Lessons from *Sunderland* and *Silva*

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This spring, the Eleventh Circuit Court of Appeals issued two opinions addressing the quality and effectiveness of communications that hospitals must provide to patients who are deaf: *Sunderland v. Bethesda Hospital, Incorporated*[1] and *Silva v. Baptist Health South Florida, Incorporated.*[2] In both cases, deaf patients alleged that certain hospitals denied them equal access to hospital services in violation of Title III of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"). In each case, the district court granted summary judgment to the hospitals. The Eleventh Circuit subsequently reversed the lower courts, allowing several of the plaintiff patients to proceed to trial. The court's consideration of these two cases within the span of a month is noteworthy. It is emblematic of the shifting legal landscape for disability discrimination issues—a shift that is spurred by more persons with sensory disabilities bringing claims over alleged denial of their rights, along with rapid changes in assistive technology being relied on by healthcare providers.

Sunderland and *Silva* were prompted by the hospitals' use of Video Remote Interpreting ("VRI") to communicate with the deaf patients as opposed to in-person sign language interpreters. VRI technology allows patients and medical providers to videoconference with a remotely located sign language interpreter. VRI often saves time and money by reducing the need for an in-person interpreter. But healthcare providers using VRI technology have occasionally encountered technical issues that compromise communications with patients. Unreliable internet connections, insufficient bandwidth, fuzzy imaging, and user error can stymie the effectiveness of VRI. In both *Sunderland* and *Silva*, VRI failures and hospitals' refusal to either correct or acknowledge (and remedy with effective communications alternatives) the failures resulted in ineffective communications with patients.[3]

Sunderland and *Silva* offer important lessons to healthcare providers in the Eleventh Circuit and beyond about their responsibilities under the ADA and Section 504.

Lesson 1: Know Your Technology

Healthcare providers must understand the limits of their technology and determine, before relying on it to provide effective communication with patients, when and where their assistive technology will and will not work. Are there rooms or large areas in the facility where the internet connectivity is unreliable or of insufficient speed and bandwidth? Will a patient's cell phone or other electronic signals interact with medical equipment? Is the technology incompatible with a certain group of patients? (In *Sunderland,* for example, patients with vision

[1] No. 16-10980, 2017 WL 1505306 (11th Cir. Apr. 27, 2017).
[2] 856 F.3d 824 (11th Cir. 2017).
[3] Although this article discusses effective communication with patients who are deaf, the substance of the article holds true for a healthcare provider's communications with deaf companions and deaf close family members of patients (who may or may not be deaf).

impairments struggled with VRI technology.) Answering these and similar questions will ensure smooth delivery of medical services and reduce a provider's exposure to liability.

In *Sunderland*, some patients experienced a blurry VRI picture, with interruptions or freezing of the streaming video. The *Silva* patients also experienced a frozen or degraded picture. These interferences undermined the patients' abilities to view and access the video interpreter, and the Eleventh Circuit in both cases found that the interferences denied patients effective communication. The court further concluded that, because evidence suggested that the hospital staff were aware of this denial but did not act, the hospitals could be liable to the patients for monetary damages under a deliberate-indifference theory. These findings highlight an important takeaway for healthcare providers: a patient alleging discrimination based on a failure to provide appropriate accommodations need only show: (1) a denial of effective communication, and (2) a hospital's deliberate indifference towards the denial. Healthcare providers, then, should know their technology. Knowledge about when and where technology will and will not work will allow a provider to limit breakdowns in effective communication, thereby reducing liability.

Lesson 2: Listen to Your Patients

The ADA requires places of public accommodation to provide auxiliary aids and services to ensure effective communication with persons with sensory disabilities such as blindness or deafness.[4] The Eleventh Circuit has held that providers must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in" the service in question.[5] "[T]he proper inquiry is whether the auxiliary aid that a hospital provided to its hearing-impaired patient gave that patient an *equal opportunity to benefit from the hospital's treatment*."[6] To be ineffective communication, it is sufficient if the patient experiences a real hindrance, because of her disability, which affects her ability to exchange material medical information with her health care providers.[7] It is therefore not sufficient for a healthcare provider to evaluate the effectiveness of the communication with a deaf patient from the point of view of the provider; the communication must be effective from the point of view of the patient as well.

Sunderland and *Silva* caution healthcare providers not to disregard the protestations of deaf patients, deaf companions, or deaf family members when they indicate that they are not able to effectively communicate with caregivers, regardless of the communication aid being provided.

Lesson 3: Prepare Your Employees

Healthcare providers must prepare their employees who are on the frontlines—the employees who are responding to requests for accommodations. Providers should ask themselves: Have our employees been appropriately trained about the various accommodations available for deaf patients, including when and how to implement them? Do employees have

[4] 28 C.F.R. § 36.303(c)(1).
[5] *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1147 (11th Cir. 2014).
[6] *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 343 (11th Cir. 2012) (emphasis added).
[7] *Silva*, 856 F.3d at 835.

clear criteria for when to approve a request for an accommodation? Are employees aware of and consistently following the official accommodation policy? Do employees have a point person when technological issues arise? When technology-based means of providing communications are not working optimally, rather than a total failure, is there a person who can approve and implement an alternative auxiliary aid or service without undue delay?

Healthcare providers often appoint a "gatekeeper" for assistive technology. In *Sunderland*, the hospital assigned nurses this role. The nurses would assess patients' requests for an interpreter or other accommodative device. The nurses would also continually evaluate whether an accommodation was adequate, and they could deny a patient access to a different accommodation if they found the accommodation unnecessary. Yet the nurses often failed to properly respond to issues with VRI technology, thereby exposing the hospitals to liability. To avoid similar exposure, healthcare providers should be sure that whoever is delegated the "gatekeeper" role is well-trained in the use of assistive technology, the availability of alternatives, and the issues and current mandates of the law regarding providing effective communication.

Lesson 4: Stay Current with Your Legal Team

People who have sensory-affecting disabilities are more frequently and effectively asserting their rights to equal treatment and equal opportunity to participate in and benefit from the services of healthcare providers. The availability of effective communication is most frequently raised. Assistive technology is rapidly changing, and as demonstrated by *Sunderland* and *Silva*, courts considering these issues under the ADA and Section 504 are not simply giving a pass to healthcare providers who try to implement technological advances. To ensure that their accommodation policies are keeping up with this shifting landscape, healthcare providers should: (1) understand the benefits and, more importantly, the limitations of accommodating technology, (2) regularly seek review of their policies with their legal teams, and (3) ensure their legal team is keeping them apprised of the current state of the law regarding assistive technologies, including new technology as it becomes available.