SOFIA LEIVA: Thanks for joining this webinar entitled, How to Write a Web Accessibility Statement and Why You Should Be Proactive. I'm Sofia Leiva from 3Play Media, and I'll be moderating today. And today I'm joined by Marc Dubin, who is the CEO of ADA Expertise Consulting, where he works with the local governments and businesses to improve their website accessibility.

Marc was instrumental in drafting the web accessibility statement for the village of Islamorada in Florida, which we, at 3Play Media, ranked as number one in terms of accessibility among local government websites. Marc was also an ADA consultant for the plaintiff in the *Winn-Dixie* case, which set new precedence over the accessibility of new business websites.

Previously, Marc served as a senior trial attorney at the Justice Department in the disability rights section of the Civil Rights Division. And with that, I'll hand it off to you, Marc, who has a wonderful presentation prepared for you.

MARC DUBIN: Good afternoon, everyone. Thank you very much for joining us. I'm very happy that we have such a good crowd today, and I hope I can be of assistance to you. There's a great deal to cover and I want to try to provide you with as much information as I can.

As mentioned, I formerly served as the Justice Department. As I'm sure you're aware, there are many changes at the department under the new administration and I will discuss some of those toward the end as well. Next screen, please.

As director of ADA Expertise Consulting, I work nationwide. I provide guidance to state and local governments and to businesses about compliance with Title II of the ADA and Title III of the ADA, as well as Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act, and I've testified in federal court as an ADA expert. And I am interested in learning from you any issues that you think we can be of assistance to you.

Today we're going to be focusing on website accessibility, the changes in the law, and the ongoing efforts of businesses to understand what their obligations are under the ADA in order to provide compliance with the law to persons with disabilities visiting the websites of businesses across the United States. Next slide, please.

There are two principal theories behind litigation that's going on. The first is the most broad based theory, and that is that the ADA covers places of public accommodation if their activities

fall within one of 12 categories of public accommodation. This theory is the broadest interpretation that the federal courts have utilized to find businesses that have websites liable under Title III of the ADA for failing to ensure the accessibility of their websites.

This is followed primarily in the First and Seventh Circuits. Lack of closed captioning is one of the issues that was brought to the attention of the court in the *Blind versus Scribd* in Vermont in 2015. There was also a case involving online digital libraries. So *NAD versus Netflix* involved the lack of closed captioning and *Blind versus Scribd* involved online digital libraries.

Both of those cases were messages, really, to the business community that they were going to be treated as if it was a brick and mortar store simply providing their services on the web. That is, as I said, the broadest approach. It's not followed nationwide.

The second approach requires a connection or nexus between the activity that is on the internet and the store's actual physical place of public accommodation. And the three cases you see on the screen identify that approach in the Third, Sixth, Ninth, and Eleventh Circuits. Those are the three cases that primarily set out the theory of Nexus, and we're going to talk more about that. Next slide, please.

The most recent case and the only case to date that actually went to trial as opposed to the previous cases that were decided in motions to dismiss was the *Winn-Dixie* case. Winn-Dixie, as you may be aware, is a southern based grocery chain. And they offer services not only in their brick and mortar stores, but obviously on the web, including pharmacy services on the web.

So you can get prescriptions on the web. You can get coupons on the web. You can identify where the stores are that are closest to you. And the plaintiff, in that case, sued Winn-Dixie alleging that he would be forced to go to the brick and mortar stores rather than being able to access their services on the web, and that there were services available on the web that were not available in the stores-- I'm sorry.

There were services available in the stores that were not available on the web. For example, the ability to get the pharmacy to fill prescriptions. You could put information on the web to get it more quickly. If it were inaccessible to this plaintiff who was blind, then it would be adversely affecting his ability to shop at Winn-Dixie.

Similarly, the court discussed issues about the availability of coupons and the timing of sales

that you could take advantage of if you could access the web that you would not be able to take advantage of if you were blind and had accessibility issues on the website.

So the plaintiff in that case, Scott Dinin, has filed a great number of lawsuits against websites across the country. I served in this case as a consultant for him and brought to the attention of the department along with Ken Nakata, another former colleague from the Justice Department, the concerns that were being raised in that case. In light of the importance of the case, we brought the case to the attention of our former colleagues at Justice, and they then participated in the case filing a statement of interest.

The plaintiffs successfully prosecuted that case with the court making a finding that there was a violation of Title III of the ADA as a result of the inaccessibility features of the website and, in a noteworthy step forward, ordered that the grocery chain come into compliance with WCAG 2.0, which is an international standard because the federal government has not issued standards for websites.

It should be noted, however, that for the past several decades since the internet began, there was an effort by the Justice Department to be consistent in the remedy, and they have consistently required in their settlement agreements compliance with WCAG 2.0. And as a result, the court adopted the Justice Department's approach to that and, for the first time in any court case, ordered the defendants to come into compliance with that standard. Next slide, please.

The next approach is almost really a question of language and interpretation of the regulations. What the ADA talks about is the location of the services are not going to be the key under this theory. This approach focuses on specific language in Title III talking about the use of the word, "of a place of public accommodation," rather than the use of the word, "at a place of public accommodation."

The Second Circuit adopted this as far back as 1999, noting that Title III applies to the goods and services of a place of public accommodation, not at a place of public accommodation. This is really a variation of approach number one. In both instances, the role of place is minimized.

I cite here too an internet case, *Andrews versus Blick Art Materials.* And I just want to point out that the *Andrews* case does an excellent job of providing a very careful analysis of the development of case law in different circuits. Next slide, please.

I wanted to talk to you also about what new plaintiffs who are bringing these lawsuits tend to look for when deciding whether to sue. As I'm sure you are all aware, there has been for a great deal of time now concerns by businesses about what are characterized as drive by lawsuits where the plaintiffs would look at the physical architectural barriers such as parking spaces, lack of ramps, or other architectural barriers, and then would file a lawsuit alleging a violation of the architectural requirements of places of public accommodation.

You will receive slides and recordings. They will be sent out to you, in response to your question. So what is happening there is plaintiffs are looking in the drive by architectural cases for issues that allow them to file the lawsuit, get attorneys' fees, fix one or more of the alleged architectural violations.

For plaintiffs filing lawsuits against websites for alleged lack of accessibility, what they are looking for are very similar kinds of attitudes. Does the store take effort to comply with the law? What messaging does the store have on its website to persons who have disabilities about the website and its features? Is there an accessibility statement? And we'll talk about accessibility statements more in a moment.

How does the website provide services? Does it offer services that are not offered at the physical store? Are there coupons, time sensitive sales? Such as ticket sales where you're buying tickets to a sporting event, or play, or a movie.

Does the website allow the visitor to develop a shopping list they can then take to the store to speed up access to the goods sold? Can they submit questions and comments? Are there photos or videos on the site that are not captioned? How are persons who are deaf experiencing this site?

How are visitors with vision disabilities experiencing this site? Does the coding on the website prevent access through screen readers to charts or photos, graphs, tables with the ability to move from page to page or just skip pages? Is there a lack of ALT tabs or indications of what the photos are? Has this site been tested for accessibility, and is it tested on an ongoing basis?

So that's what plaintiffs are looking for when they are trying to determine whether to file a lawsuit against a business that is offering its services in not just a brick and mortar setting, but a website setting as well. Next slide, please.

There are a number of defenses that businesses have raised, and we're going to talk about them. They all have some degree of validity, but they all have some degree of limitation as well.

The first one would be, well, even if you cannot access our website because we did not provide the coding correctly-- so it does not work with a screen reader for the blind-- or we have photographs, or graphs, or videos up there and the deaf person does not know what's being said and we did not properly caption it or did not caption it at all, we will offer a visitor with a disability the option of calling the business instead of visiting a website and getting the information from our staff, thereby offering an opportunity to effectively communicate the information through an alternative means.

The limitation of that defense is that while the approach is consistent with the assertion that they are trying to provide effective communication and that a well-staffed telephone line could possibly mitigate liability as long as the same services are available, such an approach has considerable risks.

First, because the website is available 24 hours a day, seven days a week, and it is unlikely that your phone service staffing needs are going to be equivalent and will not provide an equal opportunity. So that's going to be one reason it will be challenged. At the motion to dismiss stage as well, it is unlikely that the court is going to know whether or not that meets the standard because it's a fact based determination.

In some cases, such as a case in California, *Robles versus Domino's Pizza,* that approach worked. But in *Access Now versus Blue Apron* in 2017 and *Gorecki versus Dave and Busters,* also in 2017, as recently as October of 2017, the approach was rejected.

Now, even more recently, about a month ago, a California Superior Court expressly rejected a telephone access argument, finding that providing phone access as an alternative to access a website, quote, "imposes a burden on the visually impaired to wait for a response via email or call during business hours rather than have access via defendant's website as sighted customers would. Thus, the email and telephone options do not provide effective communication in a timely manner, nor do they protect the independence of the visually impaired," close quote.

That was May 21, 2018. And this is basically a case that ordered the restaurant to make its

website comply again with WCAG level 2AA, and found that The Whisper Lounge violated California's Unruh Act, which is a state civil rights law. So this is a situation where the provision of a phone number, email will not necessarily suffice. Next slide, please.

The next defense argued is that-- well, since the Department of Justice has not issued specific regulations concerning websites and they have issued specific regulations concerning architectural barriers, it's a violation of due process for a business to have to comply with WCAG 2.0 or any other standard that has not been adopted as the published standard under the ADA.

And the argument is that in the absence of specific regulations mandating compliance with WCAG, there's no basis for legal liability. And that argument was rejected on May 21, 2018 in California because the court argued that the website failing to have standards issued by the Department of Justice was not a basis for limiting liability. The court urged the department to issue regulations, but did not find that the lack of regulations was a basis for lack of liability.

At least one court in the Ninth Circuit has accepted that position, however, dismissing the case without prejudice and calling upon Congress and the Justice Department to develop more specific regulations for website liability. That case is currently on appeal to the Ninth Circuit and is probably not likely to succeed because the Justice Department has historically and consistently taken the position that WCAG is essentially a safe harbor.

That if you do what WCAG requires, there is not going to be liability. But there is now a bipartisan effort in Congress to prohibit web accessibility lawsuits as a violation of due process in the absence of greater clarification. So time will tell on that one. Next slide, please.

There is another argument that the plaintiff does not have standing to sue. And that would be because the website may have a brick and mortar presence that it is related to far away from where the plaintiff resides. Even though they are accessing the offerings of the business through the website, the argument is that they don't have standing to sue if they are not, in fact, shopping at the brick and mortar store and do not have any likelihood of doing so.

In the *Carroll* case in June of 2018, they lived 200 miles from the nearest branch of a bank, they did not allege they were entitled to the services of the bank, and they did not allege that they ever intended to become a member of the bank. But they argued that the website itself was inaccessible and, therefore, they should have the ability to have the bank held liable for the inaccessibility of the website.

In the *Carroll* case and in the *Mitchell* case decided both in June of 2018, the court felt that they did not have standing to sue. Next slide, please.

However, it should be noted that even though they did not have standing to sue in those cases, that is not a slam dunk defense by any means. Because the courts are still taking the position that because the defendant does have an offering specific to the public, it can be held liable for not having that website offering accessible. So again, the cases here are not perfectly consistent with one another.

The other defense-- the next defense is mootness. This one is not an unusual defense. It's often raised in non-website cases. The theory behind mootness is that if you have a brick and mortar store and the brick and mortar store is sued because, for example, the parking spaces are not accessible. And during the course of the litigation, the store makes all of the parking spaces accessible.

The mootness argument is, well, it's fixed. There's no violation anymore. There's no reason to expend court resources on this case. The case should be dismissed for mootness. Now, when you transfer that theory over to the website realm, it is less likely to succeed, in my opinion.

Because what will happen is even if the defendant asserts that they're revising their website, they're updating their website, they're making the necessary changes in their website to make it accessible, the reality is that websites are constantly changing. There's new information being added to websites all the time. New photographs, new graphs, new videos, new information.

And so every time there's a modification to the website, there is a significant risk that it will not be coded correctly in a way that will allow somebody who is blind to use a screen reader to be able to know what that new content is, or there may be photographs or videos put up on a constant ongoing basis that are not properly captioned.

So there's no guarantee that in light of this constant updating that the site will, in fact, provide effective communication. And therefore, mootness should not be applied because it's really capable of repetition again, and again, and again. Next slide, please.

This defense, lack of personal jurisdiction, is similar to one of the earlier defenses of standing. What they're really saying here is you really don't have a relationship to our business. You

don't live near us. You don't shop near us. You're not likely to come to our store.

But because the business is now marketing nationwide through a website, the courts are going to look at how they market. What they're targeting in terms of their customer base. So if, for example, you have a situation where the business is actually marketing a product to universities, for example-- let's say university students that might want to get clothing that is specific to a university.

In that case, their marketing efforts are targeting a specific geographic market, but people from all over the United States may want to get a jacket from that university, even if they're not likely to visit the university or be in the geographical area of the university. Because they're marketing it through the web, the courts have held that they, in fact, can be held liable.

In *Access Now versus Sportswear Incorporated* in March of 2018, a Seattle based company made collegiate branded clothing and operated a website. The court specifically held that the defendant made products specific to universities local to the plaintiff who was in Seattle and determined that this was enough to establish personal jurisdiction. Next slide, please.

Title II websites are websites run by state and local governments. These are websites that are crucial to the public, often that deal with voting, transportation, food access, child care. All of the types of websites that state and local governments runs on are covered by Title II of the ADA and are essentially required to be accessible.

Because Title II of the ADA, unlike Title III, which applies to businesses and places of public accommodation-- Title II deals with the concept of program access. Program access requires one to look at the programs, services, and activities of the state and local government, including their websites, and those programs, services, and activities, when viewed in their entirety, must be usable by and accessible to persons with disabilities.

In addition, Title II provides that no qualified individual with a disability shall by reason of the disability be excluded from participation in, be denied the benefits of services, programs, or activities of the public. And if they are, they are then subjected to discrimination. So what happens with websites of state and local governments that are inaccessible is visitors with vision or hearing disabilities are denied the benefits of that website and are subjected to discrimination.

In *Martin versus Metro Atlanta Rapid Transit Authority* in 2002, individuals who were blind

were seeking to get transit schedules in a format that was accessible to them. And the defendant argued that they put that information about transportation schedules on their websites and offered the same information in Braille format upon request and through telephone operators.

However, the plaintiff showed that the there was inaccessibility of the website because it could not be accessed successfully with a screen reader and that when they were sent the rail schedules, they were always out of date and they contained incorrect information, that the telephone operators were poorly trained and rarely answered the phone, or when they didn't answer the phone, were unable to provide useful information when they did respond. While not directly stating that the defendants website needed to be made accessible, the court again looked at program access and determined and emphasized that the program as a whole had to be accessible.

More recently in *Hindel versus Husted* in 2017-- you'll be getting copies of these notes that identify the cases for you-- the district court issued a permanent injunction requiring the voter services website of the state of Ohio to be made accessible and mandated that the state bring the website into compliance of WCAG 2.0 level AA because of the essential nature of voting and the website being so essential to the ability to vote.

So here, too, Title II websites have to be conscious of not only their requirements under Title II, but because they receive federal financial assistance, they also have to be aware of their obligations to have accessible websites in order to not violate Section 504 of the Rehabilitation Act as recipients of federal financial assistance. Next screen, please.

Now, I want to talk a moment about how to write an accessibility statement and why it matters so much. When you look at any website-- and I urge you to just look at your own website. Look at the websites of other businesses out there. If they don't talk to the public, the disability community, about what effort is being undertaken to identify problems and address problems on accessibility, they are putting up a red flag to plaintiffs attorneys to look more closely at their commitment to making not only their website accessible, but their entire business accessible.

It's much easier to have a conversation about what's wrong and what steps will be taken to fix it than to be in the defensive posture of being sued and then saying, well, we meant to do it. We would get around to it, but we haven't yet.

So while accessibly statements are essentially rather simple, they're crucial and they're often missing. And the lack of an accessibility statement is often the first thing a plaintiff's lawyer will look for when deciding who to sue.

The website accessibility statement should express a desire to be accessible. Should talk about what steps have been taken, even if they're not yet completely accessible. A good faith effort matters. The statement should alert the visitor that the operator of the website wants to know what is happening, what problems are being experienced.

They should tell the visitor how you can get the same information, even if the website doesn't provide it to you. But then you have to make sure that you're taking steps to make it equally available. And you need to follow through. You need to say you're going to do it, and then you need to do it.

And you need to set a frame out in the accessibility statement of what you're going to do, when you're going to do it, who's responsible for doing it, and how to communicate with the website operator about any problems that are being experienced.

Now, the village of Islamorada in the Florida Keys approached me when they were approached by a plaintiff's attorney who had not yet sued but had written a letter saying, I represent a client who's deaf. The client has visited your website. The website does not provide him with access to the information in an accessible way because there are videos on there and audio recordings on your website that are not captioned, so they're not accessible to him.

Rather than sue, the plaintiff's attorney wrote letters to a series of communities. And in the village of Islamorada situation, what they did is they approached me and they said, can you assist us? Can we work together to develop an accessibility statement?

And the plaintiff was very satisfied with it. And it really, I think, in many ways identifies what the village had planned to do, had been working on doing, had staff already focused on, but had not yet articulated to the public about their commitment to the ADA.

And I think in my experience having left the Department of Justice is there are a great many businesses out there that are acting in good faith who may not know always exactly what to do, but often get sued, not because they have done nothing, but because, A, they have not told anybody what they have done. They're afraid to tell the disability community that they're

working on it.

I had a situation a couple of years ago where I went into a restaurant near where I live, and it's a wonderful restaurant and it was very, very accessible. And I went up to the owner, I introduced myself, and I said, I think you should put up a sign that simply says, we welcome people with disabilities.

I said, because, A, you're really compliant. You've shown a commitment to the disability community. You will increase your business by putting up welcoming messages. And her response was understandable, but sad.

She goes, no, Marc. I don't want to do that because somebody is going to come in, they're going to find something wrong, and then they're going to sue me. So if the disability community wants to eat here, they're welcome. They're able to do so because I've done everything I can to make it accessible, but I fear the disability community's litigation posture.

Now, I found that rather depressing because when a business does it right, they should get credit for doing it right. And that's really, from my perspective, what an accessibility statement is about. It's I want to admit we're working on it. We may not have gotten it right, but we have a commitment to getting it right.

I want to go to the next slide, please. And I want to show you what the key features of Islamorada's accessibility statement addressed. First of all, it was easy to find. You click on About Us and it's prominently there.

They don't hide it. They're not playing hide the ball with their ADA efforts, even though they are not perfect. No business is. No state and local government is perfect. The key, from my perspective, is good faith efforts to come into compliance and ongoing efforts to learn what to do.

They acknowledge the importance of accessibility. They acknowledge the challenges that may be experienced by some visitors with disabilities. They expressed a desire to learn of the problems encountered, to learn about the experience of users with disabilities.

They offer information about the time frame for resolving problems, identified who will be responsible for addressing the concerns, and provided information about how to reach those individuals. They expressed a desire to hear about the problems and set up a grievance document, a procedure, saying, file the grievance. It's an internal grievance. We'll take it

seriously.

Now, the grievance procedure is required under Title II, but I recommend that Title III entities that are not under a legal obligation to have a grievance procedure consider developing one. And we can help you with that. But you should consider developing one because if you say, this is what we want to learn from the disability community about what's wrong, and we have somebody who's going to take it seriously, and we're going to have a time frame for addressing it, it will, in all likelihood, minimize or at least reduce the risk of litigation.

Because if there is no grievance procedure, if there is no receptivity about, I have a disability, I'm having a problem with your business, then you're leaving only really one option other than giving up, and that option is suing the business.

So if you have somebody in the business who's trained about the ADA, who's aware of the needs of the disability community, is receptive to it, then you're way ahead of the game in terms of these drive-by lawsuits and these website lawsuits because you're giving the message that you are in good faith trying.

So they're going to be going after, more likely, the ones that are saying we are not concerned about the disability community because we're not messaging the disability community in any positive way.

So the village of Islamorada's accessibility statement included a desire for a collaborative approach with the disability community. Trying to identify who in the village of Islamorada has a disability. Can they communicate what concerns they have, what experiences they're having?

The statement also informed the public of the village's ongoing efforts to address except accessibility concerns, engaging experts like myself and others to help improve the experience. They utilized 3Play Media's expertise to bring web accessibility for the deaf community to a high level.

They did not just simply say, either we don't know and we cannot solve this problem or we're going to wait until we get sued before we try to address it. Rather, they took an affirmative approach, which is commendable. Next slide, please.

Now, the Department of Justice and the role of the private bar. What I really want to speak

about here is that the Department of Justice and the Department of Education are really moving backwards, not forwards, in this area. Undersecretary DeVos of the Department of Education has cut the Office of Civil Rights, which enforces the ADA, considerably. They've lost about 11% of the workforce. That's nearly 70 staffers overall.

And in the Trump administration's most recent budget proposal for fiscal year 2019, they projected that Civil Rights staff would carry 38 cases per person in the 2017 fiscal year. I'm sorry. 38 cases in 2019. In the 2017 fiscal year, Civil Rights staff managed 34 cases rather than 38.

And what we're talking about there is really scaling back both the messaging by the Department of Education about the seriousness of the commitment of the Justice Department in the federal government and the Department of Ed to compliance with the ADA, and also the regulations that were in place being pushed back.

The former head of OCR under the Obama administration, who now chairs the US Civil Rights Commission, said that when Civil Rights staff have unmanageable case loads, that creates a powerful incentive to not open and not investigate those cases. In addition, in the Department of Education, the Trump administration has taken steps in recent months to change how it processes Civil Rights complaints.

Many cases have been dismissed outright if they don't meet standards issued for Civil Rights investigators. And most alarmingly, they have stopped automatically conducting systemic reviews of institutional practices when Civil Rights complaints are filed.

A new case processing manual issued in March directs the complaints to be dismissed under certain circumstances, including when they are similar to complaints filed against other institutions. So if there's a common problem, a common practice of discrimination, rather than take it on and address it, the new Department of Education dismisses those cases, resulting in the dismissal of hundreds of complaints filed by one disability rights advocate who believes many institutions' websites are not accessible to those with vision disabilities or hearing disabilities.

In addition, the Justice Department withdrew its proposed regulations on website accessibility. And as a result, private bar website litigation has increased dramatically. The reality is that the use of private litigation for website litigation has increased because not just of the situation with the Justice Department, but because there are more and more-- there's much more

awareness of the need to have websites accessible, particularly to persons with vision disabilities.

The reality of the federal government withdrawing its support for these standards is that international standards are now essentially taking a much higher role in how the private bar is enforcing these. I'm going to answer the questions in just a minute. I'm getting some in the chat. But I'm going to just finish this up in a moment, and then we'll talk about the chat questions.

What we're really looking at here are international standards that the Department of Justice adopted for decades that are required to be complied with by those working with the federal government. So we're looking at an effort by litigants to find a way to force businesses to make their websites more accessible.

A former colleague from the Justice Department who now works at Seyfarth Shaw in Washington, DC, has been tracking ADA litigation and website litigation, and the numbers are really staggering. In 2017, there were 7,663 ADA cases-- 7,663 just about the ADA. That's a steady rise since 2013. And of those cases, 814 specifically were addressing web accessibility cases.

It appears that the new drive-by doesn't even require someone to drive. You literally sit at your desk, you check out the websites, you look for accessibility statements, you test it, you see whether there is a good faith effort to comply or whether there appears to be no interest at all. And then the lawsuits generally are successful if you are, A, in the right circuit, or B, have enough of a nexus to the business to show that the website is, in fact, not providing the services that the person with the disability would otherwise be able to get.

And the *Winn-Dixie* case, admittedly, is on appeal, but that was a very strong statement by a federal judge that website accessibility cases are legitimate under Title III of the ADA and that there is a solution even in the absence of Justice Department standards. So it's a warning to businesses and state and local governments out there to take website accessibility standards quite seriously.

There is no question that the Trump administration will continue to challenge the degree of enforcement. I would not be surprised if that Department of Justice statement of interest that was filed in the *Winn-Dixie* case would not be filed by today's Department of Justice. I would not be surprised-- I'd be disappointed, but I wouldn't be surprised if that were the case.

So my recommendation is to look at what WCAG 2.0 requires. Look for expertise in website accessibility. Put together good statements on your websites about the good faith efforts you are going to make or have been making. Identify the problems and address the problems.

The lack of published standards-- in my opinion, you're taking a risk if you rely on the lack of published standards as a basis for not looking towards coming into compliance over time. I see that there is a question. "What is the stance that a website has to be 100% compliant? What if they're 95% or less?" And somebody else asked what the private bar is. I'm sorry. I should have explained the term private bar right away. Let me go to that first.

The private bar, as I'm using the term, just means anyone other than the government. So it just means a plaintiff hired an attorney and they are a private practice. That's what I mean by the private bar. So you've really got a number of ways that the ADA is enforced. You have federal government enforcement. You have private litigation enforcement. So any anybody who hires-- I'm sorry-- anybody who feels they've been discriminated against can litigate it in federal court with the use of an attorney.

So the question about 90%, 95%, does it have to be? I would say that what most of this seems to come down to is good faith ongoing efforts to come into compliance. So if you're at 90% and it's an ongoing effort, I think you'd be in very good shape. Where the risk is, just as it is with brick and mortar litigation, is where the business has done very little or has shown very little interest in identifying problems.

And let me just give you an example very quickly. If you have a brick and mortar store and you have no access to it-- let me make it even easier. You have no designated accessible parking. I think it's very clear that a private litigant, that is a lawyer in private practice, is going to see that as a real sign that you have not undertaken good faith efforts to come into compliance with what the requirements of the ADA architectural barrier removal requirements are. As a result, that means you're going to be targeted more likely than not.

Now, this is not really that if you're 90% close to finishing the WCAG requirements. These are, how do you make a website accessible? And I agree with Charles who says WCAG has no concept of percentage. To conform to the guideline means 100%.

The idea is that these are ways that you can make photographs accessible to a screen reader. You can make videos and audio tapes on your website accessible to someone who is deaf.

You have certain standards set out in WCAG.

But there are going to be ongoing efforts by the disability community to stay in touch with your business. So you have to really create, in my view, an attitude about accessibility. You have to be talking about, how are we serving people who are blind, people with cognitive disabilities, people with mobility disabilities, people who have hearing loss?

The website lawsuits have focused primarily on challenges by persons who cannot access the website through a screen reader or cannot access the audio and video portions of a website because it's not properly captioned. So pushing forward, I think the recommendation I would have is look at what the WCAG standards are, voluntarily adopt those, and move forward on an ongoing basis to stay up to date with ensuring that your website is accessible.

By my clock, it's about 2:50. Can we go to the next slide? I think that was it. Yes. So we're at Q and A. Anybody have any questions? Let's try to address them.

SOFIA LEIVA: Yup. Mike, we had a couple of questions come in. The first question that I have is, "What approaches have you tried that have worked in getting an organization to comply with the ADA a priority? In particular, leadership."

MARC DUBIN: That's a wonderful question. I don't think there's a perfect answer to it, but since you're asking what I've tried to do, I will try to respond. First, I think it's really important not to come in accusatory. I think if you come in and say, you're in violation of the law, or it appears you don't care about the disability community, you've lost the ability to have any kind of educational effort going on.

I think it's often a big challenge. Because I worked with the Center for Independent Living in Miami for 10 years as director of advocacy, and I found that there were major challenges still in place about voting access, about health care, and about a variety of other issues. And if you come in and you make the other side very defensive, they're not going to listen. Just like any other negotiation.

So the first approach I would suggest is talk with the person who's being affected by the policy or practice. See what they are experiencing in terms of not being able to access something. So when you're talking about website accessibility, I think it's important to let the business know that there is a large market of persons with disabilities that would like to spend money at their business. They cannot do so because the business has some challenges in making itself

accessible to them.

And then I would urge them to identify what they think they're doing, challenge them to think more broadly about what they can be doing, and assist them in understanding that there are tax breaks for doing most of this stuff and that there are wonderful technical assistance materials out there to help them. I hope that helps. I hope that answers it.

SOFIA LEIVA: Yeah. Great. Thank you, Marc. The next question we had is, "I heard concerns that public accessibility statements can make a company more susceptible to lawsuits by setting expectations that its website pages are accessible. How do you feel about this?"

MARC DUBIN: Well, just like the restaurant was afraid of saying "come on in" because they were afraid of getting sued, I think that's a realistic but shortsighted concern. I say that because if, in fact, you identify problems when you don't move to solve them, yeah, you're likely to get sued because now they know that you're acting in bad faith.

But if you are acting in good faith and you're moving forward, you're making good faith efforts-- you have somebody trained to assist in addressing it, you do some reaching out to the disability community-- then you are seen as a partner with the disability community, an ally of the disability community, making good faith efforts over time.

The problem is when you don't make good faith efforts over time or you promise and you don't deliver. You have to be realistic about it. You also have to have realistic turnaround times for responding and for fixing things.

So if somebody says to you, "I was on your website and I was very interested in a video about something I was concerned about, but the video was not captioned and I'm deaf," well, you caption it. You do it as quickly as possible. You hire 3Play Media or somebody else and you fix that person's problem right away. And you communicate with them what you're doing. Or if you cannot do it really quickly for a legitimate reason, you communicate with them.

I have found that many in the disability community feel disrespected, and I think that's a big problem. It's not just it's inaccessible, but the fact that it is still inaccessible 28 years after the law was passed. That is a message of disrespect that the disability community quite understandably reads. And what they want is good faith efforts to fix things.

So don't over promise, but you do need to look at the problems that you have and you need to address them. Ignoring them doesn't mean you won't get sued. Addressing them means that

you can tell a court if you do get sued, you can tell a plaintiff if you do get sued, this is what we've done to address it.

We hired an expert, we've assigned staff, we've budgeted for it, we've got a plan over time of what we're going to do and when we're going to do it. Absent that, the disability community, I think, can justifiably be skeptical of your commitment.

SOFIA LEIVA: Thank you. The next question that we have is, "I work for an educational institution that receives some federal grant funding. Does our website need to comply with WCAG 2.0, or Section 508, or both?"

MARC DUBIN: I would say both. Section 508 is what you are required to comply with if you are a federal contractor. But I do think you've still got private sector individuals coming in to visit your website, so you're still going to have the risk of litigation there. It's not just the enforcement side of the federal government. It's also the private sector visitors who are going to expect you to come into compliance.

And when I say you have to comply with WCAG 2.0, again, there's a few courts that have ordered that, but that does not necessarily mean that you have to comply with WCAG 2.0 if you're not ordered by that court. This is more of guidance to the extent that you should be moving toward complying with WCAG 2.0.

And let me also just point out that everything I've said here is not legal advice. It's guidance. This is not creating, obviously, an attorney-client relationship. But I do want to urge you to speak to your own private counsel with very specific questions about your own liabilities. These are just intended to give you kind of an overview of what the concerns and approaches have been.

SOFIA LEIVA: Great. Thank you. I think we have time for one more question. "What if the service is not a required? For example, Berkeley's free lectures."

MARC DUBIN: Say that again, please?

SOFIA LEIVA: "What if the service is not a required? For example, Berkeley's free lectures."

MARC DUBIN: If the service is not required. For example, what? I'm sorry.

SOFIA LEIVA: I think Berkeley University's free lectures.

MARC DUBIN: Free lectures. Well, is it being offered by a business or is it being offered by a state or local government, would be my first question.

SOFIA LEIVA: This one? I guess Berkeley is a university.

MARC DUBIN: So it's a private university.

SOFIA LEIVA: Mm-hmm.

MARC DUBIN: All right. So it's covered by Title III. The only reason I'm raising a distinction is with Title II, when viewed in its entirety, the program, service, or activity has to be accessible to and usable by people with disabilities. So if you've got, for example, a music program and some of them are accessible and some are not, when viewed in their entirety for a state or local government program, that may be compliant.

For a Title III private business-- for profit or nonprofit are both covered regardless of the number of employees-- if you're offering that service, that program, that activity, it cannot discriminate on the basis of disability. So if you are not mandated to provide it but you're providing it anyway, you have to be able to provide it in an accessible fashion to people with disabilities. If you're not required to provide it but you're choosing to, you have to provide it in a way that does not discriminate.

SOFIA LEIVA: Great. Thank you. And if you're open, we can do one more question.

MARC DUBIN: Sure.

SOFIA LEIVA: Can you comment on how the ADA-- "how do you see the ADA adapting to future and changing technology?"

MARC DUBIN: Well, the technology of the future was contemplated by the drafters of the ADA regulation. As a practical matter, there is language within the regulations that talk about adaptability of the ADA to future technology.

The first mention of web accessibility really came from a technical assistance letter in 1996 from the head of the Civil Rights Division at the Justice Department to Senator Harkins. And he said, the obligations for effective communication includes, quote, "computerized media such as the internet."

So there's no question that any new technology will be covered by the ADA. The question will be, will that new technology be able to be provided in a way that provides both accessibility of effective communication and modifications of policy?

As long as it is done in a fashion that provides equal opportunity, it will be in compliance. But the ADA's language would not need to be modified to cover future technologies. It already contemplates any of those technologies that may be developed in the future.

SOFIA LEIVA: Great. Well, thank you so much, Marc, for a wonderful presentation. And thank you, everyone, for joining today.