**KELLY MAHONEY:** Thank you, everyone, so much for joining us today. This presentation is called California Case Study, Why You Want to Avoid Getting Sued For Web Accessibility. My name is Kelly Mahoney from 3Play Media, and I'll be moderating today. I'm a young white woman with brown hair clipped back wearing a blue 3Play Media t-shirt.

With that, I'm happy to introduce Ken Nakata today. Ken is a Co-Founder of Converge Accessibility, a company that creates innovative and nimble accessibility solutions for Fortune 100 companies, federal agencies, and state and local governments. In addition, Ken is a former senior trial attorney with the US Justice Department's Disability Rights section, and has developed nationwide ADA policies for the internet. Thank you so much for joining us, Ken. Please go ahead and take it away as my words are failing me.

**KEN NAKATA:** [LAUGHS] Thanks, Kelly. So good day, everyone, and welcome to my presentation, California Case Study, Why You Should Want to Avoid Getting Sued For Web Accessibility.

As Kelly mentioned, my name is Ken Nakata, and I'm a Principal at Converge Accessibility where we specialize both in testing web and digital technologies for accessibility and in helping organizations manage accessibility in both the built environment as well as the digital spaces. We also spend a lot of time working with attorneys who have clients who are defending these web accessibility cases because web and digital accessibility presents such thorny and complex legal and technical issues.

We run a blog every month, and every month I go through my Lexis feed and summarize all of the web and digital accessibility cases for the month. And over the last year or so, I've noticed a trend that is polarizing different groups of courts in California towards very different legal opinions. And these differences have a huge impact on companies.

But since I agreed to present with my friends at 3Play Media, I've noticed that that same polarization is now happening also in New York and Florida, so I'll discuss that as well. So really, this presentation should be simply called-- this should be simply called Web Accessibility Litigation is a Mess, So You Should Just Avoid Getting Sued.

Before we get into that, I should introduce myself again. My name is Ken Nakata. I used to be a senior trial attorney in the Disability Rights section at the US Department of Justice. And during my 12 years when I was at Justice, I was fortunate to work on a huge variety of cases under the ADA.

And then in the second half of my career, I represented the attorney general in the original Section 508 rulemaking. And in that role, I also served as the lead counsel to the federal government's Section 508 working group, which brought together all of the federal agencies to make the federal government's IT systems accessible to people with disabilities. And I also helped develop the department's policies with respect to the ADA and websites.

As you may have heard, or maybe not, the Justice Department is planning to develop new web accessibility regulations under Title II of the ADA. I'll talk briefly about what we should expect to see there based on my experience.

So let's add a little structure to the large amount of ground that we have to cover. We'll start by talking about the ADA and something called the nexus requirement, and how that nexus requirement's evolved and the terrible predicament that we're now in as the courts struggle over what it means.

As promised when I agreed to do this presentation, we'll cover California as part of that. But since then, we've had new developments in the other two main jurisdictions for web accessibility, namely New York and Florida. Then I'd like to spend a few minutes talking about California state law and the Unruh Act, because there have been a few new developments in the last few months around this as well.

And this will give me an opportunity to wrap up my thoughts on why you really don't want to be a defendant in a web accessibility lawsuit anywhere, but especially in California. Then I'll talk about the new Department of Justice regulation. So it should be coming out in early 2023.

This won't affect most private sector companies, and I'll tell you why. Plus I'll tell you what we can expect to see in those new regulations based on what the Justice Department has said so far. Lastly, I'll close by quickly giving a few thoughts on how to avoid web accessibility problems in the first instance.

So let's dive in. Let's start by talking about the ADA. And what is this thing that I keep referring to as the nexus test? Well, let's first set a basic understanding of the Americans with Disabilities Act, or ADA. This is going to start at a really general level. But even if you're already an expert in the ADA, it's important to talk about these super basic concepts because they'll quickly become the center of our discussion.

So the ADA, of course, prohibits discrimination against people with disabilities. But what does that mean? Well, it includes obvious forms of discrimination such as just excluding people with disabilities, but it also includes more subtle forms of discrimination like providing people with disabilities with different opportunities. An example of this would be, for instance, making online coupons unreadable by people who use screen readers.

A completely different form of discrimination would be so-called eligibility criteria or screening processes. These tend to screen out people with disabilities. An example of this kind of discrimination would be a company, for instance, that required a user to complete an inaccessible, online application before they could shop at their store. Now I mentioned these two examples because these two different forms of discrimination are going to come up a lot in our discussion.

So a third kind of discrimination is failure to provide effective communication, such as making the website accessible in the first place. In the ADA, this falls under the category of failing to provide appropriate auxiliary aids and services, and it forms a foundation under which these other first two forms of discrimination occur.

And in jurisdictions that don't require the nexus standard, this is really all we need to show in order to establish an ADA violation. Of course, a defendant could still challenge a lawsuit based on things like standing to sue. For example, whether the plaintiff ever intended to become a customer. And while these can arise in any lawsuit, and not just ADA lawsuits, they can often get confused with the kinds of ADA discrimination we talked about earlier.

So these accessibility requirements for private businesses are set forth in Title III of the ADA. But Title III doesn't use the simple language private businesses. We'll be using that language a little bit during our presentation. But instead, Title III uses the language places of public accommodation.

Well, that leads to the natural question. Where is the place when it comes to the company's website? Obviously it isn't the physical place, for example, where the servers or website are hosted. So the question really becomes, how can a place of public accommodation be liable when the discrimination doesn't occur in a place?

So courts have answered this question differently, and this has created a split in the circuits. So our country is divided into 12 judicial circuits with each circuit containing one or more district courts. Some circuits are enormous and others are quite small. For instance, the DC Circuit includes only Washington, DC, which is one district court, while the Ninth Circuit includes all of the Western states and hears appeals from 15 different district courts.

So when we say that there is a split in the circuits, we mean that the different groups of courts take different approaches. And unless they change their mind or the Supreme Court settles the split, where you are sued will have a big impact on which way the court will go.

Note that I didn't say where your company is based. If you do business in a particular state such as selling a portion of your online sales to customers in that state, you may be sued in a district court in that state even if that state is thousands of miles away and you have no employees or offices anywhere near where you're being sued.

I mentioned that there's a split in the circuits over whether a company can be sued for its inaccessible website. So the most popular approach is the so-called nexus approach, and that's the real subject of our discussion today.

And this is followed in the Third Circuit, which is Delaware, New Jersey, Pennsylvania, and also the Virgin Islands; the Sixth Circuit, which is Kentucky, Michigan, Ohio, and Tennessee; the Ninth Circuit-- oh boy. This is all those Western states, which are Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and of course, the Northern Marianas Islands. And the Eleventh Circuit, which is down in the Southeast, which is Alabama, Florida, and Georgia.

In these jurisdictions, a plaintiff has to show that there's some connection or nexus between a website and a physical bricks-and-mortar place of public accommodation. So this used to be easy to show by things like a store locator feature on a website or coupons that could be redeemable at a physical store that could be downloaded from the website, or for instance, being able to place orders online and return them at a physical store. Features like that would normally create a nexus, but we'll talk pretty quickly about how courts are now reading this nexus test very differently.

On the other hand, the most liberal approach apart from the nexus approach is followed in the First Circuit, which includes the New England states of Maine, Massachusetts, New Hampshire, and Rhode Island, and then oddly enough also includes Puerto Rico, and the Seventh Circuit which includes Illinois, Indiana, and Wisconsin.

And most recently the Fourth Circuit, which you wouldn't normally put in this bunch, which is Maryland, North Carolina, South Carolina, Virginia, and West Virginia seem to have entered this group as well, at least temporarily. In these circuits, a physical place isn't required at all. This means that in these jurisdictions, a purely online company could be sued.

Now while you might think that these liberal approaches to web accessibility would make Boston, for instance, which is part of the First Circuit, or Chicago, which is part of the Seventh Circuit, the go-to venues for plaintiffs, this hasn't proven to be the case as we rarely ever see web accessibility cases filed there.

Then there's the Second Circuit, which includes Connecticut, New York, and Vermont. And here it's a mixed bag when it comes to web accessibility. I'll talk about why in a few minutes. At first at least, it appeared that they followed the nexus approach. But courts here have appeared to be rapidly polarizing.

So with what I've said, it might be tempting to think that these differences are just academic, but they really do have real-world significance. For instance, in 2012 Netflix was sued by the National Association of the Deaf in both California and Massachusetts. The California case was thrown out because nexus doesn't operate any stores or physical places of public accommodation, and so thus the lawsuit failed the nexus test. By contrast, the Massachusetts case was able to go forward because the First Circuit has no nexus requirement.

So any discussion about web accessibility wouldn't be complete without a discussion of Unruh and the Disabled Persons Act. These are two California laws that operate together to provide even greater protection for people with disabilities residing in California.

First, Unruh has a much broader coverage and includes any business establishment. In fact, any business activity is covered and there's no nexus requirement. While the ADA is limited to 12 categories of businesses, Unruh covers any business activity.

Now the ADA's coverage is still quite broad, but it's largely focused on businesses that are open to the general public. By contrast, Unruh covers everything, including all business-to-business companies and even covers odd things like condominium board association meetings.

Also, any ADA violation automatically becomes an Unruh relation. That might not sound terribly relevant until you get to the next point, which is that the damages are much bigger under Unruh than they are under the ADA.

For instance, if a person with a disability sued a business because it was inaccessible, the only money damages that they can receive is their attorney's fees under the ADA, even if they could show that the discrimination caused them real financial loss. But if that case are brought in California under the Unruh Act, then they would be entitled to three times their actual financial loss. And even if they couldn't quantify that loss or that loss were very small in value, the plaintiff could still recover a minimum of $4,000 per claim.

So when the NFB settled its lawsuit against Target Corporation for its inaccessible website, Target Corporation ended up paying $6 million as part of that settlement. Now all of that money went to the California plaintiffs. And actually, I think Target ended up with quite a deal.

There's a wrinkle here in the context of web accessibility and purely online companies. You'll recall that purely online companies can't be sued under the ADA in California because of the Nexus requirement. And the last time I gave a legal presentation with 3Play Media, I mentioned it that it was unclear whether a purely online company could be sued under the Unruh Act.

Well, a California Court of Appeals answered that question just last month, and I'll talk about how they answered it. But most companies with a website also have a physical establishment. And as more and more of these companies use their websites and physical businesses together, it isn't hard for plaintiffs to demonstrate a nexus.

So the large monetary damages under Unruh are available. And this has served as an incentive for more ADA web accessibility cases to be brought as Unruh cases. In fact, within the last two years we've seen a large increase in web accessibility cases that are filed in California state court and are brought only as Unruh cases.

Now that we have a basic understanding of the legal basics, including the ADA, the so-called nexus test, and California's Unruh Act, let's shift to how these concepts play out in the courts. And here, things get really messy really fast.

Of the thousands of web accessibility cases that are filed each year, I'd say at least 99% are filed in California, New York, or Florida. And all three of these jurisdictions follow some variation of the nexus requirement.

For several months, I've blogged about how courts have struggled with what the nexus test means and how to apply it. So let's look at each of these states in turn, starting with Florida.

So as you recall, Florida is part of the Eleventh Circuit. And it just so happens that most nexus decisions, whether from Florida or elsewhere in the country, ultimately trace their lineage back to the Eleventh Circuit case *Rendon versus Valleycrest Productions,* a case from 2002 that didn't involve websites at all and that presented a very unique fact scenario.

In that case, Sergio Rendon wanted to be a contestant on the game show *Who Wants to be a Millionaire?* But he was unable to get past the telephone screen process because that screening process used telephone based audio cues, and those were inaccessible to him because of his hearing impairment.

So the Eleventh Circuit noted that the game show was the place of public accommodation. It's a place of recreation. And the telephone screening process was the eligibility criteria for accessing that game show. So the *Rendon* court noted that the ADA prohibits eligibility criteria that screen out or tend to screen out individuals with disabilities, even where that discrimination takes place outside the physical place of public accommodation.

So far this sounds like a pretty straightforward application of the legal principles we discussed earlier. But later interpretations of *Rendon* and the Nexus test in general have roughly split in two different directions.

The first approach used by some courts is to require a general kind of nexus between that off-site discrimination and the ability to enjoy the goods and services or benefits of a physical business. So this makes sense from what we've discussed earlier. The ADA prohibits providing people with disabilities with lesser opportunities than people without disabilities.

So a second approach used by other courts is to say that the off-site discrimination such as through the internet needs to directly impede access to the physical place of business. This approach takes the unique analysis in *Rendon,* which included only a screening process, and applies it to cover any ADA discrimination that doesn't directly take place in a physical place of public accommodation.

The problem with applying the second approach to websites is that websites rarely involve facts that even remotely resemble the facts in *Rendon.* Most websites or physical businesses don't screen customers. Instead, these websites usually facilitate access to the goods or services available at a place of public accommodation such as by offering coupons or locating stores or facilitating returns.

So district courts in Florida were merely following the first approach in web accessibility cases, leading Florida, I'm sorry, becoming the most popular venue in the country for bringing web accessibility cases. One of those cases was the district court decision in *Winn Dixie,* which was one of the first web accessibility cases to go all the way to trial.

Winn Dixie didn't like the district court's opinion, which ruled against them, and appealed the case to the Eleventh Circuit Court of Appeals where a three-judge panel issued the well-known decision reversing the district court and requiring courts in Florida to follow the second approach, that narrower approach to the nexus standard.

While the three judges did their best to avoid calling their approach the nexus test, it pretty clearly followed a very narrow reading of *Rendon.* Specifically, unless the plaintiff could show that the website effectively blocked a person with a disability from accessing the goods and services at a physical place of public accommodation, they couldn't bring a lawsuit.

So the court was well aware of the absurd situation that it was creating for Mr. Gil in his lawsuit against Winn Dixie. Because he was blind, Mr. Gil could not take advantage of the online refill service that Winn Dixie provided. So he had to wait extra time, sometimes more than an hour for his prescriptions to be refilled while other customers could just walk in and pick up their prescriptions. He also couldn't take advantage of online coupons, so he had to cajole other customers into reading coupons for him when he arrived at the store, and so he couldn't plan a shopping list very effectively.

Later the Eleventh Circuit reversed and vacated its opinion, eventually meaning that the earlier opinion never even happened. Since then, district courts in the Eleventh Circuit have so far returned to the more liberal interpretation of the nexus test because the ADA, of course, prohibits more than just eligibility criteria and screening processes. And so if Mr Gil's lawsuit were brought today, he would likely succeed again.

For instance, in a case just this last month in Florida called*Ariza versus South Moon Sales,* a magistrate judge ruled that simply alleging that a website included features like being able to purchase gift cards or sign up for a newsletter, the kind of features that would never suffice under the Eleventh Circuit's *Winn Dixie* opinion were enough to meet the nexus requirement, even though courts in the Eleventh Circuit-- they'll never call it the nexus requirement. But the answer isn't at all clear because as we'll show in a few minutes, just about every circuit has struggled to come up with a consistent interpretation of how to meet the nexus test.

So if we shift over to California, the differences between these approaches becomes even clearer. In June, a district court in the Northern District of California took an approach in a web accessibility case that seemed eerily similar to *Winn Dixie.* In the case, *Langer versus Oval Motor Sports Incorporated,* Chris Langer visited the website of Antioch Speedway to look for information about car racing. But he wasn't able to understand the videos on the website because the videos weren't captioned.

The court threw out his case because he was not able to show that he was deterred from physically visiting the Speedway. And thus, he could not establish a clear nexus between the barriers on the website and the physical place of public accommodation.

While being deterred from visiting a physical establishment is likely a much easier thing to prove than being actively blocked like the *Winn Dixie* court seemed to require, it's still artificially constraining the ADA to just eligibility criteria and screening processes when the ADA prohibits a lot more forms of discrimination.

So just a few days after the *Langer* decision came out, a district court in the Eastern District of California used a very different analysis in *Erasmus versus Andrea Tse MD, Incorporated.* In that case, Megan Erasmus was unable to understand videos about cosmetic dental procedures on the defendant's website because they also lacked captioning. Unlike the *Langer* court, the court in *Erasmus* found that she could sue because the lack of captioning made it difficult for her to decide whether she should become a customer.

Now unlike Chris Langer, however, Ms. Erasmus didn't even assert that she had any intention of visiting Dr. Tse. So her case would have certainly been dismissed if she was in front of Chris Langer's judge.

But Ms. Erasmus's luck appeared to run out the next month when she sued another health provider also in the Eastern District of California. In *Erasmus versus Dunlop,* she sued a dentist named Ryan Dunlop because he had videos on his website that were not captioned. The court then dismissed her complaint because the lack of captioning on the video did not impede her ability to access Mr. Dunlop's physical dental office.

Now Megan Erasmus is a serial plaintiff, and she has sued over 30 health care providers in this kind of lawsuit. And while I'm certainly no fan of serial plaintiffs, there are people with disabilities who actually need to access services like this, and inaccessible websites often make that impossible.

Also, businesses need clarity. And most of the businesses that Ms. Erasmus and other plaintiffs sue usually have no idea that they need to make their websites accessible. But that uncertainty is compounded when judges make it impossible to know whether they can be held liable. And courts creating such different interpretations of the nexus test certainly doesn't help.

A company's success in a lawsuit shouldn't depend on which judge they end up facing. Instead, there should be clarity about what the nexus test requires or whether it should be abandoned entirely.

So earlier, I talked about the Unruh Act and how it made it easier to sue businesses for accessibility. Accessibility violations. And so now I'm going to take a little detour just momentarily.

And because California courts along with other courts in the Ninth Circuit followed the nexus standard, the only possible way to sue a purely online company in California was to use the Unruh Act. But an open question was, what was needed to support such a lawsuit?

Well, as I promised, just last month a court of appeals in California answered this question in *Martinez versus Cot'n Wash.* In that case, Abelardo Martinez, another serial plaintiff, sued Cot'n Wash, a purely online Pennsylvania company that sold cleaning products. A trial court dismissed Mr. Martinez's complaint, and so he appealed. But sadly, Abelardo Martinez died while the appeal was waiting to be heard, and his brother Alejandro succeeded him in the lawsuit.

The court's opinion really didn't come as a surprise, but it's useful to read anyways. In a nutshell, the appellate court ruled that in order to bring an Unruh claim for disability-based discrimination, a plaintiff needs to either prove a violation of the ADA or an intentional discrimination against an individual on the basis of their disability.

And because an ADA violation requires an underlying physical place, this means that suing a purely online company fell to that second part of the test. It required proving intentional discrimination.

The reason that that opinion wasn't a huge surprise is because, well, as we said before, the Unruh Act automatically makes ADA violations into Unruh Act violations. Otherwise, in order to bring a disability lawsuit under the Unruh Act, the Supreme Court told us quite some time ago that a plaintiff has to show intentional discrimination. And because Mr. Martinez couldn't show that Cot'n Wash intentionally discriminated against him, his case was dismissed.

So what constitutes intentional discrimination in California, however, is a somewhat open question. In Florida, one way to show intent is to show deliberate indifference. For instance, if a plaintiff shows that the defendant knew about the potential discriminatory harm but failed to do anything about it, they would be able to prevail in showing a deliberate indifference.

So if Cot'n Wash's web developer told them that they could make their website accessible for people with disabilities or perhaps if Cot'n Wash are attending this webinar, then they'd be in the same boat. But if Cot'n Wash then chose instead to choose an inaccessible design, it's possible that that intent requirement could be met.

So courts in New York have also struggled with the Nexus requirement. Last year, one opinion came down that used the same narrow kind of interpretation of the ADA as the *Winn Dixie* case. That case was *Winegard versus Newsday* from Judge Komitee in the Eastern District of New York. And that district includes Brooklyn, Long Island, and Staten Island, as well as a number of other jurisdictions-- regions.

Yet just across the Brooklyn Bridge is Manhattan and the courthouse for the Southern District of New York, which takes an entirely different view of web accessibility. Just last month, it put an exclamation point on this difference in its ruling in *Tavarez versus Moo Organic Chocolates* where the court held that Moo Chocolates, which is a purely online company, could be sued under the ADA. This opinion follows a pattern of several other cases in the Southern District of New York that have completely abandoned the nexus requirement altogether and allowed lawsuits against purely online companies.

So where does this analysis leave us? Well, I think the nexus standard should be abandoned. While I'm no fan of serial plaintiffs, I believe that the intent of the ADA was to protect people with disabilities from discrimination. And given that so much of our commerce takes place over the internet, it seems absurd to me that purely online companies should be exempt from the ADA.

Focusing so heavily on the words place of public accommodation to the point that it excludes so much of our economy from the ADA seems hyper technical and unfair. Plus, there were plenty of other businesses that did not rely on physical offices when the ADA was passed in 1990, such as mail order companies, travel services and insurance companies, along with a whole list of others.

Yet the history of the ADA never suggested that those businesses should be excluded. But most of all, using a nexus test has just been a failure because courts have made it impossible for companies to understand what they need to do about their websites.

But if we're going to keep the nexus standard, I think that how it gets applied should depend on the type of discrimination that's being alleged. For instance, if we go back to the basic ADA principles that we started with, if a plaintiff is alleging that the website is some kind of screening process similar to that telephone screening process in *Rendon's Who Wants to be a Millionaire?* game show, then it makes perfect sense in that instance to ask whether some features on the website impeded access to a place of public accommodation.

But if the plaintiff is claiming that some feature on the website created a completely different customer experience for them when they visited a store, such as Mr Gil having to wait an extra hour for his prescriptions to be refilled or his having to cajole other customers to read printed coupons when he went to a Winn Dixie store, then the nexus test should be met by alleging that some features on the website facilitated access features or benefits of the store. This fits in well with the other form of discrimination that we started with, whether a person with a disability is denied the same opportunities that are afforded to customers without disabilities.

So that pretty much ends my discussion of the messed up nexus requirement, why it creates legal perils for companies, and what I think the courts should do about it. I promised earlier a short update on the upcoming DOJ regulations, which I'd like to spend a few minutes talking about.

So almost 20 years ago, way back in 2003 when I was still at the Justice Department, I wrote a technical assistance piece called *Accessibility of State and Local Government Websites to People with Disabilities.* And you can still find that on the government's ada.gov website. In it, I basically wrote that state and local governments should strive to meet Web Content Accessibility Guidelines, or WCAG, and they should always strive to ensure that their programs, services, and activities were accessible to people with disabilities.

For instance, if a website couldn't be made accessible today, then state and local governments should ensure that the programs, services, and activities supported by that website were also available through an alternate means that were accessible. This just follows the language of Title II of the ADA because state and local governments need to follow this flexible concept of what we call program access that's unique to public sector entities while including effective communication requirements similar to what private businesses have to do.

So fast forward to 2022 and the Justice Department issues a new technical assistance piece,*Guidance on Web Accessibility and the ADA,* which offered almost exactly the same advice that I gave 20 years ago, but gave lots of examples where DOJ required state and local government websites to be accessible in its various settlement agreements.

And I complained bitterly about this update in my blog because the lack of any web accessibility regulations from DOJ is the biggest source of uncertainty in ADA litigation today. Well, the federal government's Office of Management and Budget, or OMB, which is part of the White House tracks upcoming regulations from agencies. And at the end of July, the Justice Department very quietly noted that they would be coming out with a draft Title II accessibility regulation by April 23. I swear, I had nothing to do with [LAUGHS] asking them to do this.

So what will those regulations look like? Well, with the background I just gave, it should be pretty obvious what those regulations should look like. Those regulations are going to look exactly like the draft guidance that DOJ issued this year. After all, it would be crazy for DOJ to suggest that state and local governments follow one piece of advice, and especially one piece of advice for the last 20 years, and then suddenly change their direction one year later.

While it's great that DOJ's planning to add clarity over what state and local governments need to do, what's clearly missing is a regulation for private sector web accessibility. I've highlighted some of the legal complexities during my presentation so far today for applying Title III of the ADA to websites. And these issues certainly make it much harder to create a Title III private sector web accessibility regulation. But without clear guidance from the Justice Department, it's also clear that the courts and the private sector are going to continue struggling.

So I'd like to close by mentioning a few strategies for avoiding these problems. So right off the bat, regardless of whether you're a private sector or a public sector entity, it's important to start thinking about web accessibility and making your websites accessible.

This means getting a manual audit of your website done as soon as possible. The reality it is that almost all the problems on modern websites fall usually within a very small number of buckets, and these problems repeat over and over again. So no offense intended, but web developers are not artists. Each page is not unique, and they shouldn't be.

When each page follows a consistent look and feel, the website becomes easier for the user. So a manual audit can find these common issues much better than an automated tool, especially with more modern designs that rely heavily on JavaScript and CSS. Automated solutions definitely have their place, but not immediately, and not for every website.

So the second element I always recommend is a good accessibility statement. Now I've talked about this in plenty of other presentations. Here, however, I always focus on an element that's usually ignored by other people who talk about accessibility statements, which is an alternate means for accessing the goods and services on your website.

So do you remember what I said earlier about how effective communication is the foundation of any web accessibility lawsuit? Well, if you provided access to exactly the same goods and services through a telephone or an email address efficiently and expeditiously-- and that's very important-- that would go a long way to providing that effective communication, even while your website is inaccessible.

So it's ironic that with the rise of the internet, most companies seem to make it harder for their customers to reach them. If you want to avoid web accessibility problems, good customer service and giving customers multiple ways to reach you will help avoid liability and probably increase sales at the same time. In this sense, reducing your liability just comes down to just really good customer service.

So that brings me to the end of this presentation. Apologies if it came across as a bit geeky or in the weeds, but we've covered some pretty heavyweight legal concepts that have a big impact on liability and web accessibility cases.

To summarize, we've covered some of the basic concepts of the ADA and where this tricky nexus requirement comes from. In that discussion, we've covered what's happening in California and also some very recent updates in New York and Florida.

Then we briefly talked about some updates in California and when purely online companies can be sued under a state Unruh Act. Next, we touched on the newly announced regulations by the Justice Department for website accessibility in state and local governments. And finally, we closed by giving some basic ideas on avoiding web accessibility problems in the first place.

So if you enjoyed this kind of legal discussion, please feel free to follow our blog at www.convergeaccessibility.com, and do sign up for our newsletter. You can also reach out to me directly at Ken.nakata@convergeaccessibility.com. Thank you very much.

**KELLY MAHONEY:** Great. Thank you very much, Ken. We have gotten some questions in, so if you don't mind, I'll just dive right into that.

**KEN NAKATA:** OK, great.

**KELLY MAHONEY:** So someone is asking-- they host ballot voting issues on a government website and some issues reference judicial files or other court documents that are not OCRed and are purely images. There are no official non-scanned versions of these documents available. When will courts update their own guidelines to meet ADA requirements? What are your thoughts on that?

**KEN NAKATA:** That's a really tricky issue because it is something that is outside of the ADA because it's done by the federal judiciary. So it's not even subject to the Rehabilitation Act. So there are architectural requirements for the judiciary because the federal judiciary is all part of Article II of the Constitution.

If it's a state court, however, they are subject to Title II of the ADA, and they really do have to make their docket accessible. So oddly enough, I suspect that we may see action first on the state level before we see it on the federal level. That's just my guess.

**KELLY MAHONEY:** Great. Thank you. And someone else is asking if you could maybe go into more detail about ADA requirements for videos, specifically audio description. Is audio description something that's required on all videos or in certain circumstances? Have you run across that at all in your work?

**KEN NAKATA:** Not so much, but I'd say the answer is yes. You do have to audio describe your videos if you're providing them on your website, but it isn't crystal clear. The Justice Department, as I mentioned, hasn't come up with those regulations yet. They announced them for Title II, so that's going to be April of next year, so we'll see that NPRM.

And they're probably going to say at that time that state and local governments have to abide by WCAG 2.1 A and AA, or 2.0 A and AA. And when they do that, then state and local governments will be on notice that one of those requirements is you have to audio describe your videos.

Title III of the ADA, on the other hand, is really like catch me if you can, you know? It's a question of if the Justice Department comes after you or a private litigant comes after you and they're blind and they can't understand your videos, and that's one of the things that they want and they allege in their complaint, then that's going to be a requirement.

So right now, the Justice Department has gone after a number of private sector entities for their inaccessible website, but not specifically for their videos that are not audio described. And they have required that private sector entities conform with WCAG 2.0 A and AA.

So yeah. And if you're a private sector entity it's really a question of, well, you should do it. And if you don't do it, well, somebody can sue you and then they'll tell you to do it. [LAUGHS]

**KELLY MAHONEY:** We agree, of course. We would always be proponents of audio description. And I did just send a link in the chat for anyone to browse the W3C's website on the Web Content Accessibility Guidelines. Those are a very comprehensive document if you're interested about the nitty gritty of specific requirements for video content.

We've got more questions coming in the chat. Someone asks, is Unruh only an option in California, or are there versions available across other states?

**KEN NAKATA:** Well, other states do have laws that prohibit discrimination against people with disabilities, and you'll often see those referenced in complaints. We see that a lot with New York, for instance. They'll reference a New York State claim.

But most of those claims are just an alternate way of getting to the same end. With Unruh, you're getting to a different end because Unruh includes monetary damages, and the scope of it is so much broader than the ADA.

So yeah, other states do have various human rights and civil rights laws that mimic the ADA, and those will often be referenced in a complaint, but they don't really add anything. But Unruh by contrast really adds some new potential avenues for going after companies and a whole new range of remedies in the form of monetary damages.

**KELLY MAHONEY:** Great. We've gotten a few questions in that are a little different, but I think they touch on the same sort of topic. Someone asks, "could public libraries or school libraries avoid responsibility by claiming it's not their fault if a selected third-party video service does not offer accessible services like audio description or closed captions?"

And then another person is asking about accessibility overlays and accessibility widgets. So to what extent can you sort of get away with claiming that the tool you're using just didn't fit the bill?

**KEN NAKATA:** Yeah. You're out of luck if you choose the wrong tool. [LAUGHS] So let's start with the library scenario. If you're a public sector entity and you're providing your programs, I'm sorry. Your programs, services, or activities through a third-party contract or through a third-party private entity, you're still on the hook for making sure those things are accessible.

But the fact that if you just include a-- say you're a library and one of the things that is in your collection is a video that's provided by a publisher, then no, you don't have to go through the extra step of making sure that that video is going to be accessible because it's not directly part of your program.

If your program is, say, getting access to the library and you have a card catalog system and you hire somebody to manage that for you, a private sector entity, then yeah, then you would have to make sure that that's accessible. It's a question of whether your actual programs are being contracted through a third party. Then you really have to be careful of that.

Now going to the second scenario with regard to overlays, yeah, as some of you may know, I'm currently working with the IAAP on overlays, some overlay issues, and let's just say it is one big hot button topic. I really do believe that artificial intelligence has a huge role to play in the future of accessibility, and what we see now is just the very, very, very beginnings of its potential. Image recognition, for instance, is so rudimentary right now compared to where it could be if AI really takes off.

Having said that, at the end of the day it all comes down to effective communication for your end user. If your end user is, say, a 90-year-old who has low vision and can't be bothered with learning how to use a screen magnifier like my mom, then in that case, yeah, an overlay may be perfect for providing accessibility. But that's probably not the person who's going to end up suing you. [LAUGHS] So if the person who ends up suing you is a person who uses a screen reader and that overlay blocks that screen reader, yeah, then you're out of luck. [LAUGHS]

**KELLY MAHONEY:** Great. Another person is asking, in light of everything that we've talked about, all of the details of accessibility, if we zoom out a little bit to a broader level, could you give an example of what a good accessibility statement would look like or might sound like?

**KEN NAKATA:** Yeah, absolutely. So I think that a good accessibility statement has three parts. First part is you should identify what your goal is. And this is really what most accessibility statements start and end with. They usually say, we strive to meet WCAG 2.0, 2.1, A and AA.

We regularly test with screen readers or we don't. We hired a third-party auditor to help us identify our inaccessible content. Or you don't include that. Basically, it's stating your efforts and what your policy is.

The second element is that element that I mentioned, which is really the alternate means of access. And yeah, that is really about providing a telephone number and hours of operation, an email address, and expected response times so that people with disabilities can access exactly the same services as are available through the website.

And here, there aren't that many cases that guide us on what effective communication means and that alternate means of access, but I can tell you examples of what doesn't work. So in the *Domino's Pizza* case, the last opinion that came out, the district court noted that the plaintiff-- that when the Domino's Pizza said, well, they could have just called us and ordered a pizza, the plaintiff responded, yeah, I tried that, and I got put on hold for 45 minutes.

And so the district court noted, yeah, putting somebody on hold for 45 minutes isn't providing effective communication. So by contrast, if you make it so that the telephone operator picks up immediately, answers all the person's questions, it makes it much, much, much harder for a plaintiff to say, oh, yeah, and I wanted your website to be accessible also.

**KELLY MAHONEY:** Great. That's very helpful. Thank you.

**KEN NAKATA:** Oh, wait. I forgot one other thing. The third element-- I said there were three elements. The third element is a feedback mechanism. So that is something like, I'm having trouble with this particular page. It's usually a form. So email address, which is optional because some people don't want to disclose their email address, the page that it happened on so that way your developer knows where they have to focus their effort, and a brief description of the problem.

That kind of form that's available on your website so that people with disabilities can say, hey, I'm having trouble accessing this page will help you prioritize which pages you'll want to focus on. And it makes it so that you're much more responsive to the needs of people with disabilities. OK, now I'm done.

[LAUGHTER]

**KELLY MAHONEY:** You can go as long as you'd like. I think this touches on what you might be talking about. Another person is asking about manual auditing. Could you tell us a little bit about what that looks like, what might be involved, or how individual--

**KEN NAKATA:** Yeah. We do that a lot at Converge. Actually, I don't my. Business partner does a lot of that. So manual audit involves trying to take this huge website that includes thousands of different web pages and trying to boil it down into a very finite number of web pages that have to be manually tested.

Manual testing is a very labor-intensive process. It means going through a website-- going through a series of web pages with assistive technology, various assistive technologies, and making sure that it meets all of the 50 requirements in WCAG A and AA. So that's everything from color contrast to web page structure so the screen reader user knows what the structure of the web page is. It includes a lot of minute requirements also now specific to mobile devices.

So it can take a long time to test a web page. And then the problem with testing a web page once you find a problem is that you then have to document the issues that come up. So that involves taking screenshots and code samples and then rewriting the code samples so that they make sense and they actually work. And so you provide a broken code sample and the fixed code sample and the screenshot and a description of the problem.

And so obviously, this takes a lot of time. So on the order of sometimes it can take up-- if it's a really bad set of web pages, it can take two hours a web page to manually test it and to document it.

So with that kind of effort, you really want to limit a website down to a very finite number of pages. Unfortunately, that can't be done because as I said-- sorry-- web developers aren't artists. And web pages generally include the same kind of content. So they'll include the same header, the same navigation bar. They'll include the same footer. OK, good. We've got those two elements. They're going to appear on every single web page on that site.

There's going to be, say, a calendar control pops up on a web page, on a couple of web pages, or forms appear on a couple of web pages, or a tab control where you tab and then different elements appear in the tab panel. Those appear on some web pages. Or an accordion control appears on some web pages.

Those accordion controls, those calendar controls, those tab controls, they pretty much should look all the same between your websites or between the different web pages. And so what we're looking for is examples of each of those different things.

And then also, if you've got critical workflows-- so for instance, if you're an e-commerce site it's a shopping cart. Being able to browse for a product, search for a product, add it to your shopping cart, and go through the checkout process. That's probably five different steps, four different steps. So those four different web pages, five different web pages, yeah, those are also critical.

And so when you tally it all up, you can reduce a really complex website down to a very finite number of web pages, usually about 25 web pages. And then that's what you want to do your manual testing on.

And then the manual test comes back with the results of all those problems. And then your developers say, oh, OK. That's how I fix that tab control. Now go fix all the rest of the tab controls on your website. Or this is how I fix this form. Oh, OK. Now go fix all the rest of the forms on your website. And so before you know it, you've gotten all the content on your website.

And then unless you're going through a major redesign of your website, if you just keep those principles in mind that you learned during the audit in mind during your updates to the web page, you should be good for quite a while until you start creating entirely new content. So basically, that's why a manual audit, even though it only uses a very small fraction of your website, it actually does cover basically all of your website.

**KELLY MAHONEY:** Great. We have another question about paid advertising on social media. So someone says, "if a state agency advertises on a social media platform, do the promos also need to be 508 compliant? For example, a video promo on Facebook."

**KEN NAKATA:** Oh my gosh. [LAUGHS] So I watch the TV and I see these advertisements for why it's so great to go to San Diego to get my mind thinking so I'll start buying plane tickets for San Diego now for the middle of winter, right? So I imagine those same ads come up in social media. Do those have to be accessible?

Well, wow. I hate to say it, but probably yes. But unfortunately, the social media platform might have issues with accessibility. So yeah, you probably do have to do it.

Yeah, and certainly if 508 comes up-- well, 508 comes up with respect to the federal government. That's what 508 is limited to. A lot of states have their own analogs or they latch on to 508 and then they say, OK, if we're California, for instance, we're only going to buy digital technology that conforms to 508 because we have a 508 analog law.

If you're a contractor and you're providing at that advertisement to, say, California or the city of San Diego for those ads, yeah, then they can say, absolutely. That content that you're providing us has to be accessible.

But that would be because of their own state requirement, their own state 508-like law or policy. The federal 508 wouldn't have anything to do with it, though.

**KELLY MAHONEY:** Very interesting. Yeah. That's where we at 3Play also distinguish between closed captions and open captions, although I suppose paid advertising is a little different. As you were saying, social media platforms often have their own restrictions on the accessibility services that are available.

**KEN NAKATA:** Yeah. I didn't think about that. So the video player in Facebook probably doesn't have a way of adding closed captions.

**KELLY MAHONEY:** Yeah, they don't allow a sidecar file, which is just an additional text file that goes with the video file, so we recommend sometimes open captions as a fix to this where they're burned directly onto the video. So the user can't toggle them on or off, but they're available. And it's great for social video, because people are scrolling and they want to read and scroll at the same time. [LAUGHS]

**KEN NAKATA:** Mm-hmm. Yeah.

**KELLY MAHONEY:** One really interesting question. I think this may be the last one that we have time for, but thank you to everyone who has asked questions throughout this session.

We were talking a little bit about manual auditing and how you have to keep track of all of these pages. Someone asks sort of about the distinction. Is it possible for a company to only offer accessibility features if you are logged into the website, but not necessarily implement those features to the general public-facing site? Do you feel that that would sort of defeat the purpose of providing the features?

**KEN NAKATA:** Yeah, I think that that would just increase your liability. I mean, in fact, most companies do it just the reverse. Like, if they want to avoid a serial plaintiff, they make sure to make their public-facing site accessible.

And then behind the login, well, that's only for serious customers, and probably a serial plaintiff isn't going to be one-- isn't interested in really becoming one of those, so they'll never end up seeing that behind the login content. And so they usually make that of secondary importance. Absolutely they have to do it, but they've realized that the potential of getting sued by a drive-by plaintiff is a lot lower with regard to that content behind the login.

**KELLY MAHONEY:** That's very interesting. I wouldn't have thought that it would be sort of the opposite there.

**KEN NAKATA:** Yeah. Yeah, it is. We have a client right now who's asking us to first to the non-login stuff. And then they say, OK, next year we'll get to the login stuff.

**KELLY MAHONEY:** There you go. Well, hopefully we get there at some point. [LAUGHS]

**KEN NAKATA:** Yeah, they'll get there. They'll get there.

**KELLY MAHONEY:** Thank you for joining us today. Thank you to everyone who has been watching. Please have a wonderful rest of your day, and thank you again, Ken.

**KEN NAKATA:** Yeah, thanks. And again, feel free to contact me by email. Thanks, Kelly.

**KELLY MAHONEY:** Sounds great. Have a good one, everyone. Bye.

**KEN NAKATA:** Bye.