* note 35.

³⁷ *Internet & Technology: Mobile Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/>.

³⁸ *Accessibility on iOS*, APPLE INC., <https://developer.apple.com/accessibility/ios/> (last visited June 21, 2019).

³⁹ *Accessibility Overview*, ANDROID, <https://developer.android.com/guide/topics/ui/accessibility/> (last visited June 21, 2019).

Access by everyone regardless of disability is an essential aspect.”⁴⁰ Every element of ODR information and communications technology—systems, content, and processes—must be accessible for ODR to be truly universal.

Although many of us may think about alternative dispute resolution (ADR) and ODR as distinct processes, ODR is merely a form of ADR. In fact, the label “Online Dispute Resolution (ODR)” is a little misleading. When most practitioners use the term ODR, they typically are referring to dispute resolution processes that not only rely on the internet but also may be supported or assisted by other technologies. This so-called ODR process may be supplemented by face-to-face contacts. A more accurate term may be “technology-assisted dispute resolution,” but the term ODR is typically used.⁴¹

“Technology” includes everything from telephones to websites, mobile apps, electronic meeting rooms, fax machines, mobile devices, and Near Field Communication. Dispute resolvers have been using some of these technologies “offline” for decades and they are an essential part of dispute resolution practices.

ODR system designers may encourage parties to keep every communication on the ODR platform for reasons such as confidentiality and accountability. Dispute resolution professionals, however, may prefer to use online tools along with “offline” technologies, such as the telephone or even a possible in-person meeting. Although a dispute resolution process may combine online and offline communications or have several stages that progress from negotiation to mediation to arbitration, there nonetheless are ODR systems that allow parties to complete the negotiation stage entirely online.⁴²

All technologies and communication options, whether offline or online, must be accessible. One advantage of a dispute resolution process that is entirely online is that all the online interactions can be designed and monitored for accessibility.

One of the goals of ODR has been improving access to justice. I am the System Designer currently working with the New York State Unified Court System to create an ODR process that will be fully integrated into the

⁴⁰ *World Wide Web Consortium Launches International Program Office for Web Accessibility Initiative*, WORLD WIDE WEB CONSORTIUM (Oct. 22, 1997), <https://www.w3.org/Press/IPO-announce>.

⁴¹ Another acronym I proposed years ago is TMDR (Technology Mediated Dispute Resolution). See David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006); David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 U. TOL. L. REV. 213 (2006).

⁴² See MODRIA, <https://www.tylertech.com/products/modria> (last visited Nov. 6, 2018); SMARTSETTLE, <https://smartsettle.com/> (last visited Nov. 6, 2018).

official court system. We began working on this project because the New York state courts recognized that the default judgment rate in credit card debt collection cases was disturbingly high. The New Economy Project has reported, for example, that the default judgment rate in several New York City zip codes was more than ninety percent.⁴³ The Office of Court Administration was directed to explore the possibility of designing an ODR system that would increase debtor participation rates in debt collection cases. Several reasons contribute to the low debtor participation rate, including allegations of “sewer service” (false claims of legal service) and massive “robo-signing” of fraudulent documents that are submitted to the court.⁴⁴ The hope was that an official online court process would address and improve some of the fraudulent service and document signing concerns. In addition to these benefits, an ODR system would also encourage debtors who do not have vacation days and could not afford to attend a court hearing, or who were intimidated by the prospect of appearing before a judge, to participate in the debt collection process.⁴⁵

Some of the same reasons for integrating an ODR process into the New York Unified State Court System apply when we consider whether an ODR process can improve access to justice for persons with disabilities. Persons with disabilities may have the same lack of vacation time, financial concerns, transportation challenges, and intimidation challenges facing credit card debtors and, in fact, many other types of civil justice defendants. Just as we must ensure that an ODR system has a literacy level appropriate for the vast majority of the population, we must ensure that any ODR system is digitally accessible for persons with disabilities. There are distinct aspects of an ODR system that require attention so that “everyone regardless of disability” will be able to fully participate.

- **Home Page:** The home page is the landing page—the user’s first interaction with the ODR system. It must be understandable and engaging. If any users cannot understand the first steps that must be taken, or if persons with disabilities immediately are confronted with inaccessible features, then users quickly may abandon the process and never return.

⁴³ *The Debt Collection Racket in New York*, NEW ECONOMY PROJECT 5 (June 2013), <https://www.neweconomy-nyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf>.

⁴⁴ *Id.* at 1.

⁴⁵ See David Allen Larson, *Designing and Implementing a State Court ODR System: From Disappointment to Celebration*, 2019 J. DISP. RESOL. 77 (2019), available at <http://ssrn.com/abstract=3399778>.

- **Dashboard:** The dashboard is the control center for an ODR platform; where information needed to understand the platform is organized and presented. Just as a driver cannot safely drive a car without understanding its dashboard, an ODR participant will not be able use the platform without understanding its dashboard. An inaccessible dashboard means the ODR system will fail.
- **Participants:** Accessibility is too often thought of only in terms of the end user—in our case, the parties to a dispute. But any system participant may need accessibility. Neutrals, court clerks, attorneys, or systems administrators may be disabled. Computer users with disabilities may be anywhere (and everywhere) in the process.
- **Authentication:** Security and confidentiality demand that each person on the ODR platform is the person that he or she claims to be, or is authorized to act on behalf of. Authentication is a critical issue when we use technology to resolve disputes. The process or procedures we use to confirm identity must be accessible. Alternative authentication processes must be available. An ODR system cannot rely only on items or documents that persons with disabilities may not possess, such as a driver's license.
- **Conferencing Platform:** Conferencing accessibility may be essential to an ODR system. Careful attention must be paid to ensure that everyone has an equal opportunity to participate in video or audio-only conferences. Key aspects of platform accessibility include:
 - Effective communications for deaf and hard of hearing participants, including captions and/or sign language interpreters. Video remote interpreting, if used, must be carefully monitored and follow best practices.⁴⁶
 - Audio description, for blind participants, to describe visual elements of any video content introduced during the conference.
 - Accessibility of the video conferencing platform itself. All functionality must be accessible, including chat windows, sign-in, volume control, and mutability.

⁴⁶ See *Remote Interpreting Guide for Courts and Court Staff*, NATIONAL CENTER FOR STATE COURTS (June 2014), <http://www.courts.ca.gov/documents/COS-VRILAP-MDS-080816-attachment-7.pdf>.

Specialized vendors are available to assist with ensuring accessible conferencing platforms.⁴⁷ Careful vetting for experience is critical and references should always be obtained.

- **Email:** As with all forms of communication that comprise ODR systems, email systems must be coded to accessibility standards and tested as per the best practices, such as those identified by Email Monks.⁴⁸
- **Chat Programs:** The ability of participants to share or provide information through a chat program must be accessible. (This may be either within or independent from the conferencing platform.)
- **Digital Signatures:** If parties are expected to sign documents as part of an ODR process, care must be taken to ensure that electronic signature software is usable by everyone. eSign Live, for example, enables blind and visually impaired signers to review and sign documents in accordance with WCAG 2.0 Level AA.⁴⁹
- **Electronic Documents:** Documents are essential to most legal processes, and ODR is no exception. If systems users and administrators can download documents, the downloading tool must be usable by all. The documents themselves must be readable by all participants. PDF/UA is the ISO standard for universal accessibility ensuring PDF documents are available to the largest audience of readers possible.⁵⁰ Documents generated in Word, Excel, and of course HTML can be made fully accessible—including all aspects of those documents such as complex data tables and other visual elements.⁵¹
- **Phone Systems:** As mentioned earlier, ODR processes may rely on web-based communications as well as older technologies such as telephones. All participants must be familiar with Telecommunication

⁴⁷ See, e.g., ZOOM, <https://zoom.us/accessibility> (last visited Nov. 6, 2018); BLUEJEANS, <https://www.bluejeans.com/accessible-online-video-conferencing-features> (last visited Nov. 6, 2018).

⁴⁸ See Kevin George, *Accessible Emails: How to Design and Code Them the Right Way*, EMAIL MONKS (Jan. 11, 2018), <https://emailmonks.com/blog/email-design/accessibility-in-emails/>.

⁴⁹ Harris Haidary, *eSignLive Release 11.2: Accessibility Support*, ESIGNLIVE (Mar. 7, 2008), <https://www.esignlive.com/blog/esignlive-release-11-12-accessibility-support>; see *ESRA Recommendation: The ADA and Electronic Signatures*, ELEC. SIGNATURE AND RECORDS ASS'N, <https://esignrecords.org/esra-recommendation-ada-electronic-signatures/> (last visited June 21, 2019).

⁵⁰ PDF/UA: *The ISO Standard for Universal Accessibility*, PDF ASS'N, <https://www.pdfa.org/pdfua-the-iso-standard-for-universal-accessibility/> (last visited June 21, 2019).

⁵¹ *Id.*

Relay Services (TRS)—federally established communication systems that allow deaf and hard of hearing people, as well as people with speech disabilities to place, receive, and participate in phone calls. As the US Federal Communications Commission states on its website: “If you hear, ‘Hello. This is the relay service . . .’ when you pick up the phone, please don’t hang up! You are about to talk, through a TRS provider, to a person who is deaf, hard-of-hearing, or has a speech disability.”⁵²

To allow deaf and hard of hearing individuals and people with speech disabilities calling via TRS to have full and equal participation in telephone discussions, all ODR participants must be mindful of the time lags that naturally result when spoken English is being translated into ASL or transcribed into English, and vice versa.

- **Architectural Accessibility:** When ODR mediations, arbitrations, or meetings are held in the physical environment, that environment must be accessible to people with physical disabilities. This not only means that the meeting room(s) must be wheelchair accessible, for example, but the restrooms must be also. If the meeting host (mediator, lawyer, etc.) does not typically operate in an accessible space, policies must be in place to hold the meeting, mediation, or arbitration in an accessible space.⁵³

The physical location, the documents, and the technology employed at that location must all be accessible. If a mediator, arbitrator, or other third-party neutral hands out a paper copy of a confidentiality statement, for example, or uses technology to summarize or illustrate progress that is being made during an in-person meeting, that information must be presented in an accessible manner.

Given the difficulty one often encounters when trying to locate and reserve a meeting place, this obviously should not be left to the last minute. Arrangements should be in place in advance.

- **Sign Language Interpreters and Other Communication Services:** It was previously explained that ODR systems often rely upon both online and offline communications. We already observed that it is crucial for digital conferencing platforms to be accessible for participants who are deaf or have hearing limitations. When meetings are held in a physical location as part of a primarily ODR process,

⁵² U.S. F.C.C., *Telecommunications Relay Service – TRS* (Sep. 8, 2017), <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>.

⁵³ See *A Planning Guide for Making Temporary Events Accessible to People with Disabilities*, ADA NATIONAL NETWORK (2015), <https://adata.org/publication/temporary-events-guide>.

disability accommodations also must be provided. Sign language interpreters or Real-Time Captioning, known as CART (Communication Access Real-time Translation), must be available to those who need it.⁵⁴

- **Alternative Formats for Paper Copies:** When ODR interactions occur in person, anything distributed in paper format must be made accessible to people who cannot read standard print. Alternatives to print (known as alternative formats) include braille, large print, and accessible electronic formats. The person needing the accommodation should be consulted to determine effective alternative formats.⁵⁵

IV. RELEVANT LAW

The Introduction already described the most recent developments concerning ADA Title III web accessibility litigation. A complete analysis of the legal foundation for accessible ODR platforms, systems, and content is beyond the scope of this Article. The following material provides examples of law and policy mandating accessibility around the world, of which ODR systems designers should be aware.

A. *International Efforts*

The United Nations Convention on the Rights of People with Disabilities (CRPD)⁵⁶ is a treaty ratified by more than 170 nations (although it has not been ratified by the United States) that includes obligations for digital accessibility. Among other things, Article 9 requires signatories to “promote access for persons with disabilities to new information and communications technologies and systems, including the Internet.”⁵⁷ Article 21 includes the obligation of “Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with

⁵⁴ See, e.g., QuickCaption, <http://www.quickcaption.com/all-services/asl/>.

⁵⁵ See generally June Kailes and Christie Mac Donald, *Providing Information in Alternative Formats*, HARRIS FAMILY CENTER FOR DISABILITY AND HEALTH POLICY, <https://hfdcphp.org/briefs/brief6a-alt-formats/> (last visited June 21, 2019).

⁵⁶ G.A. Res. 61/106, annex, United Nations Convention on the Rights of Persons with Disabilities (CRPD) (Jan. 24, 2007).

⁵⁷ *Id.* at Art. 9.

disabilities in official interactions.”⁵⁸ Finally, Article 13 ensures effective access to justice for persons with disabilities.⁵⁹

Governing bodies around the world increasingly are mandating that digital properties and content be accessible. The Web Accessibility Initiative of the World Wide Web Consortium (W3C) maintains a list of international accessibility laws and policies.⁶⁰

B. ADA Title III

In addition to the recent ADA Title III litigation and regulation developments discussed earlier, it is important to recognize that United States courts have determined that the Americans with Disabilities Act (ADA) applies to websites. The United States District Court for the Eastern District of New York, for example, could not have said it more clearly than it did in *Andrews v. Blick Art Materials, LLC* when it stated that “[i]t is unambiguous that under Title III of the ADA, dickblick.com [the retailer’s website] is a place of public accommodation.”⁶¹ *Andrews* relies in part on *National Federation of the Blind v. Scribd Inc.*, which held that Title III of the ADA covers the website of a company without any physical locations.⁶²

The *Andrews* opinion reveals that there is a disagreement among United States courts, however, as to whether a website must be affiliated with a physical location to be covered under ADA Title III.⁶³ In *Magee v. Coca-Cola Refreshments USA, Inc.*, the United States Court of Appeals for the Fifth Circuit notes that the First Circuit and Seventh Circuit have interpreted the words “public accommodation” in ADA Title III to extend beyond physical places.⁶⁴ In contrast, the Third, Sixth, and Ninth Circuits have determined that a physical location is a requirement for ADA Title III coverage.⁶⁵

I believe that the better view is that ADA Title III should cover all websites, whether or not they are affiliated with a physical location. As Americans continue to depend more frequently on websites to deliver services and goods, those websites increasingly will be perceived as “places.” In addition to our common understanding of what constitutes a “place,” we

⁵⁸ *Id.* at Art. 21.

⁵⁹ *Id.* at Art. 13.

⁶⁰ *Web Accessibility Laws & Policies*, WORLD WIDE WEB CONSORTIUM (Mar. 21, 2018), <https://www.w3.org/WAI/policies/>.

⁶¹ *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D. N.Y. 2017).

⁶² *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015).

⁶³ *Id.* at 388–394.

⁶⁴ *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 n.23, (5th Cir. 2016).

⁶⁵ *Id.*

cannot forget that the ADA is a remedial statute that must be given a broad interpretation.⁶⁶

The *Andrews* court provided additional reasons as to why a physical location is not a prerequisite. The court observed that Title III is called “Public Accommodations and Services Operated by Private Entities,” not “Places of Public Accommodation and Services Operated by Private Entities.”⁶⁷ Additionally, the title of section 42 U.S.C. § 12182, which prohibits discrimination, is “Prohibition of Discrimination by Public Accommodations,” not “Prohibition of Discrimination by or in Places of Public Accommodation.”⁶⁸ Furthermore, the categories of private entities covered by 42 U.S.C. § 12181(7) are listed under “Public accommodation,” not “Places of public accommodation.”⁶⁹ On the one hand, when ADA Title III describes the public accommodations covered by the law, it uses a variety of words, including “place,” “office,” and “establishment.”⁷⁰ On the other hand, when describing the entities that sell goods and provide services to the public, the statute never uses the word “place,” making it evident that it covers every “sales or rental establishment” and “service establishment.”⁷¹ Although the statute defines “public accommodation,” it never defines “place” nor “place of public accommodation.” This difference indicates that the word “place” was not intended to limit the statute’s reach, but “that Congress likely used the word ‘place’ because there was no other less cumbersome way to describe businesses that offer those particular goods or services to the public.”⁷²

As convincing as that may sound, as President Donald Trump continues to appoint new federal judges who are more conservative, those judges may adopt a narrow version of the ADA Title III “public accommodations” definition and decide that a website must be affiliated with a physical location.

National Federation of the Blind summarizes the argument as to why the term “public accommodations” must require a physical location:

[T]he canons of *noscitur a sociis* and *ejusdem generis* compel the Court to conclude that

⁶⁶ Noel v. New York City Taxi & Limousine Comm’n, 687 F.3d 63, 68 (2d Cir. 2012).

⁶⁷ *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017) (citing 42 U.S.C. subch. III).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (citing 42 U.S.C. § 12181(7)(E)–(F)).

⁷² *Id.* (citing Nat’l Fed’n of the Blind, 97 F. Supp. 3d at 572).

Congress did not intend to cover businesses unconnected to any physical space open to the public under Title III. The former doctrine permits the meaning of doubtful terms and phrases to be determined by reference to other associated phrases. The latter suggests that where general words are accompanied by a specific enumeration of persons or things, the general words should be limited to the persons or things similar to those specifically enumerated. . . . [B]ecause all of the specific examples in the statute operate at concrete physical locations open to the public, the statute must be construed to apply only to such places.⁷³

C. WCAG

While specific digital accessibility regulations have not yet been incorporated into the Americans with Disabilities Act, the Web Content Accessibility Guidelines (WCAG) 2.0 and 2.1⁷⁴ offer detailed information that can help online dispute resolvers adhere to ADA obligations.⁷⁵ At one point there was a possibility that the WCAG would be adopted as regulatory standards. As *Gathers v. 1-800-Flowers.com, Inc.*⁷⁶ explains, in 2010 the Department of Justice published an Advanced Notice of Proposed Rulemaking to revise the regulations implementing Title III.⁷⁷ In that Advanced Notice of Proposed Rulemaking, the DOJ requested public comment on whether and how the agency should adopt the WCAG as its standard for website accessibility for Title II and III entities.⁷⁸ No rule or regulation was ever adopted as a result of the Advanced Notice of Proposed Rulemaking, and in 2015, the DOJ announced that it would pursue separate rulemakings

⁷³ *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572 (D. Vt. 2015) (citing *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008)).

⁷⁴ *Web Content Accessibility Guidelines (WCAG) 2.0 Level AA*, WORLD WIDE WEB CONSORTIUM (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/>.

⁷⁵ *See Markett v. Five Guys Enter's. LLC*, No. 17-cv-788 (KBF), 2017 WL 5054568 (S.D.N.Y. 2017).

⁷⁶ *Gathers v. 1-800-Flowers.com, Inc.*, No. 17-cv-10273-IT, 2018 WL 839381, at *2 n.3 (D. Mass. 2018).

⁷⁷ 75 Fed. Reg. 142, 43460 (July 26, 2010).

⁷⁸ 75 Fed. Reg. 142, 43465 (July 26, 2010).

addressing web accessibility for websites falling under Title II and Title III.⁷⁹ DOJ added that it planned to address rulemaking for Title II first.⁸⁰ Today, there still are not any rules for Title III, because in 2016 the DOJ withdrew the Advanced Notice of Proposed Rulemaking and issued a Supplemental Advanced Notice of Proposed Rulemaking seeking input only regarding websites of entities covered by Title II.⁸¹

The United States District Court for the Southern District of New York did, however, refer to the WCAG standards when it denied a motion to dismiss and stated, “Plaintiff has identified steps that defendant can take to ensure equal access to its website by the blind, such as by using the Web Content Accessibility Guidelines 2.0.”⁸² And the DOJ has, at least twice, required entities subject to Title III to adopt measures to ensure that their websites and mobile applications conform to, at a minimum, certain WCAG 2.0 success criteria.⁸³ But in *Robles v. Domino’s Pizza LLC*, the court noted that in one settlement, the DOJ required the defendants to fashion their website and mobile applications to conform with WCAG 2.0 Level AA Success Criteria, and in the other settlement the DOJ obligated the defendants to instead comply with WCAG 2.0 Level AA or Level A Success Criteria.⁸⁴

The plaintiff in *Robles* claimed that Domino’s website and mobile app did not support screen-reading software and that he and other visually impaired individuals could not customize their pizza toppings, browse, shop, or complete a purchase.⁸⁵ Dismissing the plaintiff’s cause of action without prejudice, the court explained that the two cited examples highlighted, rather than dispelled, the vagueness concern asserted by defendant and demonstrated why a lack of formal guidance in this complex regulatory arena places those subject to Title III in the precarious position of having to speculate which accessibility criteria their websites and mobile applications must meet.⁸⁶ Obviously frustrated with the lack of guidance and the consequent need to dismiss the case, the court called on Congress, the Attorney General, and the DOJ to take action to set minimum web accessibility standards for the benefit of the disabled community, those subject to Title III, and the judiciary. Confronted with the same lack of guidance, other courts may feel constrained

⁷⁹ *Gathers*, 2018 WL 839381, at *2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Markett*, 2017 WL 5054568, at *2.

⁸³ *Robles v. Domino’s Pizza LLC*, No. CV 16–06599 SJO (SPx), 2017 WL 1330216, at *7 (C.D. Cal. Aug. 1, 2017).

⁸⁴ *Id.*

⁸⁵ Complaint at 11, para. 34, *Domino’s Pizza*, 2017 WL 1330216, available at <https://www.courthousenews.com/wp-content/uploads/2019/01/Dominos-Lawsuit.pdf>

⁸⁶ *Id.*

to reach the same conclusion. A September 25, 2018 letter from the Office of Legislative Affairs appears to support the position that courts should not adopt privately promulgated standards in the absence of action by the DOJ, but one must keep in mind that at this point it is only a letter.

Significantly, in January 2019, a three-judge panel of the United States Court of Appeals for the Ninth Circuit rejected the District Court's conclusion that Domino's due process rights were violated because the DOJ had not issued online accessibility standards or provided technical assistance to implement those standards. It instead declared that, "[T]he Constitution only requires that Domino's receive fair notice of its legal duties, not a blueprint for compliance with its statutory obligations."⁸⁷ The court stated the DOJ's position that the ADA applies to websites is clear, and that it "does not matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments."⁸⁸ The absence of specific guidance is not problematic "because the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process."⁸⁹ The court added that its precedent clearly states an absence of specific regulations cannot eliminate statutory obligations.⁹⁰ The case was remanded to the district court to determine "whether Domino's website and app provide the blind with effective communication and full and equal enjoyment of its products and services as the ADA mandates."⁹¹

D. *Section 508 of the Rehabilitation Act*

Section 508 of the Rehabilitation Act of 1973 requires that all United States government technology purchases be accessible.⁹² Individual states in the U.S. may have similar procurement statutes. Government purchases of ODR systems, including purchases by court systems, will only increase in the coming years.

⁸⁷ Robles v. Domino's Pizza LLC, 913 F.3d 898, 908 (9th Cir. 2019).

⁸⁸ *Id.* (citing Reed v. CVS Pharmacy Inc, No. CV 17-3877-MWF (SKx), 2017 WL 4457508, at *5).

⁸⁹ *Id.*

⁹⁰ *Domino's Pizza*, 913 F.3d at 909 (citing *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014)).

⁹¹ *Id.* at 911.

⁹² 29 U.S.C. § 794d(a)(1)(A) (2000).

V. BEST PRACTICES FOR DIGITAL ACCESSIBILITY IN ODR

The Americans with Disabilities Act requires websites and ODR systems to be accessible. The following practices will help to make certain ODR systems are accessible:

- **Adopt an Accessibility Standard:** The international standard for web, mobile, and document accessibility is the Web Content Accessibility Guide (WCAG) 2.0 Level AA and 2.1, which both offer the most complete and specific guidance for an ODR system.⁹³ System authoring tools must also be accessible. The Web Accessibility Initiative's authoring tools address this important component of ODR systems.⁹⁴

The Web Accessibility Initiative – Accessible Rich Internet Applications (WAI-ARIA) was built by W3C to support javascript generated HTML with semantic meanings to improve the user's experience by, for instance, enabling a button to declare that it will launch a pop-up when pressed.⁹⁵

- **Read and Comply with ODR Principles and Standards:** Although ODR is still in its early stages, significant work is already being done to ensure that ODR increases access to justice for everyone. Much of the attention has focused on differences in power and sophistication that may exist between the disputing parties. Understanding and addressing these concerns will protect everyone, including persons with disabilities.

The International Council for Online Dispute Resolution (ICODR), building on The National Center for Technology and Dispute Resolution's "Principles for ODR Practice," has identified Ethical Standards for ODR.⁹⁶ Many of these Standards provide support for digital accessibility design features. ICODR believes that quality ODR programs must be:

⁹³ See *Web Content Accessibility Guidelines (WCAG) 2.0 Level AA*, WORLD WIDE WEB CONSORTIUM (Dec. 11, 2008), <https://www.w3.org/TR/WCAG20/>.

⁹⁴ *Authoring Tool Accessibility Guidelines (ATAG) Overview*, WORLD WIDE WEB CONSORTIUM WEB ACCESSIBILITY INITIATIVE (Sep. 24, 2015), <https://www.w3.org/WAI/standards-guidelines/ataag/>.

⁹⁵ Jack Merideth, *Web Accessibility AKA a11y, and Why It's not Enough to Say "ADA Compliant"*, CALLIBRITY (Jan. 25, 2019), <https://www.callibrity.com/blog/web-accessibility-why-its-not-enough>. Merideth explains that it is preferred to use semantic HTML tagging (eg: <h1>, <table>) when available, as defined in the very first rule of using ARIA. *Id.*

⁹⁶ ICODR STANDARDS (INT'L COUNCIL FOR ONLINE DISPUTE RESOLUTION 2011).

DIGITAL ACCESSIBILITY

- **Accessible:** ODR must be easy for parties to find and participate in and not limit their right to representation. ODR should be available through both mobile and desktop channels, minimize costs to participants, and be easily accessed by people with different physical ability levels. (I recommend that the term “accessible” as traditionally used in the ODR field be expanded to include digital accessibility for disabled people.)
- **Accountable:** ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve.
- **Competent:** ODR providers must have the relevant expertise in dispute resolution, law, technical execution, language, and culture required to deliver competent, effective services in their target areas. ODR services must be timely and use participant time efficiently.
- **Confidential:** ODR must maintain the confidentiality of party communications but also must be transparent regarding (1) who will see what data, and (2) how that data can be used. (I would add that “there cannot be confidentiality for people with disabilities without accessibility.”)
- **Equal:** ODR must treat all participants with respect and dignity. ODR should enable often silenced or marginalized voices to be heard and ensure that offline privileges and disadvantages are not replicated in the ODR process.
- **Fair/Impartial/Neutral:** ODR must treat all parties equally and in line with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of commencement of ODR services.
- **Legal:** ODR must abide by and uphold the laws in all relevant jurisdictions. (This, of course, includes laws relating to accessibility and non-discrimination.)
- **Secure:** ODR providers must ensure that data collected and communications between those engaged in ODR is not shared with any unauthorized parties. Users must be informed of any breaches in a timely manner.
- **Transparent:** ODR providers must explicitly disclose in advance (1) the form and enforceability of dispute resolution processes and outcomes, and (2) the risks and benefits of participation. Data in ODR must be gathered, managed, and

presented in ways that ensure it is not misrepresented or out of context.

- **Designate a Digital Accessibility Coordinator:** Assign someone responsibility for accessibility and think carefully about where they are placed in the management structure. This individual must have the capacity to reach—and be readily available to—all the different departments and geographic locations in the enterprise. To achieve the best possible outcome and move beyond compliance, think broadly and avoid automatic placement in the legal or risk department.
- **Include accessibility in all requests for proposals involving digital content and technology:** The Americans with Disabilities Act prohibits discrimination “directly, or through contractual, licensing, or other arrangements.”⁹⁷ In the context of the digital world, this means making certain all vendors understand accessibility. A simple request that technology vendors “comply with applicable law” is not enough. Organizations must specify accessibility standards in every request for proposals (RFP) and require testing by disabled people before product delivery. Identify roadmaps or strategic plans for accomplishing accessibility goals before implementing any proposals.⁹⁸
- **Include Accessibility in All Technology Contracts:** Once a contract is awarded, accessibility requirements must be described with specificity. Consider the level of detail demanded with security and privacy requirements and use that same high standard with accessibility. In *Gil v. Winn-Dixie Stores, Inc.*, (currently on appeal and stayed pending a bankruptcy filing), the judge found:

[T]he fact that third party vendors operate certain parts of the Winn-Dixie website is not a legal impediment to Winn-Dixie’s obligation to make its website accessible to the disabled. First, many, if not most, of the third-party vendors may already be accessible to the disabled and, if not, Winn-Dixie has a legal obligation to require them

⁹⁷ 42 U.S.C. § 12182(b).

⁹⁸ *E.g., 2016 Roadmap to Web Accessibility in Higher Education*, 3PLAYMEDIA (2016), available at <https://uwm.edu/adaaac/wp-content/uploads/sites/374/2016/08/2016-Roadmap.pdf>.

to be accessible if they choose to operate within the Winn-Dixie website.⁹⁹

- **Train Staff (and Maintain Training):** Training staff about digital accessibility is not only about educating coders, designers, and content writers about accessibility standards and accessible design principles. Individuals who design, manage, and maintain ODR systems must understand how persons with disabilities use computers and other digital devices. They must also know how to direct issues to the appropriate person. In her book, *Structured Negotiation, A Winning Alternative to Lawsuits*, Lainey Feingold shares stories about a common problem that leads to structured negotiations and lawsuits: consumers receiving poor customer service from untrained staff. Not surprisingly, staff training was an element of the *Winn-Dixie* court-ordered injunction.¹⁰⁰
- **Test Your Website:** Use available tools to test for accessibility. WAVE,¹⁰¹ for example, is a helpful web accessibility evaluation tool developed by WebAIM.org that provides visual feedback about accessibility by inserting icons and indicators into your webpage. Because the analysis is done entirely within the Chrome browser, valuation of intranet, local, password protected, and other sensitive webpages is secure.¹⁰² Colorblinding¹⁰³ simulates the website as a color vision impaired person would see it. This Chrome extension can simulate Red-Blind/Protanopia, Green-Blind/Deuteranopia, Blue-Blind/Tritanopia, Red-Weak/Protanomaly, Green-Weak/Deuteranomaly, Blue-Weak/Tritanomaly, Monochromacy/Achromatopsia, and Blue Cone Monochromacy.¹⁰⁴

⁹⁹ *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1346 (S.D. Fla. 2017); see also Lainey Feingold & Eve Hill, *Technology Vendor Contracts and Accessibility: What Every Business Lawyer Should Know*, BUSINESS LAW TODAY (April 19, 2018), <https://businesslawtoday.org/2018/04/technology-vendor-contracts-accessibility-every-business-lawyer-know/>.

¹⁰⁰ *Winn-Dixie Stores*, 257 F. Supp. 3d at 1351.

¹⁰¹ “WAVE Evaluation Tool,” *Chrome Web Store*, CHROME (search performed June 21, 2019), <https://chrome.google.com/webstore/detail/wave-evaluation-tool/jbbplnpkjmeebjpifedlgcdilcofh?hl=en-US>.

¹⁰² *Id.*

¹⁰³ “Colorblinding,” *Chrome Web Store*, CHROME (search performed June 21, 2019), <https://chrome.google.com/webstore/detail/colorblinding/dgbgleaofjainknadoffbjkclclbbgaa?hl=en-US>.

¹⁰⁴ *Id.*

Freedom Scientific's Access with Speech (JAWS)¹⁰⁵ can be used to test website accessibility.

- **Adopt Testing Protocols that Include Disabled People:** Ongoing testing is critical to make certain accessibility is maintained. Automated tools can provide useful data but should never be used alone—human input is critical to any testing program. Additionally, testing by individuals with disabilities must be a regular aspect of a digital accessibility testing program.
- **Hire a Consultant when Needed:** Public and private entities must treat accessibility as they would any other aspect of their organization. If in-house expertise is lacking, hire someone to help. Always interview at least two or three potential consultants and check their references. It may be necessary to hire more than one individual depending on your specific needs.
- **Have an Easy-to-Find Accessibility Information Page Linked to Every ODR Page:** An Accessibility Information Page (AIP), also known as an Accessibility Statement, demonstrates an organization's commitment to accessibility. It gives persons with disabilities who encounter a problem a way to address that problem within the organization rather than calling a lawyer or simply being excluded from participation. The European Union Web and Mobile Accessibility Directive requires public sector bodies to publish Accessibility Statements.¹⁰⁶ The UK has recently published requirements for what is needed in the statement.¹⁰⁷

Among other things, the page(s) should clearly state the organization's digital accessibility policies and services and include both a phone number and email address (or a simple and accessible form) for a site visitor to report a problem or get help. Most importantly, the person on the receiving end of the phone call or email must be prompt and responsive. Examples of Accessibility Statements

¹⁰⁵ JAWS, FREEDOM SCIENTIFIC, <http://www.freedomscientific.com/Products/software/JAWS/> (last visited June 21, 2019). Jack Merideth suggests using WAVE, Colorblinding, and JAWS. Merideth, *supra* note 95.

¹⁰⁶ Council Directive 2016/2102, art. 7, 2016 O.J. (L 327) 1 (EC).

¹⁰⁷ *Consultation Information and Questions*, U.K.'S GOV'T DIG. SERV. (Sep. 11, 2018), <https://www.gov.uk/government/consultations/accessibility-of-public-sector-websites-and-apps-new-duties-and-regulations/consultation-information-and-questions#what-organisations-will-have-to-do-to-comply-with-the-directive>.

in public, private, and academic settings can help ODR providers compose pages.¹⁰⁸

- **Put Accessibility Enhancements in Release Notes:** ODR providers can let the public know of their accessibility commitment by including enhancements in standard release notes. In a 2016 settlement agreement reached through a structured negotiation, E*Trade agreed to “include information about accessibility improvements, as applicable, in the release notes for new E*Trade Mobile App releases.”¹⁰⁹
- **Make Accessibility Part of Appropriate Job Descriptions and Evaluations:** If someone’s job includes accessibility responsibility, accessibility should be included in that person’s job description and evaluations. This raises consciousness concerning disability and demonstrates to employees that accessibility is an important aspect of their work. If employees understand that accessibility is a component of their job performance evaluations, they will be motivated to identify and remedy problems before they become legal issues.
- **Evaluate Systems:** Digital accessibility concerns go beyond websites and mobile applications. Every stage of an ODR system can raise disability concerns because a person with a disability may be the next ODR disputant, mediator, lawyer, judge, or court or company personnel. Emails often contain accessibility barriers and are overlooked when thinking about website access. Digital services, including services increasingly being offered in courthouses and government agencies (that may soon include ODR systems), are typically part of stand-alone kiosks—kiosks that must be accessible.¹¹⁰

Different teams may be responsible for different digital aspects of an ODR system, but a holistic approach to accessibility saves money, leverages resources, and ensures that the public is not inadvertently left out of any aspect of the dispute resolution process.

¹⁰⁸ See Lainey Feingold, *Accessibility Information Pages Show Commitment to All Site Users*, LAW OFFICE OF LAINEY FEINGOLD (Feb. 12, 2013), <https://www.lflegal.com/2013/02/access-info-pages/>.

¹⁰⁹ *E*Trade Digital Accessibility Settlement Agreement*, LAW OFFICE OF LAINEY FEINGOLD (June 21, 2016), <https://www.lflegal.com/2016/06/etrade-agreement/#notes>.

¹¹⁰ See *ADA and Accessible Kiosks: Navigating Accessibility in a Touch Screen World*, MID-ATLANTIC ADA CTR. (June 19, 2018), <http://www.adainfo.org/training/accessible-kiosks>.

- **Study and Compare Other Plans:** Reviewing plans from other institutions can be helpful and informative.¹¹¹

The goal of these best practices is to create a culture where accessibility becomes an inherent part of all ODR systems. As each new type of technology or information is introduced in the ODR community, accessibility must be present from the beginning, as an integral way of doing business and providing both private and government services.

When accessibility is an afterthought, it is far more expensive and can create frustration and non-participation by ODR stakeholders. The ODR community must embrace disability accommodations and digital accessibility. Not as compliance checklists, but as a fundamental aspect of how ODR systems are designed and implemented around the world.

¹¹¹ E.g., *Accessibility at PPCC*, PIKES PEAK COMMUNITY COLLEGE, available at <https://www.ppcc.edu/accessibility-at-ppcc>, (last visited June 11, 2019).

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