



Welcome to the ADA Legal Webinar Series



A collaborative program between the
Southwest ADA Center and Great Lakes ADA Center, members of the ADA National Network

The Session is Scheduled to begin at 2:00pm Eastern Time
We will be testing sound quality periodically

Audio and Visual are provided through the on-line webinar system. This session is closed captioned. Individuals may also listen via telephone by dialing
1-712-432-3066 Access code 148937 (This is **not** a Toll Free number)

The content and materials of this training are property of the presenters and sponsors and cannot be used without permission. For permission to use training content or obtain copies of materials used as part of this program please contact us by email at webinars@ada-audio.org or toll free (877)232-1990 (V/TTY)

Listening to the Webinar



- The audio for today's webinar is being broadcast through your computer. Please make sure your speakers are turned on or your headphones are plugged in.
- You can control the audio broadcast via the Audio & Video panel. You can adjust the sound by "sliding" the sound bar left or right.
- If you are having sound quality problems check your audio controls by going through the Audio Wizard which is accessed by selecting the microphone icon on the Audio & Video panel



Listening to the Webinar, *continued*



If you do not have sound capabilities on your computer or prefer to listen by phone, dial:

712-432-3066


Pass Code:
148937

This is **not** a Toll Free number

3

Captioning



- Real-time captioning is provided during this webinar.
- The caption screen can be accessed by choosing the  icon in the Audio & Video panel.



- Once selected you will have the option to resize the captioning window, change the font size and save the transcript.

5

Submitting Questions



- You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area
- If you are connected via a mobile device you may submit questions in the chat area within the App
- If you are listening by phone and not logged in to the webinar, you may ask questions by emailing them to webinars@ada-audio.org



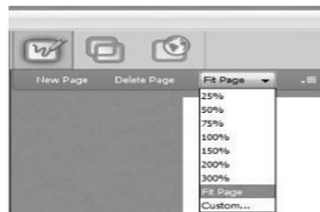
Please note: This webinar is being recorded and can be accessed on the www.ada-audio.org within 24 hours after the conclusion of the session.

6

Customize Your View




- Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is “fit page”



7

Customize Your View *continued*



- Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or “stretch/shrink”. Each panel may be detached using the  icon in the upper right corner of each panel.

8

Technical Assistance



- If you experience any technical difficulties during the webinar:
 1. Send a private chat message to the host by double clicking “Great Lakes ADA” in the participant list. A tab titled “Great Lakes ADA” will appear in the chat panel. Type your comment in the text box and “enter” (Keyboard - F6, Arrow up or down to locate “Great Lakes ADA” and select to send a message); or
 2. Email webinars@ada-audio.org; or
 3. Call 877-232-1990 (V/TTY)

9

Websites and the ADA: Accessibility in the Digital Age

Presented by:

Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality
Rachel Weisberg, Staff Attorney, Equip for Equality

Valuable assistance provided by:

Kathleen Kinsella, Legal Intern, Equip for Equality

September 22, 2014



9

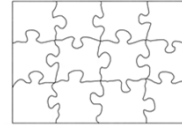
Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA Center at: 312-413-1407 or www.adagreatlakes.com
- This slide will be repeated at the end.

10

Outline of Today's Webinar



- Background/Introduction to Issue of Website Accessibility
- ADA: Title III
 - Definition of Place of Public Accommodation
 - Precedents Establishing Framework for Website Access Cases
 - Websites as Places of Public Accommodation
 - Settlement Agreements
- ADA: Title II
 - Case law and Settlement Agreements
 - Industry-Specific Settlement Agreements Under Titles II/III
- ADA: Title I
- Other Laws, including Rehab Act
- Technical Standards and Resources

11

Broad Language in ADA No Reference to the Internet or Websites



- Goals of the ADA: “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”
 - 42 U.S.C. § 12101(b)(1) (2014)
- Broad anti-discrimination requirements: Prohibits discrimination in employment, state and local governments, places of public accommodation, and telecommunications
- ADA/regulations: No reference to the Internet, or to websites
- Surprising?

12

Why Internet Accessibility Matters to People with Disabilities

- The Internet has completely altered the way most people live their lives. Some examples:
 - Businesses – Comparing prices and ordering goods online
 - Government – Applying for government benefits, renewing identification, filing taxes
 - Colleges and universities – Registering for classes
 - Health care – Sharing medical information and test results
 - Educating yourself – Participating in this Webinar!
- DOJ has called the Internet “the ubiquitous infrastructure for information and commerce.” <http://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf> (Advanced Notice of Proposed Rulemaking)

13

A Primer on Website Accessibility



- **Disclaimer:** This Legal Brief does not provide technical guidance on how to make an accessible website
- Info about technical standards, and technical assistance can be found at the end of this presentation
- Still – here are some examples of virtual barriers:
 - Conveying content visually through a graphic, image or chart without labeling with “alternative text”
 - Color coding content
 - Content that cannot be adjusted by font, size, or color contrast
 - Audio information without captioning
 - Requiring use of a mouse without keyboard alternatives
 - Flashing visual content that can trigger seizures

14

Legal Issue: Must Websites Be Accessible?



- **Statute:** No mention of websites/Internet
- **Courts:** Differing opinions over the past 20 years
- **DOJ non-regulatory guidance (amicus briefs, statements of interest, settlement agreements):** ADA requires web entities to be accessible
- **DOJ regulations:**
 - 2010: Published Advanced Notice of Proposed Rulemaking
 - 2014/2015: Plans to publish Notice of Proposed Rulemaking
 - <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=1190-AA65> (Title II-August 2014)
 - <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=1190-AA61> (Title III-March 2015)

15

Title III: Places of Public Accommodation

- Most cases about the ADA/websites arise under Title III
- Most Title III/website cases turn on whether the website is a place of public accommodation
- “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of **any place of public accommodation** by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a)
- **Question** = What is a place of public accommodation?

16

Definition of “Public Accommodation”

- ADA/Regulations define “public accommodation” by providing twelve categories of entities that are “considered public accommodations,” so long as they “affect commerce.”
- Examples (4 of 12 categories) - 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104
 - a restaurant, bar, or other establishment serving food or drink
 - a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment
 - a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment
 - a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

17

Precedents That Shaped The Law on Website Access



- **Insurance cases:** Litigants sued insurance companies, alleging that the companies’ policies violate the ADA
 - Courts asked: Are insurance policies places of public accommodation? If not, are they covered by Title III?
 - Some courts held that Title III applied to conduct that occurred outside of a place of public accommodation
 - Other courts held that Title III applied only to physical places of public accommodation and did not regulate conduct that occurred outside of the physical structure, unless there was a nexus to a place of public accommodation
 - Cases establish legal framework for ADA website accessibility cases

18

Cases: Title III Applies to Conduct Outside of Physical Place of Public Accommodation

Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Association of New England, Inc.

37 F.3d 12 (1st Cir. 1994)

- **1st Cir: Title III applied to an insurance policy**
 - Examples listed in twelve categories are “illustrative”
 - No express requirement for a physical structure
 - By including “travel service” as an example, Congress intended Title III to include entities that do not require a person to physically enter “an actual physical structure”
- “It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”

19

Cases: Title III Applies to Conduct Outside of Physical Place of Public Accommodation

Carparts continued...

- Excluding broad class of businesses would “run afoul” of the ADA
- **Note:** Insurance company had a brick-and-mortar establishment but did not state expressly that a service offered off-site required a nexus to such establishment

Doe v. Mutual of Omaha Ins. Co.

179 F.3d 557 (7th Cir. 1999)

- **7th Cir:** The “core meaning” of Title III is that the owner or operator of a “store, hotel, restaurant, *Web site*, or other facility (whether in physical space or in *electronic space*) . . . that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.”

20

Cases: Title III Requires a Nexus Between Discrimination and Physical Structure

Weyer v. Twentieth Century Fox Film Corp

198 F.3d 1104 (9th Cir. 2000)

- **9th Cir:** Places of public accommodation are “actual, physical places where goods or services are open to the public, and places where the public gets those goods and services.”
 - Each example is a physical place
 - Must have connection between discrimination and actual, physical place

Similar holdings:

- ***Parker v. Metro. Life Ins. Co.***, 121 F.3d 1006 (6th Cir. 1997)
- ***Ford v. Schering-Plough Corp.***, 145 F.3d 601 (3d Cir. 1998)

Courts found no nexus between policies and physical place

21

Case: Goods/Services OF a Place of Public Accommodation

Pallozzi v. Allstate Life Ins. Co.

198 F.3d 28 (2d Cir. 1999)

- **2nd Cir:** Title III requires the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations **of** any place of public accommodation.”
 - The word **of** is distinct from the word **in**
 - Title III could apply to the sale of insurance policies, even if such policies were sold outside of the insurance office.

22

Case: Nexus is Required Non-insurance precedent



Rendon v. Valleycrest Productions, Ltd

294 F.3d 1279 (11th Cir. 2002)

- **Facts:** Individuals with hearing and mobility disabilities sued TV show “Who Wants to be a Millionaire” because contestant hotline “fast finger” game screened out people with disabilities
- **Issue:** Is contestant hotline a place of public accommodation?
- **11th Cir:** Quiz show itself = Place of public accommodation
 - Falls within “theaters and other places of entertainment”
- Title III does not require discrimination to occur on site
 - ❖ “[T]he fact that the plaintiffs in this suit were screened out by an automated telephone system, rather than by admission policy administered at the studio door, is of no consequence under the statute.”

23

Cases/DOJ: Are Websites Places of Public Accommodation?



- Two types of website cases
 - Websites used by traditional brick-and-mortar establishments
 - Websites of businesses housed exclusively online
- DOJ guidance (Issued before any court case)
 - **1996:** Letter from Ass’t Atty. Gen. Deval L. Patrick
 - “Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.”

http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt

24

Early Years of ADA & Website Accessibility



Access Now, Inc., v. Southwest Airlines, Co.

227 F. Supp.2d 1312 (S.D. Fla. 2002)

- **Note:** Florida is in the 11th Circuit, where *Rendon* was decided
- **Facts:** Website provided way to check airline fares, schedules, book airline reservations, and stay informed of promotions
- **Lawsuit:** Website was inaccessible in violation of the ADA
 - No “alternative text” to communicate content displayed visually on the website
 - Online forms could not be completed with a screen-reader
 - No “skip navigation link,” permitting consumers to bypass the navigation bar on a website and proceed to the main content

25

Southwest Airlines



Court

- Website itself if not a place of public accommodation
- Used *Rendon* analysis and considered whether there was a “nexus” between southwest.com and a “physical, concrete place of public accommodation”
 - Found that there was no indication that the website’s barriers “impede[] . . . access to a specific physical, concrete space such as a particular airline ticket counter or travel agency.”
- **Query:** Aircrafts are exempt from Title III of the ADA. Would the court’s decision be different if it could have established a nexus between a place of public accommodation, listed in Title III, and the website?

26

Services OF v Services IN



Nat'l Fed'n of the Blind v. Target Corp.

452 F.Supp.2d 946 (N.D. Cal. 2006)

- **Lawsuit:** Accessibility problems re Target's website (specifically discusses alt text, navigating without a mouse, clear navigation links)
- California is in the 9th Circuit, bound by *Weyer* ("physical place")
- **Court:** Title III applies to the "services **of** a place of public accommodation, not services **in** a place of public accommodation"
 - MTD denied re: issues that impede "full and equal enjoyment of goods and services offered in Target stores"
 - MTD granting re: issues "unconnected to Target stores."
- "To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."

27

Target Settlement Agreement

If there is a "Nexus" – Website is Likely Covered

- Parties settled shortly after the court's ruling
- Terms of agreement:
 - Target to modify its website to ensure "that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use."
 - Pay over \$6 million to the class
 - Pay \$20,000 to the California Center for the Blind, a nonprofit organization dedicated to helping individuals who are blind

Press Release: www.dralegal.org/pressroom/press-releases/national-federation-of-the-blind-and-target-agree-to-class-action

Settlement Agreement:
www.dralegal.org/sites/dralegal.org/files/casefiles/settlementagreement_2.pdf

28

What About Internet-only Businesses?



Nat'l Fed'n of the Blind v. AOL Time Warner, Inc.

No. 99-cv-12303 (D. Mass. Compl. filed Nov. 16, 1999)

- Believed to be the first case against an Internet-only business
- NFB asserted that AOL's browser interfered with the ability of individuals who are blind from using screen-reader software to access AOL
- Before court decided the case, the parties settled
- **Settlement agreement:** AOL agreed to establish an accessibility policy, and consult on accessibility with the disability community
<http://www.nfbcal.org/nfb-rd/1633.html>

29

DOJ Amicus Brief: *Hooks v. OKBridge*

Hooks v. OKBridge, Inc.

232 F.3d 208 (5th Cir. 2000)

- **Facts:** Individual with bipolar disorder sued Internet-only business
 - Claimed that site barred him from an online bridge tournament and associated bulletin board due to disability
 - District court: Granted business's motion for summary judgment
 - Website was not a place of public accommodation-provided services over the Internet rather than at a physical place
 - Website was a private membership club exempt from ADA
- **5th Cir:** Affirmed the lower court's decision-different reasoning
 - Defendant was unaware of the plaintiff's disability and thus, could not have discriminated against him

30

Important Case Because it Provided Forum for DOJ to Issue Interpretation

DOJ amicus brief in *Hooks v. OKBridge* (filed in 2000)

- Limiting Title III to entities that provide services on-site would be an “arbitrary and irrational limitation on coverage that conflicts with the clear and important purposes of the Act”
- By including “catchall phrases” in its definition of public accommodation (“other service establishment”), Congress demonstrated that the definition is “plainly broad enough to encompass establishments that provide services in their clients’ homes, over the telephone, or through the internet”
- Courts regularly “apply old words to new technology”
 - Supreme Court has applied the 1st Amendment’s principles of freedom of speech to new mediums like the Internet

www.justice.gov/crt/briefs/hooks.htm

31

Recent Case Re Internet-Only Businesses



Nat’l Ass’n of the Deaf, et al, v. Netflix, Inc.

869 F. Supp. 2d 196 (D. Mass. 2012)

- Plaintiffs asserted that Netflix’s “Watch Instantly” streamed content without providing closed captioning in violation of Title III of the ADA
- Netflix motion to dismiss: It is not a place of public accommodation
- DOJ filed a statement of interest, including a number of strong statements:
 - “Netflix is subject to [T]itle III of the ADA, even if it has no physical structure.”
 - “[T]he fact that the regulatory process is not yet complete does not support any inference whatsoever that web-based services are not already covered by the ADA, or should not be covered by the ADA.”
 - The DOJ “has long interpreted [T]itle III to apply to web services, and DOJ’s ongoing regulatory developments concerning the accessibility of web content and services support that Netflix is a public accommodation subject to [T]itle III of the ADA.” www.ada.gov/briefs/netflix_SOI.pdf

32

Netflix Litigation and Consent Decree

Court denied Netflix's motion to dismiss

- Relied on 1st Circuit's decision in *Carparks*, which held that "'places of public accommodation' are not limited to 'actual physical structures'"
- Examples were not intended to be exhaustive, and that the ADA was intended to adapt to changes in technology
- Netflix "falls within at least one, if not more, of the enumerated ADA categories," identifying "service establishment," "place of exhibition or entertainment," and "rental establishment"

Parties settled after court's decision

- Netflix agreed to provide captioning for 100% of its content by 2014

Press Release: <http://dredf.org/captioning/netflix-press-release-10-10-12.pdf>

Consent Decree: <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>

33

Cases Brought in the Ninth Circuit Against Internet-Only Businesses

- Most cases against Internet-only business have been brought in the Ninth Circuit, bound by *Weyer*, which limits the definition of "places of public accommodation" to "actual physical spaces"
- DOJ has not filed amicus briefs or statements of interest in any of these cases

Cullen v. Netflix, Inc.

880 F. Supp. 2d 1017 (N.D. Cal. 2012)

- Court recognized the conflicting opinion about *Netflix* in Massachusetts
- Held that it "must adhere to Ninth Circuit precedent" which defined "place of public accommodation" to be a physical place
- Because the Netflix website was not "an actual physical place," and because it had no nexus to one, the court dismissed the case

34

More Ninth Circuit Cases



Cases in 9th Circuit find Internet-only businesses outside Title III

- ***Young v. Facebook, Inc.***, 790 F. Supp. 2d 1110 (N.D. Cal. 2011)
 - *Pro se* litigant with bipolar disorder filed lawsuit against Facebook.
 - Court: Because “Facebook operates only in cyberspace,” it is not a place of public accommodation as construed by the Ninth Circuit”
- ***Ouellette v. Viacom***, 2011 WL 1882780 (D. Mont. Mar. 31, 2011); *rep. and rec. adopt.*, 2011 WL 1883190 (D. Mont. May 17, 2011)
 - *Pro se* litigant asserted that Google, YouTube, and Myspace removed his videos, and then failed to process the plaintiff’s notices challenging the removals because they had “minor errors” due to his reading disability
 - Court: Sites were not covered by Title III b/c not physical places of public accommodation, and lacked a connection to a physical structure

35

More Ninth Circuit Cases



Earl v. eBay, Inc.

2011 WL 3955485 (N.D. Cal. Sept. 7, 2011)

- Plaintiff who is deaf could not register as a seller on ebay.com b/c of eBay’s automated, telephone verification process
- **Court:** Denied plaintiff’s request to amend complaint, finding the “eBay website is not a place of public accommodation within the meaning of the ADA”
 - “Under controlling Ninth Circuit authority, ‘places of public accommodation’ under the ADA are limited to ‘actual physical spaces.’”

36

What's Next for Case Law re Internet-Only Businesses

- Given the number of newly emerging web-only businesses, courts outside of the 1st and 9th Circuit will likely consider this legal question
- Litigants may also appeal district court opinions to the appellate courts, possibly changing the established precedent on this issue
- DOJ regulations will likely change the landscape: NPRM coming soon
- ANPRM: www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf
 - ❖ Plain language of the ADA applies “to discrimination in offering the goods and services ‘of’ a place of public accommodation . . . rather than being limited to those goods and services provided ‘at’ or ‘in’ a place of public accommodation . . .”
 - ❖ Businesses with websites must make their websites accessible
 - ❖ “[T]he ADA mandate for ‘full and equal enjoyment’ requires nondiscrimination by a place of public accommodation in the offering of *all* its goods and services, including those offered via Web sites.”

37

Settlement Agreements: Websites of Brick & Mortar Establishments

DOJ settlement agreements and consent decrees

- Some recent DOJ agreements focus exclusively on website accessibility, others include website access in a laundry list of other accessibility issues

H&R Block Consent decree

- Resolved lawsuit (filed by NFB/private plaintiffs, DOJ intervened) alleging that www.hrblock.com is inaccessible
 - Examples: PWD cannot benefit from H&R Blocks services offered online (prepare and file taxes online, download tax preparation software, find tax professionals, obtain information on the website’s blog, review an instructional video about getting a “Second Look” review, and have taxes prepared in real time via a “Block Live” function)

Motion of the United States of America to Intervene

- www.ada.gov/hrb-motion-intervene.htm

38

H&R Block Consent Decree



- Covers H&R Block's website, mobile apps, and online tax products
 - By 1/1/2015: Website and Online Tax Preparation Product will be accessible pursuant to the Level A and AA Success Criteria in the Web Content Accessibility Guidelines (WCAG), ver. 2.0
 - By 1/1/2016: All mobile apps will conform to the same standards
- H&R Block will adopt a web access policy, which includes:
 - All new web pages, web applications, content published to existing websites, mobile applications, and electronic products meet the Level A and Level AA Success Criteria for WCAG 2.0
 - Notices soliciting feedback on how accessibility can be provided are publicized
 - Web access policy is distributed on an annual basis
 - A web accessibility coordinator is designated

39

Web Accessibility Policy



- Web Access Policy continued...
 - Annual training is provided
 - Accessibility is assessed and reviewed annually
 - Automated tests to test for accessibility are regularly conducted
 - Enlisting people with various disabilities to test for accessibility is regularly done
 - A web access consultant will annually evaluate accessibility and provide a report identifying barriers and providing recommendations
- **Query:** Impact of H&R Block Consent Decree?
- Tip for businesses: Review the H&R Block web access policy to inform their own policies on website access. www.ada.gov/hrb-cd.htm (Ex. A)

40

DOJ Settlement Agreements: Web Access As One Requirement



Agreement with the Newseum, Inc.

- www.ada.gov/newseum/newseum-sa.htm
- Newseum agreed to ensure that the visual and audio contents of its website conform to WCAG 2.0, Level AA

Agreement with the Cavaliers Operating Company ("Cavs")

- www.ada.gov/cavaliers.htm
- Within 6 months from the date of the agreement, the Cavs will ensure that its website complies with WCAG 2.0, Level AA
- Cavs agreed to develop a written policy to evaluate the site routinely, and remedy any accessibility problems
- Agreed to advertise a contact email address to allow people with disabilities to inform the Cavs of any accessibility problems
- Excludes third-party content (like advertising)

41

Agreements Resulting from Structured Negotiations



Many agreements achieved with the American Council of the Blind (ACB), American Fed'n for the Blind, and Cali. Council of the Blind (CCB) through Structured Negotiations (attorneys Lainey Feingold and Linda Dardarian)

CVS Agreement (2009)

- CVS/pharmacy will use best efforts to ensure that all pages on www.cvs.com substantially comply with the WCAG guidelines (1.0 or 2.0)
- CVS hired consultant to audit website & issue final audit report to parties
- Excludes third party content, but requires CVS to make a good faith effort to locate and select contractors and vendors able to comply with the WCAG guidelines when issuing RFPs or enters into contracts re third-party content
- **Press Release:** <http://iflegal.com/2009/07/cvs-press>
- **Settlement Agreement:** <http://iflegal.com/2009/07/cvs-agreement>

42

Agreement with Rite Aid



Rite Aid (2008)

- Similar agreement to CVS
- Addresses the site's use of CAPTCHAs
 - Rite Aid agreed to make best efforts to incorporate alternative security measures that are equally effective and usable by blind and visually-impaired users, without impairing security
 - Parties approved CAPTCHA in use at the time of the settlement
 - If Rite Aid wishes to use a different CAPTCHA, it will provide an opportunity for testing by the organizations involved that represent individuals who are blind or have low vision
- **Note:** Rite Aid and CVS agreements also cover POS devices
- **Press Release:** <http://lflegal.com/2008/05/rite-aid-press-release/>
- **Settlement Agreement:** <http://lflegal.com/2008/04/rite-aid-web-agreement>

43

Additional Settlements Through Structured Negotiations



Similar agreements reached with RadioShack, Safeway, and Staples

- As the years go by, the specific accessibility code cited in the agreements has changed
 - Older agreements (RadioShack) – Lists WCAG 1.0 as appropriate standard
 - More recent agreements (CVS and Rite Aid) – Permits entities to choose which of the two standards they wish to apply
 - Most recent agreements (Safeway) – Designates WCAG 2.0 as the appropriate standard for web accessibility
- RadioShack: <http://lflegal.com/2007/05/radio-shack-agreement>
- Safeway: <http://lflegal.com/2013/12/safeway-web-press>
- Staples: <http://lflegal.com/2009/04/staples-settlement-agreement>

44

Settlement Agreements: Businesses Housed Exclusively Online



Agreement with Amazon.com (2007)

- Agreement with NFB (represented by Disability Rights Advocates)
- Settlement terms:
 - Amazon.com, as well as several affiliated websites, will be accessible to people who use assistive technology to read and navigate Internet websites
 - Creates an accessibility committee, to ensure that accessibility remains a priority as new Internet technology develops
 - **Note:** Agreement explicitly recognizes that new technologies are bound to develop, and the parties agree to cooperate with one another to identify and potentially implement solutions to accessibility barriers posed by new technology in the future

www.dralegal.org/impact/cases/amazoncom-structured-negotiations

45

Agreements with State Attorneys General

State attorneys general have also entered into settlement agreements with two Internet-only businesses

- **Priceline.com agreement (2004)**
 - Will implement a range of accessibility standards required by WCAG in an agreement with the NY Attorney General's Office
 - <http://www.ag.ny.gov/press-release/spitzer-agreement-make-web-sites-accessible-blind-and-visually-impaired>
- **Monster.com agreement (2013)**
 - Will provide job seekers who are blind with full and equal access to its products and services, including its mobile apps
 - Agreement with MA Attorney General's Office and NFB
 - <https://nfb.org/monstercom-first-industry-make-website-accessible-blind-users>

46

Settlement Agreement with the Digital Arm of the MLB

- Agreement with the ACB and two of its state affiliates
- MLB operates www.mlb.com, and each MLB club site, such as www.cubs.com
- Settlement terms:
 - www.mlb.com and club sites will satisfy WCAG 2.0, Level AA
 - MLB further agreed to ensure that content delivered through its Game Day Audio Player and related Media Center, as well as its radio and television streams, satisfy the same criteria
- Parties executed an addendum in 2012 to address new technologies (apps)
 - Under the terms of the addendum, MLB agrees to use reasonable efforts to ensure that the content provided on its mobile application satisfies the Level A and AA Success Criteria set forth in WCAG 2.0
- **Settlement Agreement:** <http://llegal.com/2010/02/mlb-agreement>
- **First Addendum :** <http://llegal.com/2012/06/mlb-addendum>

47

Title II (State and Local Governments)



- Under Title II, qualified individuals with disabilities shall not be excluded from “participation in or be denied the benefits of the services, programs, or activities of a public entity.” 42 U.S.C. § 12132
- **Courts:** Not much dispute about whether the websites of state and local governments are subject to the ADA
- **DOJ position:** State/local government websites covered by Title II
 - 2003 Technical Assistance Guide: Accessibility of State and Local Government Websites to People with Disabilities
www.ada.gov/websites2.htm
 - 2010 ANPRM: “There is no doubt that the Web sites of state and local government entities are covered by [T]itle II of the ADA.”
www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf

48

Case Law: Website Accessibility for State/Local Government Websites

Martin v. Metro. Atlanta Rapid Transit Auth.

225 F. Supp. 2d 1362 (N.D. Ga. 2002)

- Plaintiffs, individuals with mobility- and vision-related disabilities, alleged that MARTA violated the ADA in a number of ways, including access to information via the agency's website
- Court granted plaintiff's motion for preliminary injunction
- Information available on MARTA's website was not equally available to people with disabilities
- Until MARTA's website was made accessible, MARTA was "violating the ADA mandate of 'making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service.'"

49

Settlement Agreements: Title II

Orange County Clerk of Courts (2014)

- DOJ complaint filed by an attorney, alleging the Clerk denied him full and equal access to electronic court documents
- Clerk required litigants to submit documents in PDF format, to be fully searchable, and to be optical-character-recognition compliant
- Attorney sought documents in searchable electronic format – provided only after months of delay
- DOJ concluded that the Clerk discriminated against the complainant by "excluding him from full and equal participation in, and denying him the benefits of the services, programs, or activities of, the Clerk of the Courts."

50

Settlement Agreement with Orange County Clerk of Courts



Terms of Settlement Agreement

- Web pages and web applications will comply with WCAG 2.0 AA, including all other websites owned, operated, branded or funded by the Clerk, including the Clerk's electronic filing system
- Establish a procedure for individuals with disabilities to request court documents in an accessible format, and designate a person responsible for electronic and website access
- Provide training WCAG 2.0 AA to all employees and contractors with responsibilities related to website access
- Settlement Agreement: www.ada.gov/occ.htm
- Press Release: www.justice.gov/opa/pr/2014/July/14-crt-751.html

51

DOJ: Project Civic Access Agreements

DOJ has entered into a number of agreements with state and local governments through Project Civic Access (PCA)

City of Fort Morgan, Colorado

- City will annually distribute DOJ's TA document: Accessibility of State and Local Government Websites to People with Disabilities
- Within 3 months, the City will:
 - Post online a policy that its web pages will be accessible and create a process for making its web pages accessible
 - Make all new and modified web pages and content accessible
 - Make existing web content accessible
 - Post a telephone number or e-mail address on its home page for visitors to request accessible information
 - At least annually, enlist people with disabilities to test pages
www.ada.gov/fort-morgan-pca/fort-morgan-pca-sa.htm

52

Other Project Civic Access Agreements

Similar agreements with other PCA agreements

- **Differences re existing web content:** Other PCA agreements require governments to agree to “[d]evelop and implement a plan” to make existing web content more accessible
- **Standards:** PCA agreements usually do not specify standards, but refer to DOJ TA document, which references both 508 Standards and WCAG

Other Settlement Agreements that include website accessibility

- Town of Poestenkill, New York: www.ada.gov/poestenkill-pca/poestenkill-sa.htm
- City of West Columbia, SC: www.ada.gov/west-columbia-pca/west-columbia-pca-sa.htm

53

Other Settlement Agreements: Specific Industries



Colleges and Universities

- DOJ and the Dep’t of Education have recently entered into settlement agreements with various colleges and universities to improve the accessibility of their websites
- Many agreements also discuss accessible course materials
- **Example: Louisiana Tech University**
 - New/redesigned web pages, apps, web content must comply with WCAG 2.0
 - Existing web pages: Develop a plan to make pages accessible by a specific date, prioritizing pages with most important information or used most frequently

www.ada.gov/louisiana-tech.htm

54

Settlement Agreements/Initiatives: Healthcare

WellPoint – large health benefits company

- Recently announced an initiative to make its affiliated health plan websites, mobile applications, and print information accessible for all people by adopting WCAG 2.0 AA as its accessibility standard
- <http://ir.wellpoint.com/phoenix.zhtml?c=130104&p=irol-newsArticle&ID=1899357>

American Cancer Society

- Resulted from Structured Negotiations with the ACB
- Agreed to use best efforts to ensure that its website complies substantially with WCAG 2.0, AA
- Separate requirements to ensure that PDF documents housed on the website, and the use of CAPTCHAs, are accessible
- Excludes third-party content
- <http://lflegal.com/2011/02/acs-agreement>

55

Settlement Agreements: Financial Institutions

Charles Schwab Settlement Agreement (2012)

- Agreed to use good faith efforts to ensure that its client website satisfies the Level A and AA Success Criteria in WCAG 2.0, and phases in these accessibility requirements
 - Third-party requirements
 - If third-party content is inaccessible, Charles Schwab will request that the third-party bring their content into compliance
 - If the third-party does not come to compliance, then Charles Schwab will use good faith efforts to find an alternate vendor
 - Future RFPs for development or inclusion of third-party content will include compliance with Level A and AA Success Criteria in WCAG 2.0 as a requirement in all requests and proposals
- <http://lflegal.com/2012/05/schwab-agreement/>

56

Other Settlement Agreements in the Financial Services Industry

- Note: Importance of providing accessible online banking and talking ATMs for people with disabilities
- Many cases and settlement agreements regarding accessible ATMs and online banking

Other Settlement Agreements

- LaSalle Bank: <http://lflegal.com/2005/05/la-salle-final-agreement/>
- Bank of America: <http://lflegal.com/2013/03/bofa-security-settlement/>
- First Union: <http://lflegal.com/2003/01/first-union-final-agreement/>
- Bank One: <http://lflegal.com/2003/06/bank-one-final-agreement/>
- Fleet Bank: <http://lflegal.com/2001/02/fleet-bank-initial-agreement/>
- Washington Mutual: <http://lflegal.com/2002/01/washington-mutual-agreement/>

57

Title I (Employment)



- Title I of the ADA prohibits employers from discriminating against qualified individuals with a disability with regard to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a)
- Possible cases:
 - If an employer required all job applicants to apply for employment via an application on an inaccessible website
 - Many employers are also using online tests, which can raise accessibility issues
- Note: As more and more employers rely on electronic applications, the more likely we are to see cases arise under Title I challenging an employer’s use of an inaccessible website

58

Rehabilitation Act, As Amended

- In 1998, Congress amended the Rehabilitation Act to require federal agencies to make their electronic and information technology access to people with disabilities.
- **Section 508**
 - Requires federal agencies to give employees with disabilities and members of the public access to information that is comparable to access provided by others.
 - Charged with U.S. Access Board with establishing standards for electronic and information technology for federal agencies
- **Note:** Given this clear mandate, there has not been significant litigation on the topic of website access under the Rehab Act

29 U.S.C. § 794d

59

Other Laws/Regulations Regarding Website Accessibility

Businesses and government entities must comply with other applicable laws ensuring access to electronic information

- **State laws:** Many states have their own anti-discrimination laws, some of which include requirements for website accessibility
- **Industry-specific laws: Colleges/Universities**
 - The Technology, Education, and Accessibility in College and Higher Education (“TEACH”) Act has been introduced
 - Goal: Strengthening the accessibility of education technologies for college students with disabilities
 - Would require the U.S. Access Board to develop guidelines for the accessibility of electronic instructional materials and information technologies at institutions of higher learning

Fact Sheet: www.warren.senate.gov/files/documents/TEACH%20Act%20fact%20sheet.pdf

60

New DOT Regulations Under Air Carrier Access Act



- Airlines must make websites accessible
 - 2 years to modify website pages with core travel information
 - 3 years to modify all other web pages accessible
- Specifies WCAG as the proper standard
- Applies to U.S. and foreign airlines, so long as foreign airline has a website that markets air transport to U.S. consumers for travel within, to, and from the U.S.
- Ticket agents must disclose and offer web-based discount fares to customers unable to use their websites due to a disability
- After the website is accessible, airlines must still offer equivalent services to passengers with disabilities unable to use websites

www.regulations.gov/#!documentDetail;D=DOT-OST-2011-0177-0111

61

Technical Standards and Resources: WCAG 2.0



Web Content Accessibility Guidelines, updated in Dec '08 (WCAG 2.0)

- Developed by Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), and contain 12 guidelines for web access
- WCAG 2.0: www.w3.org/TR/2008/REC-WCAG20-20081211/
- Technical Assistance
 - How to Meet WCAG 2.0: A Customizable Quick Reference to Web Content Accessibility Guidelines 2.0 Requirements (Success Criteria) and Techniques: www.w3.org/WAI/WCAG20/quickref/
 - WebAim's WCAG 2.0 Checklist:
<http://webaim.org/standards/wcag/checklist>
 - Understanding Conformance: www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html

62

Technical Standards and Resources: Section 508



Electronic and Information Technology Accessibility Standards, commonly referred to as the Section 508 Standards

- Derived from the Rehabilitation Act Amendments of 1998, and published by the U.S. Access Board.
- **Section 508 Standards:** www.section508.gov/section-508-standards-guide
- Technical Assistance
 - Summary of Section 508 Standards: www.section508.gov/summary-section508-standards
 - GSA 508 Tutorials, Guidance, Checklists: www.gsa.gov/portal/content/103565
 - DOJ materials on Section 508: www.justice.gov/crt/508/508home.php

63

Resources: How to Check Your Website

Resources to evaluate website accessibility

- The World Wide Web Consortium compiled a list of various sites that assess website accessibility:
 - www.w3.org/WAI/ER/tools/complete
- Web Accessibility Evaluation Tool:
 - <http://wave.webaim.org/>
- Section 508 Technology Tools:
 - <http://www.section508.gov/technology-tools>

The ADA National Network also provides technical assistance on certain website accessibility issues

- (800) 949-4ADA / www.adata.org

64

Conclusion

- The Internet has changed the way that we live our lives
- Due to virtual accessibility barriers, many people with disabilities cannot access goods and services of businesses and public entities
- Hot legal topic: Whether Title III of the ADA applies to websites, especially to websites of Internet-only businesses
 - Websites of brick-and-mortar stores: Likely yes, due to nexus
 - Split in courts: Websites of online-only businesses
 - Many settlement agreements regarding both types of websites
- All eagerly await the publication of the DOJ's NPRM
- Given the importance of websites to our society, and the real barriers that can prevent access for many people with disabilities, this is a legal issue that will continue to grow in importance!

65

Continuing Legal Education Credit for Illinois Attorneys



- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA Center at: 312-413-1407 or www.adagreatlakes.com
- This slide will be repeated at the end.

66

Session Evaluation

Your feedback is important to us

You will receive an email following the session with a link to the on-line evaluation



67

Websites and the ADA: Accessibility in the Digital Age

Presented by:

Barry Taylor, VP for Civil Rights and Systemic Litigation, Equip for Equality
Rachel Weisberg, Staff Attorney, Equip for Equality

September 22, 2014

Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center, University of Illinois at Chicago, U.S. Department of Education, National Institute on Disability of Rehabilitation and Research Award No.H133A110029.



68